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Preface

Welcome to *The Middle Eastern and African Arbitration Review 2022*, one of Global Arbitration Review's annual, yearbook-style reports.

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

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

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

All contributors are vetted for their standing before being invited to take part. Together they provide you the reader with an invaluable retrospective. Across 290 pages, they capture and interpret the most substantial recent international arbitration developments, complete with footnotes and relevant statistics. Where there is less recent news, they provide a backgrounder – to get you up to speed, quickly, on the essentials of a particular seat.

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

A close read of these reviews never disappoints. Among the nuggets this reader noted were:

- African governments are keener than ever to advance mining projects, for various reasons. To that end, some seem more willing to settle disputes;
- China's investment in renewables infrastructure exceeded its investment in fossil fuels in 2021;
- Egypt is home to a new sports-arbitration provider;
- someone with a criminal record can sit as an arbitrator in Egypt – if all parties agree;
- Egypt's court of cassation has reversed a worrying appeal court ruling that had seemed to allow annulment of awards where damages were disproportionate to the harm suffered;
- courts in Kuwait are growing more resistant to the 'no authority to sign an arbitration clause' defence;
- Chinese investment in Lebanon is on the increase;
- Nigeria's Supreme Court has gone out on a limb to decry frivolous challenges to arbitral awards – calling it a 'disturbing trend', obiter dicta;
- 84 teams took part in the most recent running of the Saudi Center for Commercial Arbitration's Arab Moot Competition; and
- although it's not fully clear-cut, Abu Dhabi onshore courts may be falling in line with case law from Dubai on 'apparent authority' to conclude arbitration agreements, which would be helpful. As ever though in both emirates the picture is a bit mixed.

And much, much more – I particularly commend this year's overviews, which are packed with useful stuff.

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. Please note all the content in this volume predates unfortunate events in Ukraine – so you won't see mention of that.

David Samuels
Publisher, Global Arbitration Review
April 2022

Damages in the Middle East and Africa: Trends from recent cases and some challenges

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

IN SUMMARY

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

DISCUSSION POINTS

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

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

Recent cases in the region

The MEA region is particularly active in international arbitration. Out of the 2,507 parties involved in cases filed with the ICC in 2020, 19 per cent were from the Middle East and Africa.[2] Countries such as the United Arab Emirates, Saudi Arabia and Qatar are among the most frequent nationalities among parties, representing respectively 3.59 per cent, 2.55 per cent, and 1.87 per cent of the total number of parties in 2020 filings (the United States being the number one country with 9.25 per cent share).[3] Among these cases, three main characteristics stand out. First, according to data collected from GAR covering the past four years, the majority of cases in the region are linked to large infrastructure-related disputes, in particular in the energy and mining sectors, with an average award value that exceeds US$800 million.[4] Table 1 on page 5 illustrates some of the recent cases involving the MEA region.

Second, among recent cases, investor-state disputes appear to be more frequent in the region than commercial disputes (around 70 per cent of investor-state cases versus 30 per cent commercial cases). Investor-state disputes in the MENA (Middle East and North Africa) region have, in fact, increased from 5 per cent to 9 per cent of ICSID's new caseload in the past years (while sub-Saharan new caseload decreased from 21 per cent to 14 per cent).[5] Also, within the set of ICSID cases, most are related to energy and infrastructure.[6]

Third, the most frequent allegations for arbitration are expropriation and breach of contract, including breach of shareholders' agreement. In investor-state disputes, expropriation is generally related to project cancellations. The *Mohamed Abdel Raouf Bahgat v Egypt* dispute related to a businessman's loss of his iron and steel business and his imprisonment.[7] The *Nile Douma Holding Co. WLL v Arab Republic of Egypt* dispute concerned difficulties encountered by Nile Douma at a riverside development

2 Data from ICC Dispute Resolution 2020 Statistics, © International Chamber of Commerce (ICC), 2020.

3 Data from ICC Dispute Resolution 2020 Statistics, © International Chamber of Commerce (ICC), 2020.

4 NERA analysis of relevant GAR publications published over the past four years covering disputes in the MEA. This is a general review of relevant GAR publications rather than a review of an exhaustive set of all disputes in the MEA

5 ICSID Caseload – Statistics Issue 2021-2. ICSID Caseload – Statistics Issue 2015-1.

6 ICSID Caseload – Statistics Issue 2021-2.

7 Saderson, C, 2020. 'Egypt Finnish investor takes Egypt award to US court.' [online] Globalarbitrationreview.com. Available at: <https://globalarbitrationreview.com/finnish-investor-takes-egypt-award-us-court> [Accessed 4 February 2022].

known as the Shaza Nile Douma Hotel in the Rod El Farag area in central Cairo. The subsidiary held the rights to use a plot of land that was approved by the Egyptian authorities for the project, but the state allegedly refused to register the land for the project in its name.[8] The *Güneş Tekstil Konfeksiyon Sanayi ve Ticaret Limited Şirketi and others v Republic of Uzbekistan* dispute involves the expropriation of Turkish investors in one of Tashkent's largest shopping centres.[9]

Breach of contract is also a recurring theme in the region. In *GPGC Limited v The Government of the Republic of Ghana*, the tribunal held Ghana liable for cancelling an emergency power purchase agreement with GPGC amid an electricity supply crisis. Under this agreement, GPGC would relocate two gas turbine power plants from Italy to Ghana, which would supply electricity to the state for four years.[10] In *Prombati SPA v Bilyap Insaat Enerji Ve Turizm Sanayi Ticaret AS, Kayi Insaat Sanayi Ve Ticaret AS and Kayi Uluslararası İnşaat Sanayi ve Ticaret AS*, the dispute related to disruptions and delays in the construction of a Marriott hotel, mall and related facilities in the eastern Algerian city of Sétif.[11] In *Lebanese Broadcasting Corporation International (LBCI) v Lebanese Media Holdings (LMH) and Rotana Holding*, the dispute involved several breaches of obligations under a cooperation and service agreement with a local broadcasting company, and an arbitrary and unlawful termination.[12] In *CSE v Guinea*, the dispute arose after four years of requests for payment sent by the engineering and infrastructure company CSE to the Minister of Public Works and the Minister of Finance. The Dakar-based company had been awarded two procurement contracts by Guinea to upgrade roads to Gbessia international airport on the country's

8 Ballantyne, J, 2021. 'Egypt reports win against Bahraini hotel investor.' [online] Globalarbitrationreview.com. Available at: <https://globalarbitrationreview.com/egypt-reports-win-against-bahraini-hotel-investor> [Accessed 4 February 2022].

9 Sanderson, C, 2019. 'Uzbekistan liable for seizure of shopping mall.' [online] Globalarbitrationreview.com. Available at: <https://globalarbitrationreview.com/uzbekistan-liable-seizure-of-shopping-mall> [Accessed 4 February 2022].

10 Sanderson, C, 2021. 'Ghana liable over cancelled energy deal.' [online] Globalarbitrationreview.com. Available at: <https://globalarbitrationreview.com/ghana-liable-over-cancelled-energy-deal> [Accessed 4 February 2022].

11 Perry, S, 2020. 'Turkish group liable in Algerian hotel dispute.' [online] Globalarbitrationreview.com. Available at: <https://globalarbitrationreview.com/turkish-group-liable-in-algerian-hotel-dispute> [Accessed 4 February 2022].

12 Perry, S, 2018. 'Lebanese-Saudi media feud leads to ICC award.' [online] Globalarbitrationreview.com. Available at: <https://globalarbitrationreview.com/lebanese-saudi-media-feud-leads-icc-award> [Accessed 4 February 2022].

Atlantic coast.[13] In *Strabag SE v Libya*, the tribunal found Libya liable over infrastructure projects managed by the Austrian infrastructure and energy company Strabag, that were disrupted by the country's civil war.[14] In *Global Voice Group v Guinea and the Guinean Postal and Telecommunications Regulatory Authority*, the Seychelles-based telecoms group won an ICC claim against Guinea over a contract to provide technical resources for the taxing of international phone calls, after the state failed to substantiate allegations of corruption.[15]

Shareholder disputes are also observed in the region. In *Société Nationale d'Opérations Pétrolières de la Côte d'Ivoire (Petroci) v MRS Holdings Ltd*, the dispute related to an agreement between the parties under which they would jointly acquire and operate Chevron's downstream distribution assets in East and West Africa through a joint venture.[16] The contractual breaches included alleged misappropriation of Chevron's subsidiary's assets and blocking access to the joint venture. In *SCF Holdings II v Manhattan Coffee Investment Holding*, the dispute, which involved a fraud claim, is part of a long-running dispute over Tatu City, a 5,000-acre residential and industrial development being built on former coffee estates in the northeast of the Kenyan capital. At issue in the arbitration was Manhattan's failure to pay a deposit to the Belgian sellers of the land on which Tatu City is being built.[17]

13 Ballantyne, J, 2020. 'Senegal roadbuilder pursues Guinea in DC.' [online] Globalarbitrationreview.com. Available at: <https://globalarbitrationreview.com/senegal-roadbuilder-pursues-guinea-in-dc> [Accessed 4 February 2022].

14 Ballantyne, J, 2020. 'Libya held liable over civil war disruption.' [online] Globalarbitrationreview.com. Available at: <https://globalarbitrationreview.com/libya-held-liable-over-civil-war-disruption> [Accessed 4 February 2022].

15 Sanderson, C, 2019. 'Guinea on the hook for telecoms claim.' [online] Globalarbitrationreview.com. Available at: <https://globalarbitrationreview.com/guinea-the-hook-telecoms-claim> [Accessed 4 February 2022].

16 Ballantyne, J, 2021. 'Nigerian oil trader seeks injunction against Ivorian state entity.' [online] Globalarbitrationreview.com. Available at: <https://globalarbitrationreview.com/nigerian-oil-trader-seeks-injunction-against-ivorian-state-entity> [Accessed 4 February 2022].

17 'Fraud claim upheld in Kenyan real estate dispute.' [online] Globalarbitrationreview.com. Available at: <https://globalarbitrationreview.com/fraud-claim-upheld-in-kenyan-real-estate-dispute> [Accessed 4 February 2022].

Table 1: MEA region recent international arbitration cases

Case details	Concluded	Award	Sector	Venue	Type
Vale v BSGR					
An LCIA award worth US$2 billion that made findings of corruption in a dispute over an iron-ore mining project in Guinea has become public after being submitted to the US courts for enforcement.	2019	US$2 billion	Mining	LCIA	Commercial
DP World v Djibouti					
An LCIA tribunal ordered Djibouti to pay US$533 million to a subsidiary of Emirati port operator DP World after finding that the East African state breached the company's exclusivity rights by pursuing the development of container port facilities with a rival Chinese operator.	2017	US$533 million	Infrastructure	LCIA	Commercial
Divine Inspiration Group v Democratic Republic of the Congo					
South African oil exploration company, Divine Inspiration Group, has reportedly been awarded US$617 million in an ICC claim against the DRC over the state's failure to honour two oil contracts.	2018	US$617 million	Energy	ICC	Commercial
Ansbury Investment v Ocean and Oil Development Partners BVI and Whitmore Asset Management					
An LCIA tribunal has ruled that an investment vehicle linked to an Italian-Nigerian billionaire, Gabriele Volpi, is owed US$680 million in a shareholder dispute with fellow investors in a major Nigerian oil company. Ansbury is owed US$600 million by Ocean and Oil Development Partners and US$80 million by Whitmore Asset Management, both of which are BVI entities.	2018	US$680 million	Energy	LCIA	Commercial
PT Ventures v Unitel					
In 2019, Isabel Dos Santos' British Virgin Islands-registered company Vidatel was among those ordered to pay US$646 million to Portuguese entity PT Ventures by a five-member ICC tribunal, in a shareholder dispute over Angolan mobile carrier Unitel.	2019	US$650 million	Telecom	ICC	Commercial

Case details	Concluded	Award	Sector	Venue	Type
Unión Fenosa Gas, SA v Arab Republic of Egypt (ICSID Case No. ARB/14/4)					
An ICSID tribunal ordered Egypt to pay US$2 billion to UFG in 2018 after holding the state liable under the Spain-Egypt bilateral investment treaty for the failure to deliver the gas.	2018	US$2 billion	Energy	ICSID	Investor-state
Damietta International Port Company (DIPCO) v Damietta Port Authority (Cairo-seated ICC arbitration)					
A Kuwaiti-led consortium named Damietta International Ports Company (DIPCO) won over US$490 million in an ICC claim against an Egyptian state authority over a terminated concession for a container terminal facility at the port of Damietta – a dispute that has also given rise to a threatened treaty claim.	2020	US$490 million	Infrastructure	ICC	Investor-state
Turkmengaz v National Iranian Gas Company (NIGC)					
Turkmenistan's national gas company Turkmengaz has reportedly been awarded around US$2 billion in an ICC claim concerning payments for the supply of natural gas to Iran. The National Iranian Gas Company (NIGC) has been found liable for failing to pay for gas it had imported from Turkmenistan.	2020	US$2 billion	Energy	ICC	Commercial
Privinvest Group v Greece					
Greece has lost a challenge to an ICC award in favour of the Middle Eastern-owned operator of one of the country's largest commercial shipyards, known as Hellenic Shipyards (HSY) – and has disputed a recent statement by the investor that the award has a total commercial value of more than €1.2 billion.	2017	€1.2 billion	Infrastructure	ICC	Commercial

Source: GAR, NERA Review

Challenges for the common valuation approaches

Despite some similarities in the issues and the sectors affected by the cases mentioned above, from a quantum perspective, each displays features that need to be assessed in the specific context in which they arise. The quantification of the damage usually requires the valuation of the companies or projects affected by the liable actions. The

three main approaches commonly relied upon to value a business or an asset (the market approach[18], the income approach[19] and the asset approach[20]) are often difficult to apply (see Table 2):

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

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

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

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

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

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

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

Country risk

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

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

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

The discount rate reflects the time value of money, namely the correction to the current value that investors would attach to a monetary value in the future. The larger the uncertainties that can make such future value vary, the less will be the current value

for risk-averse investors, given the same expected future value. As a result, if the conditions in a country A make the expected future value of a project more variable than in country B, even if on average the expected value of the projects is the same, then investors will rationally view the project in country A as less valuable today.

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

For this reason, an accepted principle in DCF analysis is that cash-flow projections should reflect the characteristics of the project at hand. They will therefore reflect features of the sector where the project operates, the contracting arrangements it has signed to sell its production, the labour contracts in place for its workforce; many of these features may be sector-specific or project-specific, particularly when the project is one of a kind. The cash flows the project delivers may then be more or less subject to change as compared to those in the average sector in the country. As long as the cash-flow projections reflect the project characteristics, they must consider all the likely scenarios for the project in the future, which reflect all the uncertainties related to the project, including those related to the country where it operates. Such scenarios would reflect the practical consequences on the specific project of the interaction between all risk factors, project-specific and country-specific. The scenarios are then weighted according to their probability of occurrence and the resulting average values reflect the expected stream of cash flows going forward.

While cash-flow projections reflect all risks affecting the project, the inclusion of country risk in the discount rate must consider only the systematic (or non-diversifiable) part of country risk. Standard asset valuation models such as the capital asset pricing model (CAPM) attach a premium related only to the part of the risk that investors cannot avoid with diversification. The degree of diversification of the relevant investors must be analysed case by case as often global investors are well diversified and local investors are not, particularly in relation to investments in real assets and if restrictions to access capital markets exist. Moreover, beta estimates may not be reliable, as local industry stocks are often not very liquid or have a short history of public trading. These conditions are common in many emerging markets.

Often country risk premiums are derived by comparing US dollar-denominated bond yields in the local country with those in reference countries (such as the United States or Germany) for the same maturities.[21] Adding such a premium to the risk-free rate implicitly assumes that: all country risk is systematic, and the risks related to the local government defaulting on its bonds is a relevant risk for the project under valuation. These assumptions do not hold in many cases and not correcting for these factors may lead to using country risk premiums that are unrealistically high for the project in question.

When country risk premiums are derived from bond rates, the question arises as to whether further adjustments are necessary to account for the greater risk inherent in equities than in debt. Often such equity risk differentials are reflected in the determination of equity discount rates, for instance, by using market risk premiums that are then multiplied by the relative volatilities (the betas) of specific samples of companies with similar risk profiles relative to the overall market.[22] Attempts to use data from companies with comparable risk (such as multinational companies with a similar percentage of activity in countries with similar risk assessments) with equity-to bond country risk adjustments may lead to double counting country risk.

In sum, the assessment of country risk must be tailored to each particular environment. Cash flow projections need to include realistic assumption about all risks on a project if such risks exists at the time of valuation.[23] This includes political risk, such as expropriation risk.[24] However, it should avoid the temptation to excessively weigh bad outcomes to 'illustrate' how certain elements of country risk would impact the

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

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

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

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

project if they were to materialise. Once expected cash flows reflect the market expectations at the valuation date, they need to be discounted with a rate that includes the systematic component of country risk and considers the effects of potentially illiquid local equity markets on the volatilities of companies used as benchmarks for risk purposes. This is because, in emerging markets, country risk is project-specific and not fully systematic, and it may not correlate well with the spread of government bonds of the country concerned.

Foreign exchange rates

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

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

The two methods may seem equivalent and, in fact, they generally provide the same answer as this equivalence is the well-known interest rate parity result. The results might not, however, be exactly the same and there are many reasons why this may be, ranging from slight imperfections in market prices to theoretical issues.[25]

However, the valuation issues we address below go beyond questions related to the accuracy of interest rate parity. Rather, we consider how the non-existence of foreign exchange markets or the existence of currency controls affects the valuation of cash flows. These are significant concerns and apply to valuation in many countries around the world, including in the MEA region. In the MEA region, there are a variety of FX regimes, with pegged currencies, floating currencies and a variety of arrangements that seek to approximate a fixed exchange rate (see Table 3).

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

Table 3: FX regimes in the MEA region[26]

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

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

Differences in the FX regimes and in the rules specific to any asset may affect the best way to approach the valuation. To illustrate the challenges that arise, we refer to a numerical example below. An asset generates foreign currency (FC) cash flows and the aim is to derive its value in terms of the domestic currency (DC). Specifically, an asset generates a FC cash flow of FC 20 one year in the future. The FC risk-free rate is 2 per cent and the DC risk-free rate is 10 per cent (including country risk of the domestic country), and the spot FC/DC exchange rate is five (ie, one unit of FC is valued at five units of DC). For simplicity the cash flows are assumed to be risk-free.

Data on expected future FX rates are often not available and, even when they are, the reliability of such data may be questionable. While it depends on the specifics of why future FX rates are not available, a straightforward approach that can be appropriate would be to discount the FC cash flows of the asset using FC risk-free rates and then convert the result to DC units using the spot exchange rate. In the example, that

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

results in FC 19.6, which is the result of dividing FC 20 by (1 + 2 per cent). When converted using the spot exchange rate, this is equal to DC 98.0. The domestic risk-free rate of 10 per cent does not enter this computation. This is because the cash flows are earned in the future in FC.

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

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

In the example, if FC earned by the asset in one year is forced to convert at the official rate and by then the official rate is such that each unit of FC gets 20 per cent less DC than the black-market rate, then an expectation of a discount to the value of the asset should be built into the valuation. This is because 20 per cent of the value is diverted due to the use of the official exchange rate. If covered interest parity holds for black market rates, the value of the asset is worth exactly 20 per cent less than the value without the forced use of the official exchange rate.[27] In this case, the forced use of the official exchange rate had a meaningful impact on the valuation.

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

Under other FX regimes the valuation may require other approaches. Some countries operate with an exchange rate that is allowed to adjust only slowly. Other countries have a currency that is pegged to either the euro or the US dollar. What is

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

important for valuation of future cash flows is the expectations for these regimes in the future, whether the peg will remain in place, or what FX regime will be adopted if the peg collapses. These are not necessarily easy questions to answer, but a proper valuation should consider them.

As an extreme example, since 2019 Lebanon has placed unofficial[28] restrictions on the withdrawal of currency from the country.[29] This makes it challenging to value an asset that generates cash flows in Lebanese pounds for a US investor. One approach could be to shift cash flows into future periods when the restrictions on transfers are expected to cease. Such an estimate is, however, difficult to make and might be highly subjective. In addition, several different currency exchange rates emerged in the country:[30] the Lebanese pound remains officially pegged at 1,517 to US$1, banks allow cash withdrawal at a rate closer to 3,900, the black-market rate at the time of writing stands more than 20,000, and is subject to fluctuation, and businesses randomly apply their own exchange rate, which depends on the payment means (cash, foreign or local credit cards, etc). In such circumstances, a careful examination of the factors that are relevant to the project cash flows and to the valuation is necessary to decide on the most appropriate approach.

Fiscal regimes and transfer pricing

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

In many cases involving joint ventures between local (often state-owned) entities and international companies, damage claims refer to the difference between the actual project value, which was reduced by the liable actions, and the continuation value of the project for the claimant. In these cases, the ability to restructure the project by the local entity or by the state after expropriation or after the cancellation of the concession

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

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

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

contracts with the international investor may lead to substantial value being diverted to the state in the form of fiscal revenues. If the possibility of these alternative arrangements is not considered, the continuation value of the project may appear low, when in fact the distribution of profits between the local entity and the state implicit in the original project structuring does not need to apply after cancellation of the concession. Post-cancellation values would be affected by changes in the fiscal treatment of the project and treatment does not necessarily remain the same after cancellation of the contract with the original investor or partner.

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

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

In commercial arbitration, transfer pricing issues may arise in the context of shareholder disputes, whereby shareholders disagree on the level of profit made by the entities they own, as a result of intercompany transactions. This can, for example, be the case when an entity controlled by one shareholder sells products or charges service fees or intangible related fees to an affiliate it co-owns with other shareholders.

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

A common topic of recent disputes in commercial arbitration relates to minority shareholders viewing the level of management fees paid by the entity they own to the majority shareholder as abusive.[31] Subsidiaries pay management fees to their parent company in return for centrally performed activities. The latter can be administrative and of low value, as well as strategic or operational and of high value. Moreover, such activities can lead to the development of intangibles, which need to be taken into consideration in assessing the right remuneration of the parent company at arm's length.[32] The diversity of headquarter activities and organisation structure translates into a diversity of transaction structure. Management fees can thus be charged on a cost-plus basis, on a revenue basis (royalty), on a lump-sum basis or following other mechanisms.

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

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

- the roles and responsibilities of the parent company in performing centralised activities and of the subsidiary, in line with the functions they perform, the risks they assume and the assets they own, within the overall framework of the group's value creation;
- the actual benefits obtained by the subsidiary from the centralised activities, relative to its next best alternative;

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

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

- the contractual arrangements governing the overall relationship between the parent company and the subsidiary (this is not necessarily limited to the management services agreement between the parent company and the subsidiary, but could include other agreements that could have an impact on pricing); and
- a comparison with similar market practices, and a specific pricing analysis, notably in cases where comparability is limited.

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

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Energy arbitrations in the Middle East

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IN SUMMARY

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

DISCUSSION POINTS

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

REFERENCED IN THIS ARTICLE

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

Introduction

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

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

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

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

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

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1 BP Statistical Review of World Energy 2020, pp. 14, 32, https://www.bp.com/content/dam/bp/business-sites/en/global/corporate/pdfs/energy-economics/statistical-review/bp-stats-review-2020-full-report.pdf (last accessed 28 February 2021).

2 ibid., p. 14.

3 ibid.

4 ibid., p. 17.

5 ibid.

6 ibid., p. 30.

7 ibid., p. 17. Saudi Arabia is the second largest oil producing nation globally when it comes to oil producing capabilities per day. Ibid., p. 16.

8 ibid., p. 32.

9 ibid., p. 32.

10 ibid., p. 32.

11 ibid., p. 34.

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

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

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

12 World Energy Outlook 2018, Executive Summary, International Energy Agency, 13 November 2018, p. 1, https://www.iea.org/news/world-energy-outlook-2018-examines-future-patterns-of-global-energy-system-at-a-time-of-increasing-uncertainties (last accessed 16 February 2021).

13 World Energy Outlook 2020, Executive Summary, International Energy Agency, p. 18, https://iea.blob.core.windows.net/assets/80d64d90-dc17-4a52-b41f-b14c9be1b995/WEO2020_ES.PDF (last accessed 25 February 2021).

14 ibid., p. 17.

15 ibid., p. 17.

16 ibid., p. 17.

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

17 The UAE plans to have at least 6 per cent of its electricity generated from nuclear power by 2050. UAE federal government website, Federal governments' strategies and plans, UAE Energy Strategy 2050, https://government.ae/en/about-the-uae/strategies-initiatives-and-awards/federal-governments-strategies-and-plans/uae-energy-strategy-2050 (last accessed 27 February 2021). A reactor at the UAE's first, and the world's largest (upon completion), nuclear plant was recently confirmed as ready to begin operations. 'UAE Nuclear Power Plant's First Reactor Ready for Operation', *The Arab Weekly*, 2 February 2020, https://thearabweekly.com/uae-nuclear-power-plants-first-reactor-ready-operation (last accessed 27 February 2021). Saudi Arabia has similar plans. By 2032, Saudi Arabia is aiming to build at least two large nuclear reactors; these reactors are expected to provide approximately 15 per cent of the state's power by 2040. Robert Mason and Gawdat Bahgat, 'The Arab Gulf States Institute in Washington, Civil Nuclear Energy in the Middle East: Demand, Parity and Risk', 11 April 2019, https://agsiw.org/wp-content/uploads/2019/04/Mason_Bahgat_Civil-Nuclear_ONLINE-1.pdf, p. 14 (last accessed 25 February 2021).

18 According to one report, coal is expected to satisfy 2 per cent of the total energy demand in the region by 2040. BP Energy Outlook 2019, Insights from the Evolving transition scenario – Middle East, 2019, p. 1 https://www.bp.com/content/dam/bp/business-sites/en/global/corporate/pdfs/energy-economics/energy-outlook/bp-energy-outlook-2019-region-insight-global-et.pdf (last accessed 28 February 2021). Construction of coal-based power plants is already underway in the UAE and Iran, while Oman has announced plans for new coal-fired generators. 'Hassyan Clean Coal Project, Dubai', Power Technology, https://www.power-technology.com/projects/hassyan-clean-coal-project-dubai/ (last accessed 28 February 2021); 'Iran to Construct 1st Coal Power Plant', MEHR News Agency, 14 December 2016, https://en.mehrnews.com/news/122017/Iran-to-construct-1st-coal-power-plant (last accessed 28 February 2021); Andrew Roscoe, 'EXCLUSIVE: Oman sets target for coal project tender', MEED, 19 August 2018, https://www.meed.com/exclusive-oman-sets-target-issue-tender-coal-project/ (last accessed 28 February 2021). In Jordan, a power plant powered by coal and petroleum coke with a net capacity of 30MW commenced operations in 2019. Manaseer Group website, News, 16 September 2018, https://www.manaseergroup.com/News/manaseer-cement-industry-launches-operations-of (last accessed 26 March 2021).

19 In 2018, 867MW, less than 1 per cent of the region's power, came from renewable sources. However, 7000MWs of renewable energy projects is reported to be in the pipeline in the region. Renewable Energy Market Analysis: GCC 2019, IRENA, p. 49, https://www.irena.org/publications/2019/Jan/Renewable-Energy-Market-Analysis-GCC-2019 (last accessed 28 February 2021). The renewable power sector was the only energy source to grow its share of the power market globally during the covid-19 pandemic and analysts expect renewable energy capacity in Middle East to more than double within the next five years. Notable projects in the region include the world's largest solar farm in the UAE, Saudi Arabia's first wind farm and Qatar's 800MW solar power plant. Claudia Carpenter and Dania Saadi, S&P Global Platts, 'Gulf Arab countries speed ahead with renewables projects despite fossil fuels boon', 30 September

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

Ownership and management of resources

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

Ownership

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

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

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2020 (last accessed 27 March 2021). Major IPP projects awarded in UAE, Qatar and Oman are estimated to increase the renewable energy capacity in the MENA region. International Energy Agency, Renewables 2020 Analysis and Forecasts to 2025, November 2020, p. 30, https://www.iea.org/reports/renewables-2020/renewable-electricity-2#abstract (last accessed 26 March 2021).

20 Law No. 3 of 2007 Regarding the Exploitation of Natural Resources and its Sources, article 2.

21 Saudi Arabia Basic Law of Governance of 1992, article 14; Constitution of Kuwait, 1962 (Reinstated 1992), article 21; Constitution of the Kingdom of Bahrain, 2002, article 11; Constitution of the Syrian Arab Republic, 2012, article 14; Constitution of the Republic of Yemen, 2001, article 8; Sultani Decree No. (101/96) Promulgating the Basic Statute of the State, article 11.

22 Constitution of the United Arab Emirates, 1971, article 23.

23 Constitution of the Republic of Iraq, 2005, article 111.

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

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

Management: the role of national oil companies

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

- Saudi Arabian Oil Company (Aramco): Saudi Arabia's state-owned national petroleum company manages the upstream, midstream and downstream components of Saudi Arabia's crude oil and natural gas. Aramco is the world's largest oil and gas company.[27] Following its historic initial public offering (IPO) in 2019, it raised approximately US$25.6 billion to become one of the world's most valuable

24 The Federal Oil and Gas Draft Law, the Iraqi Parliament Version, English Translation, http://www.iraq-businessnews.com/wp-content/uploads/2011/10/CoR-Draft-Oil-and-Gas-Law-English-Version-by-IEI.pdf (last accessed 25 February 2021).

25 Despite being approved by the Council of Ministers, the draft law was never enacted because of differences over its terms. Christopher B Strong, Iraq, *The Oil and Gas Law Review*, https://thelawreviews.co.uk/title/the-oil-and-gas-law-review/iraq (last accessed 25 February 2021).

26 Kyriaki Karadelis, 'Iraq claims against Turkey over Kurdish oil exports', *Global Arbitration Review*, 26 May 2014, https://globalarbitrationreview.com/article/1033414/iraq-claims-against-turkey-over-kurdish-oil-exports (last accessed 28 February 2021).

27 'Factbox: Saudi Aramco-the oil colossus', Reuters, 4 November 2019, https://www.reuters.com/article/us-saudi-aramco-ipo-factbox/factbox-saudi-aramco-the-oil-colossus-idUSKBN1XE18Z (last accessed 25 February 2021).

listed companies.[28] Despite oil prices falling during the pandemic, Aramco appears to have navigated its way through the carnage better than the rest and notably continued its commitment to pay shareholders an annual dividend of US$75 billion.[29]

- Abu Dhabi National Oil Company (ADNOC): Abu Dhabi, which has the vast majority of hydrocarbon reserves in the UAE, created ADNOC to produce, manage, preserve and trade these reserves.[30] ADNOC manages approximately 95 per cent of the UAE's proven oil reserves and 92 per cent of the country's gas reserves.[31] ADNOC's board of directors is comprised of members of the recently created Supreme Council for Financial Economic Affairs, responsible for all matters related to the financial investment and economic, petroleum and natural resources affairs in Abu Dhabi.[32]
- Qatar Petroleum: Qatar's NOC manages upstream, midstream and downstream oil and gas operations in Qatar[33] and acts as the state's investment arm in the oil and gas sector both domestically and internationally.[34]

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28 Marwa Rashad, Saeed Hasan, Stephan Kalin, '"Vindication" – Saudi Arabia hails 10% debut jump in Aramco shares', Reuters, 11 December 2019, https://www.reuters.com/article/us-saudi-aramco-ipo-markets/vindication-saudi-arabia-hails-10-debut-jump-in-aramco-shares-idUSKBN1YF0LC (last accessed 28 February 2021).

29 Frank Kane, 'How Saudi Aramco IPO proved a game changer in a tumultuous year for oil', *Arab News*, 16 December 2020, https://www.arabnews.com/node/1778021/business-economy (last accessed 16 February 2021).

30 ADNOC website, Who We Are, https://www.adnoc.ae/en/about-us/who-we-are (last accessed 28 February 2021).

31 U.S-U.A.E Business Council, The UAE Oil and Gas Sector Recent Updates, January 2019, p. 6, http://usuaebusiness.org/wp-content/uploads/2019/01/U.A.E.-Oil-and-Gas-Sector.pdf, (last accessed 28 February 2021).

32 Abu Dhabi Government Media Office website, Khalifa bin Zayed issues an Emiri decree to form the Board of Directors for the Supreme Council for Financial and Economic Affairs, 27 December 2020, https://www.mediaoffice.abudhabi/en/government-affairs/khalifa-bin-zayed-issues-decree-Board-of-Directors-Supreme-Council-Financial-Economic-Affairs/ (last accessed 27 March 2021). ADNOC website, Our Story, ADNOC Board of Directors, https://www.adnoc.ae/our-story/adnoc-board-of-directors (last accessed 27 March 2021).

33 Qatar Petroleum website, About QP, https://qp.com.qa/en/AboutQP/Pages/AboutUs.aspx (last accessed 28 February 2021).

34 Decree Law No. 10 of 1974 on the Establishment of Qatar Petroleum, article 6(4).

- Iraqi Ministry of Oil/Iraqi National Oil Company (INOC): INOC was reconstituted in 2018[35] and a decree transferred the ownership of nine state-owned oil companies from the Ministry of Oil to INOC.[36] In January 2019, however, the law establishing INOC was challenged before Iraq's Federal Supreme Court and was declared, in part, to be unconstitutional.[37] At present, the Iraqi Ministry of Oil continues to control and supervise the oil and gas exploration process in Iraq.[38] INOC was expected to be operational by the third quarter of 2021 or the first quarter of 2022,[39] and in September 2020, Iraq's oil minister was named as the head of INOC.[40]
- Iranian Ministry of Petroleum: the Iranian Ministry of Petroleum controls all issues pertaining to the exploration, extraction, exploitation, distribution and exportation of crude oil and oil products with a number of NOCs (including the National Iranian Oil Company, National Iranian Gas Company, National Iranian Oil Refining and Distribution Company and the National Petrochemical Company)[41] that enter into contracts on behalf of the state.

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35 Ahmed Rasheed, 'Iraq Parliament votes to create national oil company: lawmakers', Reuters, 5 March 2018, https://www.reuters.com/article/us-iraq-oil/iraq-parliament-votes-to-create-national-oil-company-lawmakers-idUSKBN1GH1XB (last accessed 28 February 2021).

36 'Iraq transfers ownership of nine state oil companies to new National Oil Company', Reuters, 18 October 2018, https://www.reuters.com/article/us-iraq-oil/iraq-transfers-ownership-of-nine-state-oil-companies-to-new-national-oil-company-idUSKCN1MS27E (last accessed 28 February 2021).

37 Samya Kullab and Staff, 'Supreme Court rules against INOC law', Iraq Oil Report, 23 January 2019, https://www.iraqoilreport.com/news/supreme-court-rules-against-inoc-law-36306/ (last accessed 28 February 2021); Robert Mogielnicki, 'One Year On, the Iraqi National Oil Company is Everything and Nothing', The Arab Gulf States Institute in Washington, 1 October 2019, https://agsiw.org/one-year-on-the-iraqi-national-oil-company-is-everything-and-nothing/ (last accessed 28 February 2021).

38 John Lee, 'Oil Ministry Pauses Transfer of Oil Cos to INOC', *Iraq Business News*, 22 October 2018, https://www.iraq-businessnews.com/2018/10/22/oil-ministry-pauses-transfer-of-oil-cos-to-inoc/ (last accessed 28 February 2021).

39 Rowena Edwards, 'Iraq to revive national oil company by 1Q22', *Argus*, 20 October 2020, https://www.argusmedia.com/en/news/2151791-iraq-to-revive-national-oil-company-by-1q22 (last accessed 28 February 2021).

40 Jennifer Gnana, 'Iraq appoints oil minister as head of its national oil company', *The National*, 16 September 2020, https://www.thenationalnews.com/business/energy/iraq-appoints-oil-minister-as-head-of-its-national-oil-company-1.1078609 (last accessed 28 February 2021).

41 Islamic Republic of Iran Ministry of Petroleum website, About MOP; Companies, https://en.mop.ir/home/ (last accessed 27 March 2021).

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

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

- concession agreements in the UAE, under which the state has permanent sovereignty over hydrocarbons and only grants legal title to petroleum to the international oil company (IOC) partner once recovered at the wellhead;[42]
- risk service contracts in Iraq, including technical service contracts for producing fields and production service contracts for development and producing fields under which the contractor is not entitled to any share of production, but can elect to have the service fee paid in kind in oil;[43]
- production-sharing agreements in the KRG,[44] under which the contractor is entitled to a share of production to recover the costs of petroleum operations and a proportion of remaining production, which is shared with government;
- exploration and production sharing agreements in Qatar, or, particularly in respect of gas projects, development and production sharing agreements;[45] and

42 Adam Powell, 'Understanding Petroleum regimes in the MENA region', Al Tamimi & Company Law Update, February 2018, https://www.tamimi.com/law-update-articles/understanding-petroleum-regimes-mena-region/ (last accessed 28 February 2021).

43 Tariq Shariq, 'PSAs Vs Service Contracts, The Case of Iraq', MEES, 21 February 2014, https://www.mees.com/2014/2/21/op-ed-documents/psas-vs-service-contracts-the-case-of-iraq/9427e060-656f-11e7-a8b1-7f90c264c496 (last accessed 28 February 2021).

44 Ministry of Natural Resources Kurdistan Regional Government website, Publications, Contracts, Signed PSCs, https://gov.krd/mnr-en/publications/contracts/ (last accessed 27 March 2021).

45 Qatar Petroleum website, QP Operations, https://qp.com.qa/en/QPActivities/QPOperations/Pages/QPOperations.aspx (last accessed 28 February 2021).

- historically, risk service 'buy-back' contracts in Iran, but more recently, contracts have been modelled on the Iran Petroleum Contract, a new generation of upstream oil and gas contracts that are more incentivising to foreign investors.[46]

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

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

Arbitration of energy disputes in the Middle East

Types of arbitration

The precise nature of the arbitration agreements contained in the contracts between states or their NOCs, and the relevant counterparty, is often confidential. In the Middle East, few states make their model agreements, or the agreements once entered, publicly available. As a result, it is not possible to identify specific and clear trends

46 'Iran awards $1.3 bil contract to develop 2 oil fields', S&P Global Platts, 9 February 2020, https://www.spglobal.com/platts/en/market-insights/latest-news/natural-gas/020920-iran-awards-13-bil-contract-to-develop-2-oil-fields (last accessed 28 February 2021). Fazel M Farimani, Xiaoyi Mu, Hamed Sahebhonar and Ali Taherifard, 'An economic analysis of Iranian petroleum contract', *Petroleum Science* 17, 1451–1461 (2020), 31 July 2020, https://doi.org/10.1007/s12182-020-00486-2 (last accessed 28 February 2021).

47 Corporate Choices in International Arbitration, Industry Perspectives, 2013 International Arbitration Survey, Queen Mary University and PWC, http://www.arbitration.qmul.ac.uk/research/2013/ (last accessed 26 March 2021). Based on the findings of the 2018 Queen Mary survey, this trend is likely to continue: 'It is widely known that arbitration is very prominent in the energy sector and our finding strongly confirms that trend: a large majority of 85 per cent of the respondent group believe that the use of international arbitration is likely to increase even more in the future.' 2018 International Arbitration Survey: The Evolution of International Arbitration, White & Case, Queen Mary and School of International Arbitration, p. 29, http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF (last accessed 26 March 2021).

in relation to arbitration agreements in energy contracts related to the Middle East. However, some documents are publicly available. From these, a preference for arbitration under the ICC is evident.[48]

Reflecting this preference, energy disputes accounted for approximately 16 per cent of the ICC's 2019 caseload.[49] However, parties to energy agreements are not only choosing ICC arbitrations. In 2019, energy and resources disputes constituted 22 per cent of the London Court of International Arbitration's (LCIA) caseload.[50]

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

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

Three notable MITs for the region are the Organisation of Islamic Cooperation Agreement of Promotion, Protection and Guarantee of Investments (the OIC Agreement), the Arab League's Unified Agreement for the Investment of Arab Capital in the Arab States (the Arab League Agreement) and the Energy Charter

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48 For example, article 37.4 of the Technical Service Contract for the Rumaila Oil Field between South Oil Company of the Republic of Iraq, BP Iraq NV, Petrochina Company Limited, and Oil Marketing Company of the Republic of Iraq refers to ICC arbitration, http://platformlondon.org/documents/BP-CNPC-Contrac-Oct-8-2009.pdf (last accessed 28 February 2021). Contracts involving international companies in Qatar are increasingly providing for arbitration with the ICC rules most commonly adopted. D*eveloping renewable energy projects – A guide to achieving success in the Middle East* (3rd Ed.) January 2016, p. 66, https://www.pwc.com/m1/en/publications/documents/eversheds-pwc-developing-renewable-energy-projects.pdf (last accessed 28 February 2021).

49 ICC Dispute Resolution 2019 Statistics, p. 15, https://iccwbo.org/publication/icc-dispute-resolution-statistics/ (last accessed 26 March 2021).

50 LCIA, 2019 Annual Casework Report, p. 6, https://www.lcia.org/LCIA/reports.aspx (last accessed 26 March 2021).

51 The following counties in the region have BITs in force: Bahrain, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Oman, Qatar, Saudi Arabia, Palestine, Syria, UAE, Yemen. United Nations Conference on Trade and Development website, Investment Policy Hub, https://investmentpolicy.unctad.org/international-investment-agreements/by-economy (last accessed 16 February 2021).

52 Dispute Settlement Provisions in International Investment Agreements: a large sample survey, p. 18, http://www.oecd.org/investment/internationalinvestmentagreements/50291678.pdf (last accessed 16 February 2021), p. 65, https://unctad.org/en/PublicationsLibrary/diaeia2013d2_en.pdf (last accessed 16 February 2021).

Treaty (ECT). Both the OIC Agreement[53] and the Arab League Agreement[54] provide that, in certain circumstances, disputes relating to them shall be resolved through

53 Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference. Article 17, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2399/download (last accessed 17 February 2021); Joel Dahlquist and Luke Eric Peterson, 'Governments Working To Rein In Use Of OIC Investment Treaty's Investor-State Arbitration Offer', IA Reporter, 3 April 2019, https://www.iareporter.com/articles/governments-working-to-rein-in-use-of-oic-investment-treatys-investor-state-arbitration-offer/ https://www.iareporter.com/articles/governments-working-to-rein-in-use-of-oic-investment-treatys-investor-state-arbitration-offer/ (last accessed 17 February 2021).

54 The Arab League Agreement further provides that where an award is not made within the required period, the dispute may be referred to the Arab Investment Court, based in Cairo. Unified Agreement for the Investment of Arab Capital in the Arab States. Article 27, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2394/download (last accessed 28 February 2021).

arbitration. Neither agreement specifies any arbitral institution or rules. To date, there have been 15 reported arbitrations relating to the OIC Agreement[55] and six relating to the Arab League Agreement.[56]

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55 Luke Eric Peterson, 'OIC Round Up: An Update on Pending Arbitration Cases Lodged Under the OIC Investment Agreement', IA Reporter Investment Arbitration Report, 11 August 2020, https://www.iareporter.com/articles/oic-round-up-an-update-on-pending-arbitration-cases-lodged-under-the-oic-investment-agreement/ (last accessed 28 February 2021); *Trasta Energy Limited v The State of Libya*, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/979/trasta-v-libya (last accessed 17 February 2021) *Hilal Hussain Al-Tuwairqi and Al-Tuwairqi Holding v Pakistan*, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/987/al-tuwairqi-v-pakistan (last accessed 17 February 2021); *beIN Corporation v Saudi Arabia*, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/940/bein-v-saudi-arabia (last accessed 17 February 2021); *Hesham Talaat M. Al-Warraq v The Republic of Indonesia*, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/426/al-warraq-v-indonesia (last accessed 17 February 2021); *Kontinental Conseil Ingénierie v Gabonese Republic*, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/678/kci-v-gabon (last accessed 17 February 2021); *Ali Alyafei v Hashemite Kingdom of Jordan (II)*, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/781/alyafei-v-jordan-ii- (last accessed 17 February 2021); *D.S. Construction FZCO v Libya*, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/775/d-s-construction-v-libya (last accessed 17 February 2021); *Omar Bin Sulaiman Abdul Aziz Al Rajhi v The Sultanate of Oman*, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1025/bin-sulaiman-v-oman (last accessed 28 February 2021); *Itisaluna Iraq LLC, Munir Sukhtian International Investment LLC, VTEL Holdings Ltd, VTEL Middle East and Africa Limited v Republic of Iraq*, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/796/itisaluna-iraq-and-others-v-iraq (last accessed 28 February 2021); *Navodaya Trading DMCC v Gabonese Republic*, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1071/navodaya-v-gabon (last accessed 28 February 2021); *Qatar Pharma and Ahmed Bin Mohammad Al Haie Al Sulaiti v Kingdom of Saudi Arabia*, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/981/qatar-pharma-and-al-sulaiti-v-saudi-arabia (last accessed 28 February 2021); *Qatar Airways Group Q.C.S.C. v Kingdom of Bahrain*, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1059/qatar-airways-v-bahrain (last accessed 28 February 2021); *Qatar Airways Group Q.C.S.C. v Arab Republic of Egypt*, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1060/qatar-airways-v-egypt (last accessed 28 February 2021); *Qatar Airways Group Q.C.S.C. v Kingdom of Saudi Arabia*, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1057/qatar-airways-v-saudi-arabia (last accessed 28 February 2021); *Qatar Airways Group Q.C.S.C. v United Arab Emirates*, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1058/qatar-airways-v-united-arab-emirates (last accessed 28 February 2021).

56 *Mohamed Abdulmohsen Al-Kharafi & Sons Co v Libya and others*, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/408/al-kharafi-v-libya-and-others (last accessed: 28 February 2021); *Ali Alyafei v Hashemite Kingdom of Jordan (I)*, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/620/alyafei-v-jordan-i-

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

Trends

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

Increasing ties to the relevant state jurisdiction

There is an increasing desire among states and state-owned entities to 'localise' arbitration clauses where possible. The extent that this localisation of arbitration clauses will happen in practice will depend, in large part, on the nature of the deal, the parties and their relative bargaining power. An example of this localisation is found in Egypt's model concession agreement. This model agreement requires that disputes are either dealt with in the Egyptian courts or, in respect of certain matters between the Egyptian General Petroleum Company and the relevant contractor, resolved through arbitration

(last accessed 17 February 2021); *Qatar Airways Group Q.C.S.C v Kingdom of Bahrain*, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1059/qatar-airways-v-bahrain (last accessed 28 February 2021); *Qatar Airways Group Q.C.S.C v Arab Republic of Egypt*, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1060/qatar-airways-v-egypt (last accessed 28 February 2021); *Qatar Airways Group Q.C.S.C v Kingdom of Saudi Arabia*, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1057/qatar-airways-v-saudi-arabia (last accessed 28 February 2021; and *Qatar Airways Group Q.C.S.C v United Arab Emirates*, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1058/qatar-airways-v-united-arab-emirates (last accessed 28 February 2021).

57 Energy Charter website, Process, International Energy Charter (2015), Overview, https://www.energycharter.org/process/international-energy-charter-2015/overview/ (last accessed 27 March 2021).

58 International Energy Charter, FAQ: What is the relationship of the International Energy Charter to the European Energy Charter and the Energy Charter Treaty, p. 21, https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/IEC_AR.pdf (last accessed 17 February 2021).

59 By December 2019, the Energy Charter Secretariat had tracked 128 publicly known cases where the ECT was invoked. The bulk of these disputes were brought before ICSID, followed by the Stockholm Chamber of Commerce (SCC), ad hoc arbitrations under UNCITRAL Rules and the Permanent Court of Arbitration. International Energy Charter website, List of Cases, https://www.energychartertreaty.org/cases/list-of-cases/ (last accessed 17 February 2021).

according to the rules of the Cairo Regional Centre for International Commercial Arbitration (CRCICA) and, unless otherwise agreed by the parties, the place of the arbitration will be Cairo. This requirement to use either the national courts of Egypt or arbitration under CRCICA is a clear step away from the use of the more traditional arbitral institutions. It remains to be seen how far the Egyptian government will be willing to move in respect of adopting Cairo as the seat of any arbitration.

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

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

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

Enhancing the appeal of international arbitration in the region

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

60 Thomas Snider, Sara Koleilat-Aranjo, Meteb AlGhashayan, Sergejs Dilevka, 'Commercial Arbitration: Saudi Arabia', *Global Arbitration Review*, 2 April 2020, https://globalarbitrationreview.com/insight/know-how/commercial-arbitration/report/saudi-arabia (last accessed: 28 February 2021).

Legislative changes

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

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

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

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61 Article 2 of the UAE Federal Arbitration Law, Essam Al Tamimi and Sara Koleilat-Aranjo, Commentary on the UAE's New Arbitration Law, Al Tamimi & Company Law Update, June–July 2018, https://www.tamimi.com/law-update-articles/commentary-on-the-uaes-new-arbitration-law/ (last accessed 17 February 2021).

62 Jane Rahman and Shanelle Irani, 'Is the Introduction of Interim Relief: A Relief?', Al Tamimi & Company Law Update, September 2018, https://www.tamimi.com/law-update-articles/is-the-introduction-of-interim-relief-a-relief/ (last accessed 17 February 2021).

63 Cabinet Decision No. 57 of 2018. See Mosaab Th. Aly and Zane Anani, 'Enforcement of Foreign Arbitral Awards in the UAE: Paving the way for a New Enforcement Regime', Al Tamimi & Company Law Update, December 2018–January 2019, https://www.tamimi.com/law-update-articles/enforcement-of-foreign-arbitral-awards-in-the-uae-paving-the-way-for-a-new-enforcement-regime/ (last accessed 17 February 2021).

64 Al Tamimi & Company website, News, https://www.tamimi.com/news/first-foreign-arbitration-award-recognised-and-enforced-in-sharjah-under-new-uae-enforcement-regime/ (last accessed 17 February 2021).

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

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

There have also been notable legislative changes in Qatar. In 2017, Qatar introduced a new arbitration law that applies to all arbitrations taking place in Qatar.[65]Based on the UNCITRAL Model Law, Qatar's new arbitration law modernises the previously outdated arbitration legislation and aligns it with international standards. The new arbitration law clarifies the position in respect of interim measures, just as the UAE's Federal Arbitration Law does.[66]

In 2018, the Iraqi government announced its intention to accede to the New York Convention.[67] In November 2019, the Cabinet of Iraq approved a recommendation to expedite the legislation on Iraq's accession to the New York Convention.[68] On 4 March 2021, the Iraqi parliament ratified Iraq's accession the New York Convention.[69]

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65 Law No. 2 of 2017 issuing the Law of Arbitration in Civil and Commercial Matters (the Qatar Arbitration Law), http://www.gcccac.org/images/english-pdf/Law_of_Arbitration_in_Civil_and_Commercial_Matters_Qatar.pdf (last accessed 17 February 2021).

66 Qatar Arbitration Law, article 17(3), http://www.gcccac.org/images/english-pdf/Law_of_Arbitration_in_Civil_and_Commercial_Matters_Qatar.pdf (last accessed 17 February 2021).

67 Noor Kadhim, 'Finally, Iraq Says Yes to the New York Convention', Kluwer Arbitration Blog, 13 March 2018, http://arbitrationblog.kluwerarbitration.com/2018/03/13/scheduled-15-march-better-late-never-iraq-embraces-new-york-convention/ (last accessed 17 February 2021); Government of Iraq website, 'The Cabinet approves Iraq's accession to the New York Convention on international arbitration', 25 April 2018, https://gds.gov.iq/cabinet-approves-iraqs-accession-new-york-convention-international-arbitration/ (last accessed 17 February 2021).

68 John Lee, 'Iraq Ratifies New York Convention on Arbitration', *Iraq Business News*, 19 March 2021, https://www.iraq-businessnews.com/2021/03/19/iraq-ratifies-new-york-convention-on-arbitration/ (last accessed 27 March 2021).

69 Thomas Snider, Al Tamimi & Company Insights, 26 March 2021, https://insights.tamimi.com/post/102gu64/iraqi-parliament-ratifies-accession-to-new-york-convention (last accessed 27

Given that this is a recent development, it is yet to be seen how the Iraqi courts will apply the principles of the New York Convention.[70] This is a significant step taken towards improving perceptions of Iraq as an arbitration-friendly jurisdiction and may well result in an increase in energy arbitrations connected to Iraq.

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

Institutional progress

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

In the UAE, the financial free zones, which are empowered to create their own specific legal and regulatory framework in respect of all civil and commercial matters,[72] continue to flourish. These zones are an integral tool in ensuring that the UAE is perceived as an arbitration-friendly jurisdiction. One financial free zone, the Dubai International Financial Centre (DIFC), has its own system of laws based on common law. Where there are gaps in the DIFC law, or where there are conflicts, English law applies. In particular, the DIFC has its own arbitration law, DIFC Law No. 1 of 2008,

March 2021).

70 John Lee, 'Cabinet pushes for Int'l Arbitration Convention', *Iraq Business News*, 28 November 2019, https://www.iraq-businessnews.com/2019/11/28/cabinet-pushes-for-intl-arbitration-convention/ (last accessed 17 February 2021).

71 'Saudi Arabia: Cabinet Issues New Law on Commercial Franchise', *Global Legal Monitor*, 5 March 2020, https://www.loc.gov/law/foreign-news/article/saudi-arabia-cabinet-issues-new-law-on-commercial-franchise/ (last accessed 25 February 2021).

72 Federal Law No. 8 of 2004 regarding the Financial Free Zones, article 3(2).

as amended by DIFC Law No. 6 of 2013.[73] The key arbitral institution within the DIFC is the DIFC-LCIA. The DIFC-LCIA is 'essentially a joint venture between the DIFC and the London Court of International Arbitration'.[74] In 2021, the DIFC-LCIA released updated rules of arbitration, which closely follow the LCIA Rules as amended in 2020.

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

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.

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73 DIFC website, Arbitration Law DIFC Law No. 1 of 2008, https://www.difc.ae/business/laws-regulations/legal-database/arbitration-law-difc-law-no1-2008/ (last accessed 28 February 2021).

74 As described by the then-chief justice of the DIFC, Sir Anthony Evans, DIFC-LCIA Arbitration Centre website, Overview, www.difc-lcia.org/overview.aspx (last accessed 17 February 2021).

75 ADGM Courts website, ADGM Courts Legislative Framework, https://www.adgm.com/legal-framework (last accessed 17 February 2021).

76 ibid.

77 ibid.

78 ADGM Arbitration Centre website, Arbitration Regulations, https://en.adgm.thomsonreuters.com/rulebook/arbitration-legislation (last accessed 28 February 2021).

79 Abu Dhabi Global Market, ADGM Arbitration Centre, Arbitration Guidelines, https://www.adgmac.com/wp-content/uploads/2019/09/ADGM-Arbitration-Centre-Guidelines.pdf (last accessed 27 March 2021).

80 ADGM Courts website, ADGM Arbitration Centre, the state-of-the-art arbitration hearing facility in Abu Dhabi, commences full operations, 17 October 2018, https://www.adgm.com/media/announcements/adgm-arbitration-centre-the-state-of-the-art-arbitration (last accessed 25 February 2021).

81 'ICC Court opens in Abu Dhabi', *Global Arbitration Review*, 4 January 2021, https://globalarbitrationreview.com/icc-court-opens-in-abu-dhabi (last accessed 25 February 2021).

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

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

Third-party funding

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

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

82 Saudi Center for Commercial Arbitration, Institutional Arbitration in the Kingdom: A National Vision, Report on the work and activities of the Saudi Center for Commercial Arbitration, p. 15, https://sadr.org/assets/uploads/SCCA_Report_Eng.pdf (last accessed 17 February 2021).

83 In March 2018, the Tehran Regional Arbitration Centre launched a set of arbitration rules which are essentially based on the UNCITRAL Arbitration Rules 2010, Tehran Regional Arbitration Centre website, Rules, http://trac.ir/rules-of-arbitration/ (last accessed 17 February 2021). In October 2017, the Bahrain Chamber for Dispute Resolution updated its arbitration rules. Foutoun Hajjar and John Gaffney, 'Seven years in Bahrain: The Bahrain Chamber for Dispute Resolution updates its Arbitration Rules,' Al Tamimi & Company Law Update, November 2017, https://www.tamimi.com/law-update-articles/seven-years-bahrain-bahrain-chamber-dispute-resolution-updates-arbitration-rules/ (last accessed 17 February 2021).

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

Areas of dispute in the energy sector

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

Covid-19

The effects of covid-19 have had and will continue to have a reverberating impact in the energy sector. These have resulted in disputes where parties attempt to attain relief from their contractual obligations by invoking *force majeure*, termination provisions, frustration and change in law. To what extent parties will be allowed to avail of these legal remedies in arbitration is yet to be seen. However, it is worth noting that the threshold for the parties to avail of *force majeure* under the region's civil code laws does warrant that the obligation must be rendered wholly impossible, rather than merely excessively onerous. While the former would result in extinguishing parties' obligations completely, the latter may result in a moderation of the parties' obligation

84 In 2017, the DIFC courts issued Practice Direction No. 2 of 2017, which sets out the requirements for funded parties to observe in respect of their relationships, interactions and contracts with funders in legal proceedings in the DIFC courts. DIFC Courts website, Practice Directions, https://www.difccourts.ae/about/practice-directions/practice-direction-no-2-of-2017-on-third-party-funding-in-the-difc-courts (last accessed 17 February 2021).

85 ADGM Courts website, media, announcements, https://www.adgm.com/media/announcements/abu-dhabi-global-market-courts-issue-litigation-funding-rules (last accessed 17 February 2021); Al Tamimi & Company website, News, https://www.tamimi.com/news/adgm-enacts-litigation-funding-rules-2019/ (last accessed 17 February 2021).

to the extent that the arbitral tribunal deems reasonable, at its discretion.[86] Both of these legal provisions are likely to be extensively relied upon and invoked by disputing parties in energy arbitrations in the region post covid-19.

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

The global economic recession triggered by covid-19 along with the looming uncertainties on China's economic recovery has also invariably led to a decrease in oil prices. The knock-on effect of the tighter finances of the oil-producing and oil-exporting countries in the region is discernible. For example, Saudi Arabia's prioritised efforts to combat and mitigate the effects of covid-19 towards its citizens, residents

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86 Mohamed S Abdel Wahab, 'Construction Arbitration in the MENA Region', *The Guide to Construction Arbitration* (3rd Ed), Global Arbitration Review, p. 388.

87 'Samsung C&T lands EPC contract for North Field Expansion project', Hydrocarbons Technology, 2 March 2021, https://www.hydrocarbons-technology.com/news/samsung-ct-contract-north-field-expansion (last accessed 27 March 2021).

88 Katie MacQue and Daniel Lalor, 'Qatar Petroleum delays start-up of North Field LNG expansion due to COVID-19, S&P Global Platts, 7 April 2020, https://www.spglobal.com/platts/en/market-insights/latest-news/natural-gas/040720-qatar-petroleum-delays-start-up-of-north-field-lng-expansion-due-to-covid-19 (last accessed 25 February 2021).

89 'PROJECTS: Kuwait to merge solar power projects', Zawya, 5 January 2021, https://www.zawya.com/mena/en/projects/story/PROJECTS_Kuwait_to_merge_solar_power_projects-ZAWYA20210105081323/ (last accessed 27 March 2021).

90 'Aramco delays expansion projects due to COVID-19 impacts', Technical Review Middle East, 6 October 2020, https://www.technicalreviewmiddleeast.com/business-a-management/business-a-management/aramco-delays-expansion-projects-due-to-covid-19-impacts (last accessed 25 February 2021).

and businesses meant that it was not able to offer financial assistance to Lebanon's deteriorating economy, as initially planned.[91] This resulted in Lebanon defaulting, for the first time in history, on a US$1.2 billion bond payment.[92] Jordan could have potentially followed this trend, but was timely assisted by the International Monetary Fund's four-year Extended Fund Facility programme of US$1.3 billion.[93] Notwithstanding the various financial packages offered, the economic crisis of the hard-hit countries could only worsen in the post covid-19 recovery period, likely leading to an uptick in disputes in the region.

Politics

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

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

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91 Mohammed Soliman, 'COVID-19, the oil price war, and the remaking of the Middle East', Middle East Institute, 8 April 2020, https://www.difc.ae/business/laws-regulations/legal-database/arbitration-law-difc-law-no1-2008/ (last accessed 28 February 2021).

92 ibid.

93 IMF website, Press Release No. 20/371, IMF Executive Board Concludes First Review Under Jordan's Extended Fund Facility Arrangement and Rephases Access to Address the Impact of COVID-19, 4 December 2020, https://www.imf.org/en/News/Articles/2020/12/15/pr20375-jordan-imf-executive-board-concludes-first-review-under-jordans-eff (last accessed 28 February 2021).

94 Ed Reed, 'Kuwait signs up LNG supplies from Qatar', *Energy Voice*, 6 January 2020 https://www.energyvoice.com/oilandgas/middle-east/215662/kuwait-signs-up-lng-supplies-from-qatar/ (last accessed 17 February 2021). Qatar continues to supply the UAE with natural gas through the Dolphin Pipeline. 'Qatar Petroleum renews shared oilfield concession pact with UAE', *Reuters*, 13 March 2018, https://www.reuters.com/article/us-qatar-emirates-oil/qatar-petroleum-renews-shared-oilfield-concession-pact-with-uae-idUSKCN1GP12R (last accessed 17 February 2021). In March 2018, Qatar Petroleum and ADNOC renewed their concession agreement with Japan's United Petroleum Development Co and Bunduq Company Ltd in respect of the development and operation of the Al-Bunduq offshore oilfield. 'Qatar Petroleum renews shared oilfield concession pact with UAE', *Reuters*, 13 March 2018, https://www.reuters.com/article/us-qatar-emirates-oil/qatar-petroleum-renews-shared-oilfield-concession-pact-with-uae-idUSKCN1GP12R (last accessed 17 February 2021).

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

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

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

The resolution of ongoing border disputes will also have an effect on future energy relations and disputes. The unresolved maritime border dispute between Israel and Lebanon has made oil exploration in the disputed area impossible.[100] Given the recent normalisation deal signed between the UAE, Bahrain and Israel at the time of writing, there is also a possibility for ADNOC to become involved as 'a significant part of

95 'The 2020 Russia-Saudi Arabia Oil Price War Explained', *KVB Prime*, 28 April 2020, https://kvbprime.medium.com/2020-oil-price-war-explained-b2548a9f7b65 (last accessed 25 February 2021).

96 Tom O'Connor, 'U.S. and Russian Duelling Roadblocks Create Friction Near Syria's Oil and Gas Regions', *Newsweek*, 22 January 2020, https://www.newsweek.com/us-russia-forces-syria-oil-region-1483527 (last accessed 28 February 2021).

97 Among other things, maintaining supply during the protests is difficult. Khalid Al Ansary, Kadhim Ajrash, Zaid Sabah, 'Iraqi Oil Fields Halts as Reform-Driven Protests Escalate', *Bloomberg*, 19 January 2020, https://www.bloomberg.com/news/articles/2020-01-19/iraqi-oil-field-halts-as-protests-calling-for-reforms-escalate (last accessed 28 February 2021).

98 Jack Ballantyne, 'Award against Yemen enforced in US', *Global Arbitration Review*, 8 October 2018, https://globalarbitrationreview.com/article/1175394/award-against-yemen-enforced-in-us (last accessed 17 February 2021).

99 Alison Ross, 'UAE investor in Libya brings claim under Islamic treaty', *Global Arbitration Review*, 11 January 2019, https://globalarbitrationreview.com/article/1178986/uae-investor-in-libya-brings-claim-under-islamic-treaty (last accessed 17 February 2021).

100 'Lebanon's Berri: Israel violating water borders in oil exploration', *Reuters*, 6 February 2019, https://www.reuters.com/article/us-lebanon-israel-oil/lebanons-berri-israel-violating-water-borders-in-oil-exploration-idUSKCN1PV1QV (last accessed 17 February 2021).

the solution to the Lebanon-Israel maritime dispute'.[101] A similar dispute between Saudi Arabia and Kuwait was drawn to a close in December 2019, which enabled the renewed production of 500,000 barrels of crude per day.[102]

Sanctions

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

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

With the recent change of administration in the United States, the scene is set for the revival of the JCPOA and, concomitantly, for the relaxing or lifting of sanctions on Iran.[105] While there have not been any conclusive steps taken to relax or lift those

101 Mustafa Abu Sneineh and Adam Chamseddine, 'Israel and Lebanon's border dispute could give the UAE a Mediterranean foothold', *Middle East Eye*, 13 February 2021, https://www.middleeasteye.net/news/uae-israel-lebanon-gas-mediterranean-foothold (last accessed 25 February 2021).

102 Stanley Reed, 'Saudi Arabia and Kuwait Settle Dispute Over Oil Fields', *New York Times*, 24 December 2019, https://www.nytimes.com/2019/12/24/business/saudi-arabia-kuwait-oil.html (last accessed 17 February 2021).

103 'US unleashes sanctions on Iran, hitting oil, banking and shipping', *BBC News*, 5 November 2018, https://www.bbc.com/news/business-46092435 (last accessed 17 February 2021).

104 In May 2019, the United States ended exemptions from US secondary sanctions for major importers of Iranian oil. 'Six charts that show how hard US sanctions have hit Iran', *BBC News*, 9 December 2019, https://www.bbc.com/news/world-middle-east-48119109 (last accessed 17 February 2021).

105 Ali Vaez, 'The effect of US sanctions on Iran was global – and a global effort must end them', *The Guardian*, 22 January 2021, https://www.theguardian.com/commentisfree/2021/jan/22/effect-us-sanctions-iran-global-effort-end (last accessed 28 February 2021).

sanctions at the time of writing, this is likely to follow in the coming months. If indeed so, this would necessarily follow steps taken by the members of the JCPOA to reverse the economic harm caused by the sanctions.

Infrastructure development

The infrastructure required to service the levels of oil and gas production coming from the Middle East is vast. Power plants, offshore platforms, drilling rigs, LNG terminals and trains, oil and gas pipelines, refineries, transport vessels and roads are all integral parts of the energy infrastructure. Infrastructure requirements for coal and renewable developments are also significant. Issues relating to the time, costs, quality and scope of the works with respect to energy-related infrastructure projects and the subsequent decommissioning of these projects have consistently led to arbitrations. In particular, questions relating to the design and construction of facilities are issues that frequently emerge in such disputes. Indeed, as recently as 2018, Qatar Petroleum's subsidiary, Barzan Gas Company, brought ICC arbitration proceedings against Hyundai Heavy Industries regarding alleged problems with the pipeline that Hyundai had installed.[106] Where infrastructure, such as pipelines, cross international borders, the complexity of the project increases due to the need for the participation or consent of multiple states.

Environmental issues

Climate change and other environmental concerns are having an increasing impact on the energy industry. Climate change-related disputes (both commercial and investment),[107] including disputes related to increased environmental regulation, will

106 Jung Min-hee, 'Hyundai Heavy Involved in Multi-billion-dollar Dispute with Qatari Firm', *Business Korea*, 27 March 2019, http://www.businesskorea.co.kr/news/articleView.html?idxno=21278 (last accessed 26 March 2021).

107 At its broadest, climate change-related disputes have been defined by the ICC Task Force as 'any dispute arising out of or in relation to the effect of climate change and climate change policy, the United Nations Framework Convention on Climate Change ("UNFCC"), and the Paris Agreement.' International Chamber of Commerce, Commission on Arbitration and ADR, ICC Commission Report, Resolving Climate Change Related Disputes through Arbitration and ADR, p. 8. https://iccwbo.org/content/uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf (last accessed 17 February 2021).

likely increase. Bahrain has already faced a claim in respect of the construction of the state's first recycling plant in which it alleged, among other things, that the construction company failed to obtain the necessary environmental permits.[108]

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

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

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108 Cosmo Sanderson, 'ICC Tribunal throws out claim against Bahrain', *Global Arbitration Review*, 16 January 2020, https://globalarbitrationreview.com/article/1213198/icc-tribunal-throws-out-claim-against-bahrain (last accessed 17 February 2021).

109 Robin Mills, 'Gulf States can lead the way with carbon capture', *The National*, 3 December 2017, https://www.thenational.ae/business/energy/gulf-states-can-lead-the-way-with-carbon-capture-1.680938 (last accessed 17 February 2021).

110 Saudi Aramco website, Creating Value, Technology development, Global research centers, carbon management, https://www.saudiaramco.com/en/creating-value/technology-development/globalresearchcenters/carbon-management (last accessed 17 February 2021).

111 UNFCCC, Transboundary carbon capture and storage project activities (Technical paper), 1 November 2012, https://unfccc.int/resource/docs/2012/tp/09.pdf (last accessed on 17 February 2021).

112 Rania El Gamal, 'Saudi Arabia plans to launch carbon trading scheme', Reuters, 30 October 2019, https://www.reuters.com/article/us-saudi-investments-energy/saudi-arabia-plans-to-launch-carbon-trading-scheme-idUSKBN1X91M1 (last accessed 17 February 2021).

113 Lisa Hodes Rosen and Adrienne Bossi, 'Due Process Rights in the Carbon Markets' (2011) 11 Climate L Rep 9,12. (last accessed 17 February 2021).

Technology

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

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

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

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

Belt and Road Initiative

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

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114 'ADNOC has Implemented IBM Blockchain Technology to Streamline Daily Transactions', *World Oil*, 12 October 2018, https://www.worldoil.com/news/2018/12/10/adnoc-has-implemented-ibm-blockchain-technology-to-streamline-daily-transaction (last accessed 17 February 2021).

115 Saudi Aramco Energy Ventures website, https://www.saev.com/ (last accessed 17 February 2021).

116 'Data Gumbo Secures $6M in Series A Funding from Venture Arms of Leading International Oil & Gas Companies', *Business Wire*, 7 May 2019, https://www.businesswire.com/news/home/20190507005752/en/Data-Gumbo-Secures-6M-Series-Funding-Venture (last accessed 17 February 2021).

117 A recent study found that nine out of 10 senior oil and gas executives said they had not been able to meet expectations around digital transformation and had not yet seen value being delivered. Cristina Lago, 'Middle East Oil and Gas CIOs confront digital Transformation Hurdles' CIO, 14 November 2019, https://www.cio.com/article/3453438/middle-east-oil-and-gas-cios-confront-digital-transformation-hurdles.html (last accessed 4 February 2021). Carla Sertin, 'Digital can unlock $1.6 trillion of value for oil and gas, if you know how to use it', *Oil & Gas Middle East*, 15 November 2020, https://www.oilandgasmiddleeast.com/37244-digital-can-unlock-16-trillion-of-value-for-oil-and-gas-if-you-know-how-to-use-it (last accessed 27 March 2021).

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

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

It is inevitable that there will be some disputes resulting from these economic ties. Notwithstanding China's obvious commitment to mediation as a form of dispute resolution,[123] it seems likely that some of these disputes, which will likely relate to large-scale cross-border projects, will result in international arbitrations. Investor-state

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118 Saudi Arabia was the top supplier of China's crude oil in 2019. Notwithstanding US sanctions, China also purchased Iranian oil. Muyu Xu and Chen Aizhu, 'China oil imports from top supplier Saudi Arabia rise 47% in 2019: customs', *Reuters*, 31 January 2020, https://www.reuters.com/article/us-china-economy-trade-oil/china-oil-imports-from-top-supplier-saudi-arabia-rise-47-in-2019-customs-idUSKBN1ZU0EH (last accessed 21 February 2021). In 2018, as well as from Saudi Arabia, China imported significant amounts of crude oil from Iraq, Oman, Iran and Kuwait – all of whom were in the top 10 countries that supplied crude oil to China that year. The UAE was number 11. 'Top 15 Crude Oil Suppliers to China', World Stop Exports, 28 January 2020, http://www.worldstopexports.com/top-15-crude-oil-suppliers-to-china/ (last accessed 17 February 2021).

119 'Chinese construction firm wins $130mln contract in Abu Dhabi', Zawya, 21 February 2019, https://www.zawya.com/uae/en/story/Chinese_construction_firm_wins_130mln_contract_in_Abu_Dhabi-SNG_138376278/ (last accessed 28 February 2021).

120 'UPDATE 1-China/Abu Dhabi oil firms sign exploration refining agreement', Reuters, 22 July 2019, https://www.reuters.com/article/china-emirates-adnoc/update-1-china-abu-dhabi-oil-firms-sign-exploration-refining-agreement-idUSL4N24N2E1 (last accessed 17 February 2021).

121 'Hassyan Coal-Fired Power Plant, Dubai', *NS Energy*, https://www.nsenergybusiness.com/projects/hassyan-coal-fired-power-plant-dubai/ (last accessed 17 February 2021).

122 ibid.

123 Bruce Love, 'China Belt and Road disputes set to fuel mediation's global rise', *Financial Times*, 14 August 2019, https://www.ft.com/content/71288fe2-9e6f-11e9-9c06-a4640c9feebb (last accessed 17 February 2021).

disputes will likely be resolved according to the disputes procedures set out in the applicable treaties. In addition, certain arbitral institutions have positioned themselves to be well-placed to administer BRI-related arbitrations. For example, the ICC, which now has a case management office in the region in the ADGM, has created a Belt and Road Commission to support BRI disputes.[124]

Funding

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

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

Conclusion

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

* *The authors acknowledge the contribution of Jane Rahman to previously published versions of this article. The information in this article was accurate as at May 2021.*

124 ICC website, Dispute Resolution, https://iccwbo.org/dispute-resolution-services/belt-road-dispute-resolution/belt-and-road-commission/ (last accessed 17 February 2021).

125 JD Alois, 'Largest Equity Crowdfunding Round in the MENA Region: Enerwhere Lists on Eureeca', *Crowdfund Insider*, 30 October 2017, https://www.crowdfundinsider.com/2017/10/123831-largest-equity-crowdfunding-round-region-enerwhere-lists-eureeca/ (last accessed 17 February 2021).

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Energy arbitration in Africa

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IN SUMMARY

This article outlines key facts pertaining to Africa's natural resources landscape. Some of the recent issues faced in African energy projects are explored, including those faced by parties in arbitrations stemming from energy projects in Africa. Other related issues are also explored, such as diversity in African arbitrations.

DISCUSSION POINTS

- The ownership, control and management of natural resources in Africa
- Prevalence of arbitration in African energy projects
- Potential and development of renewable energy projects in Africa
- Types of disputes faced by African parties in energy arbitrations
- Diversity in arbitral tribunals and counsel in African arbitrations

REFERENCED IN THIS ARTICLE

- *Maritime Delimitation in the Indian Ocean, Federal Republic of Somalia v Republic of Kenya*, 12 October 2021
- *Frazer Solar GmbH v The Kingdom of Lesotho*, 28 January 2020
- *Pungwe B v ZETDC*, 22 October 2021

Africa, the world's second largest and second most populous continent comprising 54 different states,[1] has considerable oil and natural gas reserves that are a crucial element to its economic development and sustainability plans.

The continent is a significant oil-producing region. It accounts for 7.8 per cent of global oil production[2] and is responsible for roughly 8.9 per cent of global oil exports.[3] Africa is home to four of the top 30 oil-producing countries in the world: Nigeria, Angola, Algeria and Egypt.[4] Nigeria is the largest oil-producing nation on the continent, followed by Algeria and Angola.[5]

Africa is also home to substantial natural gas reserves and accounts for 6.9 per cent of the world's proven gas reserves. Within the region, Nigeria has the largest proved gas reserves, followed by Algeria, Senegal, Mozambique and Egypt.[6]

Africa also has abundant potential for renewable energies, most of which is under-exploited.[7] Despite being home to 17 per cent of the world's population, Africa currently accounts for just 4 per cent of global power supply investment and 1.3 per cent

1 There are eight regional economic communities in Africa: the Arab Maghreb Union (AMU), the Community of Sahel-Saharan States (CEN-SAD), the Common Market for Eastern and Southern Africa and Community of Sahel–Saharan States (COMESA), the Eastern African Community (EAC), the Economic Community of Central African States (ECCAS), the Economic Community of West African States and Economic Community of Central African States (ECOWAS), the Intergovernmental Authority on Development (IGAD), and the Southern African Development Community (SADC). European Centre for Development Policy Management, Poorva Karkare and Bruce Byiers, 'Making sense of regional integration in Africa', 7 July 2019, https://ecdpm.org/talking-points/making-sense-of-regional-integration-in-africa/ (last accessed 9 December 2021).

2 *BP Statistical Review of World Energy 2021*, 70th Edition, https://www.bp.com/content/dam/bp/business-sites/en/global/corporate/pdfs/energy-economics/statistical-review/bp-stats-review-2021-full-report.pdf (last accessed 9 December 2021), p. 18.

3 ibid., p. 32.

4 ibid., p. 20.

5 ibid., p. 18.

6 Matthew Goosen, 'Top 10 African Countries Sitting on the Most Natural Gas', *Energy Capital & Power*, 16 July 2021, https://energycapitalpower.com/top-ten-african-countries-sitting-on-the-most-natural-gas/ (last accessed 9 December 2021).

7 The reasons for this generally relate to political instability, macroeconomic uncertainty, weak policy and regulatory frameworks, financially weak utilities, and lack of transparency and institutional capacity. Gerd Muller and Francesco La Camera, *The Renewable Energy Transition in Africa: Powering Access, Resilience and Prosperity*, p. 53, https://www.irena.org/-/media/Files/IRENA/Agency/Publication/2021/March/Renewable_Energy_Transition_Africa_2021.pdf (last accessed 9 December 2021).

of the world's renewable power generation share.[8] Solar and wind together constituted 3 per cent of Africa's generated electricity in 2018 versus 7 per cent in other regions of the world.[9] According to a report by the International Energy Agency, only 10 per cent of sub-Saharan Africa's hydropower potential is currently being exploited.[10]

However, the renewable energy landscape in Africa is rapidly evolving and significant projects in the renewable sector have taken place recently.

Developments in Africa have also been impacted by Agenda 2063: Africa's blueprint and master plan for transforming the continent into a global powerhouse of the future.[11] Agenda 2063 recognises that by 2070 the total global population will grow by 2.4 billion people, with more than half of this growth taking place in Africa. [12] Against this background, Agenda 2063 seeks to accelerate the development of Africa's energy and infrastructure requirements, recognising that sustainable energy solutions are key to transforming the continent.

The immense potential for growth in the energy sector in Africa, and the need to do so in line with the large and growing population's energy demand, makes it an attractive destination for global investment flow. In 2020, Egypt issued its inaugural green bond worth US$750 million,[13] with Ghana to follow suit.[14]

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8 World Energy Outlook special report, 'Africa Energy Outlook, Country Report, November 2019', https://www.iea.org/reports/africa-energy-outlook-2019 (last accessed on 9 December 2021).

9 Leo Holtz and Christina Golubski, 'Figures of the week: Africa's renewable energy potential, Brookings', 5 May 2021, https://www.brookings.edu/blog/africa-in-focus/2021/05/05/figures-of-the-week-africas-renewable-energy-potential/ (last accessed 9 December 2021).

10 Shuaib Van Der Schyff, 'Renewable Races: The African Countries Leading the Way to a more Sustainable Future', *Energy Capital & Power*, 11 July 2020, https://energycapitalpower.com/renewable_races-the-african-countries-leading-the-way-to-a-more-sustainable-future/ (last accessed 9 December 2021).

11 'Agenda2063: The Africa We Want', https://au.int/en/agenda2063/overview (last accessed 9 December 2021).

12 'Agenda2063: Infrastructure and Energy Initiatives', https://au.int/en/videos/20190101/agenda2063-infrastructure-and-energy-initiatives (last accessed 9 December 2021).

13 Davide Barbuscia and Abhinav Ramnarayan, 'Egypt becomes first Arab country to issue Green bonds with $750 million deal', 29 September 2020, https://www.reuters.com/article/egypt-bonds-int-idUSKBN26K1MJ (last accessed 9 December 2021).

14 Carlos Mureithi, 'Ghana is entering the surging social bond market', 27 May 2021, https://qz.com/africa/2013386/ghana-plans-to-issue-a-social-bond/ (last accessed 9 December 2021).

The renewable energy resources with which Africa is endowed,[15] in tandem with the recent initiatives to accelerate development of its energy requirements, indicates that there will likely be an increase in energy projects and, with that, the potential for a growing number of disputes coming from the energy sector in Africa.

Ownership, control and management of natural resources

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

Natural resources in Africa are generally owned by the state. The states typically adopt a production sharing agreement (PSA) or grant licences permitting foreign companies to explore and, if successful, to develop and produce oil and gas in the region.[16] PSAs differ from licences in respect of how the state is compensated for a successful exploration. Under a licence arrangement, the operator's profits are taxed by the state, while, under a PSA, the state derives value principally by receiving a share of the oil and gas produced by receiving income via fees, royalties or bonuses, or a combination thereof.[17]

African states are typically represented by national oil companies (NOCs), which then enter into PSAs with international oil companies (IOCs) to facilitate transfer of the technical know-how and financial expertise in exploration and development operations. PSAs typically contain the rights of exploration and extraction from specific designated areas over a specified and limited amount of time and will stipulate the portion of oil and gas that the state and the IOCs are to receive respectively.

15 International Renewable Energy Agency (IRENA), *Scaling up Renewable Energy Deployment in Africa: Impact of IRENA's Engagement*, p. 3, https://www.irena.org/africa (last accessed 9 December 2021).

16 John Paterson, 'Production Sharing Agreements in Africa: Sovereignty and Relationality', University of Aberdeen, 2019, https://www.abdn.ac.uk/law/documents/001.19%20-%20Paterson.pdf (last accessed 9 December 2021).

17 ibid.

Apart from PSAs and licences, some African states also sign concession agreements.[18] Concession agreements are typically structured in a manner in which the government grants exclusive rights to private oil companies for long-term exploration, development, production and marketing rights for oil resources.[19]

The exploration and development of resources is a high-risk endeavour in a geological, commercial, technical, managerial and political sense.[20] Therefore, almost all sub-Saharan African countries have opted for PSAs, licences and/or concession agreements to manage their energy resources; these arrangements limit the governments' exposure (namely financial and reputational) in the event that reserves are not discovered during exploration, while enabling them to also participate in the management of the project.[21]

Joint venture arrangements between government and semi-government entities on the one hand, and private corporations on the other, have also been increasingly relied on. In January 2021, Italian multinational energy firm Enel's renewables arm,

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18 Technology group Wärtsilä and Gabon Power Company (GPC), a subsidiary of the Sovereign Fund of the Gabonese Republic (FGIS), recently signed a concession agreement with the government of Gabon for the development, supply, construction, operation and maintenance of a 120 megawatts gas power plant on 22 September 2021. 'Wärtsilä signs Concession Agreement to Develop 120 MW Power Plant Project in Gabon', *Energy Capital & Power*, 27 September 2021, https://energycapitalpower.com/wartsila-signs-concession-agreement-to-develop-120-mw-power-plant-project-in-gabon/ (last accessed 9 December 2021). A consortium led by Gridworks and including Eranove and AEE Power entered into three concession agreements with the Ministry of Hydraulic Resources and Electricity of the Democratic Republic of Congo in March 2021. 'Gridworks / Aee Power / Eranove Consortium Signs Concession Agreements with Democratic Republic of Congo Government on $100M Solar-hybrid Power Project', The Rockefeller Foundation, Press Releases, 6 March 2021, https://www.rockefellerfoundation.org/news/consortium-signs-concession-agreements-with-democratic-republic-of-congo-government-on-100m-solar-hybrid-power-project/ (last accessed 9 December 2021).

19 ibid., p. 189.

20 Kirsten Bindemann, Oxford Institute for Energy Studies, 'Production-Sharing Agreements: An Economic Analysis', p. 5, https://www.oxfordenergy.org/wpcms/wp-content/uploads/2010/11/WPM25-ProductionSharingAgreementsAnEconomicAnalysis-KBindemann-1999.pdf (last accessed 9 December 2021).

21 Examples include SNPC, Total E&P Congo, Chevron Overseas Congo Ltd PSA, SNPC, Pelfaco Congo Ltd, Sounda PSA, The Tullow Uganda Ltd, Kanywataba Prospect Area PSA, the Heritage Oil & Gas Ltd, Energy Africa Uganda Ltd PSA, the Allied Energy Plc, Nigeria Agip Exploration Ltd PSA, the Libya-Canadian Superior Energy Inc 7th November Block PSA, the Sonde Resources Corp, Siraj and Hadaf PSA in Libya.

Enel Green Power, partnered up with Qatar Investment Authority, which is among the top 10 largest national sovereign wealth funds in the world,[22] to form a joint venture to finance, build and operate renewable projects in sub-Saharan Africa.[23]

In 2019, a joint venture agreement between Africa Oil Corp, Tullow Oil Plc and Total SA was signed with the government of Kenya for the first-ever development of oil fields in the South Lokichar basin.[24] At the time of writing, the joint venture partners and Kenyan government appear to have made significant progress and had received extensions to the block exploration licences in Kenya to the end of 2021.[25]

Public–private partnerships (PPPs) also play a key role in the energy sector. PPPs typically involve a contract between a government or a state-owned entity and a private party where the private party assumes a function usually carried out by the government such as providing electricity, water or building infrastructure. African countries have relied on PPPs in various sectors. An example of a successful PPP is the Kigali Bulk Water project, which received significant backing from the African Development Bank, the World Bank and private sector players.[26]

Prevalence of arbitration in African energy projects

The precise nature of the arbitration agreements contained in contracts between states or their NOCs, and the relevant counterparty, is often confidential. The contracts that are publicly available indicate a preference for arbitration as the dispute resolution

22 'Largest sovereign wealth funds worldwide as of September 2021, by assets under management', Statista Website, https://www.statista.com/statistics/276617/sovereign-wealth-funds-worldwide-based-on-assets-under-management/ (last accessed 9 December 2021).

23 Paul Burkhardt, 'Enel, Qatar's Sovereign Fund to Develop Renewables in Africa', Bloomberg, 7 January 2021, https://www.bloomberg.com/news/articles/2021-01-07/enel-qatar-s-sovereign-fund-to-develop-renewables-in-africa (last accessed 9 December 2021).

24 'Africa Oil, JV partners sign on for first ever oil development in Kenya', *World Oil*, 26 June 2019, https://www.worldoil.com/news/2019/6/26/africa-oil-jv-partners-sign-on-for-first-ever-oil-development-in-kenya (last accessed 9 December 2021).

25 'Africa Oil Receives Kenya Licence Extensions to the End of 2021', https://africaoilcorp.com/news/africa-oil-receives-kenya-licence-extensions-to-th-122798/ (last accessed 9 December 2021).

26 Five African countries accounted for more than 50 per cent of all successful PPP activity from 2008 to 2018: South Africa, Morocco, Nigeria, Egypt and Ghana. Several other countries have multiple PPPs in the pipeline – Burkina Faso has 20, and Botswana has eight. 'Supporting Public Private Partnerships in Africa: African Development Bank ready to scale up', African Development Bank Group, 10 September 2020, https://www.afdb.org/en/news-and-events/press-releases/supporting-public-private-partnerships-africa-african-development-bank-ready-scale-37804.

forum. For instance, the 2013 Tanzanian model PSA contains an ICC arbitration dispute resolution clause,[27] and the 1999 Ugandan model PSA provides for arbitration under the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention).[28] Further, Kenya's standardised power purchase agreements also provide options for arbitration under the Kenyan Arbitration Act or the ICC Rules of Arbitration for projects that are above 10 megawatts.[29]

Commercial arbitration

Reflecting this preference, global energy disputes accounted for approximately 18 per cent (167 of the total 946 cases registered) of the ICC's 2020 caseload.[30] In 2018, the ICC Court of Arbitration, in a bid to strengthen its presence and enhance awareness of ICC's dispute resolution mechanism in the region, launched an Africa Commission.[31] Recently, in May 2021, the ICC also created a new role for Regional Director for Africa to work closely with the ICC Africa Commission towards developing ICC activities and raising awareness of ICC dispute resolution services within sub-Saharan countries.[32] In light of these efforts by the ICC in Africa, the number of African parties resolving their dispute through ICC arbitration may well increase, suggesting a concomitant increase in African energy disputes.

27 Model Contract, PSA 2013, https://www.resourcecontracts.org/contract/ocds-591adf-8006566420 (last accessed 9 December 2021).

28 Uganda 1999 Model Production Sharing Contract, https://www.resourcecontracts.org/contract/ocds-591adf-8006566420 (last accessed 9 December 2021).

29 Standardised Power Purchase Agreement for Renewable Energy Generators greater than 10 MW template, https://rise.esmap.org/data/files/library/kenya/Renewable%20Energy/RE%20 10.1%20Standardized%20PPA%20for%20Large%20Scale%20Generators%20More%20than%20 10MW.pdf (last accessed 9 December 2021).

30 ICC Dispute Resolution 2020 Statistics, p. 17, https://iccwbo.org/publication/icc-dispute-resolution-statistics-2020/ (last accessed 9 December 2021).

31 International Chamber of Commerce Website, Home, Dispute resolution services, Africa Commission, https://iccwbo.org/dispute-resolution-services/africa-commission/ (last accessed 9 December 2021).

32 International Chamber of Commerce Website, Home, News & Speeches, 'Regional Director role to bolster ICC reach in Africa', 11 May 2021, https://iccwbo.org/media-wall/news-speeches/regional-director-role-to-bolster-icc-reach-in-africa/ (last accessed 9 December 2021).

However, parties to energy agreements are not only exclusively choosing ICC arbitration. In 2020, global energy and resources disputes constituted 26 per cent of the London Court of International Arbitration (LCIA)'s caseload.[33]

Investor-state arbitration

As at 9 December 2021, African states had signed 758 bilateral investment treaties (BITs).[34] In addition to the BITs, there are also a number of regional trade agreements entered into between African states.[35] Against this backdrop, there have been a number of Africa-related ICSID cases involving energy disputes. In 2021, 15 per cent of ICSID cases involved a sub-Saharan African state party. This is not an insignificant number, as it is topped only by 22 per cent from South America and compares to 12 per cent from the Middle East and North Africa and 4 per cent from North America.[36] The oil and gas sector was the most litigated sector, accounting for 25 per cent of the cases that have been registered at ICSID as of 30 June 2021 followed closely by the electric power and other energy sector at 17 per cent.[37]

Enforceability

While concerns remain about the enforceability of foreign arbitral awards in many African jurisdictions, recent years have shown notable successes on the enforcement landscape in Africa. For example, the Tanzanian courts enforced a US$65 million award against the Tanzania Electric Supply Company (TANESCO) in the *Dowans* case.[38]

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33 LCIA 2020 Annual Casework Report, https://www.lcia.org/News/lcia-news-annual-casework-report-2020-and-changes-to-the-lcia-c.aspx (last accessed 9 December 2021).

34 ICSID, Resources Databases Database of Bilateral Investment Treaties, https://icsid.worldbank.org/resources/databases/bilateral-investment-treaties (last accessed 9 December 2021).

35 These include the Common Market for Eastern and Southern Africa (COMESA), Economic Community of West African States and Economic Community of Central African States (ECOWAS), and the Southern African Development Community (SADC).

36 'The ICSID Caseload – Statistics Issue 2021-2', https://icsid.worldbank.org/sites/default/files/Caseload%20Statistics%20Charts/The%20ICSID%20Caseload%20Statistics%202021-2%20Edition%20ENG.pdf (last accessed 9 December 2021).

37 ibid., p. 12.

38 Kamal Shah, Leonie Parkin and John Miles, 'Tanzanian High Court dismisses petition to set aside ICC arbitration award', *Thomson Reuters Practical Law*, 3 November 2011, https://uk.practicallaw.thomsonreuters.com/2-510-6528?transitionType=Default&contextData=(sc.Default)&firstPage=true (last accessed 9 December 2021).

A majority of African states are party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Only 12 of the 54 African states are not signatories to the New York Convention.[39] Malawi was the latest African state to accede to the New York Convention in March 2021[40] and three African states – Ethiopia, the Seychelles and Sierra Leone – signed and ratified the New York Convention in 2020.[41] Most African countries are also party to the ICSID Convention.[42] In contrast, most African states have not yet adopted a national arbitration law based on the UNCITRAL Model Law.[43]

Regional arbitration centres

While the reliance of African parties has more commonly been on international arbitral institutions such as the ICC and LCIA,[44] there are a number of regional arbitration centres gaining prominence in Africa. These include, among others, the Cairo Regional Centre for International Commercial Arbitration (CRCICA),[45] the

39 New York Arbitration Convention, Contracting States, https://www.newyorkconvention.org/countries (last accessed 9 December 2021). African states that are yet to accede to the New York Convention include Gambia, Guinea-Bissau, Chad, the Republic of the Congo, Equatorial Guinea, Eritrea, Eswatini, Libya, Namibia, Somalia, South Sudan and Togo.

40 Malawi accedes to the New York Convention, https://www.newyorkconvention.org/news/malawi+accedes+to+the+new+york+convention (last accessed 9 December 2021).

41 Thomas R Snider, 'Recent arbitration developments in East Africa', Al Tamimi & Company Law Update, November 2020, https://www.tamimi.com/law-update-articles/recent-arbitration-developments-in-east-africa/ (last accessed 9 December 2021).

42 Forty-one African states are members of the ICSID Convention. Angola, Djibouti, Equatorial Guinea, Eritrea, Libya and South Africa have not signed the ICSID Convention. Ethiopia, Guinea-Bissau and Namibia have signed but not ratified the ICSID Convention. ICSID Website, Database of ICSID Member States, https://icsid.worldbank.org/about/member-states/database-of-member-states (last accessed 9 December 2021).

43 The few countries that have adopted their domestic arbitration laws based on the UNCITRAL Model Law include Angola, Madagascar, Mauritius, Mozambique, Zambia and Zimbabwe. Notable countries that have not adopted a version of the Model Law include South Africa, Namibia, Botswana, Lesotho, Malawi and Swaziland. Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status (last accessed 9 December 2021).

44 Queen Mary University of London, 2021 International Arbitration Survey: Adapting arbitration to a changing world, http://www.arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf (last accessed 9 December 2021).

45 The Cairo Regional Centre for International Commercial Arbitration Website, About Us, https://crcica.org/AboutUs.aspx (last accessed 9 December 2021).

Arbitration Foundation of Southern Africa (AFSA),[46] Lagos Court of Arbitration (LCA),[47] Kigali International Arbitration Centre (KIAC),[48] Nairobi Centre for International Arbitration (NCIA),[49] the Mediation and Arbitration Centre (MARC) in Mauritius,[50] and Casablanca International Mediation and Arbitration Centre (CIMAC).[51]

The caseloads of African arbitral institutions have been growing. CRCICA had administered 1,385 cases at the end of 2019, including 82 new cases in 2019 alone.[52] AFSA also has a caseload of approximately 60 international matters in addition to its domestic caseload of about 500 matters.[53] The caseloads of KIAC, NCIA and the LCA are also growing.[54]

In addition, regional institutions like the Organization for the Harmonization of Business Law in Africa (OHADA)'s Court of Justice and Arbitration may also play an increasingly prominent role as an international arbitration-administering institution.[55]

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46 Arbitration Foundation of Southern Africa, Website, About Us, https://arbitration.co.za/a-brief-history/ (last accessed 9 December 2021).

47 Lagos Court of Arbitration, Website, About the LCA, https://www.lca.org.ng/about/ (last accessed 9 December 2021).

48 Kigali International Arbitration Centre, African Arbitration Association Website, https://afaa.ngo/Sys/PublicProfile/47340977/4568030 (last accessed 9 December 2021).

49 Nairobi Centre for International Arbitration, Website, Home, https://ncia.or.ke/ (last accessed 9 December 2021).

50 Mediation and Arbitration Centre Mauritius, Website, https://www.marc.mu/en (last accessed 9 December 2021).

51 Casablanca International Mediation and Arbitration Centre, Website, About Us, http://cimac.ma/history/ (last accessed 9 December 2021).

52 Cosmo Sanderson, 'Cairo centre unveils case figures and new advisers', *Global Arbitration Review*, 14 May 2020, https://globalarbitrationreview.com/article/1226853/cairo-centre-unveils-case-figures-and-new-advisers (last accessed 9 December 2021).

53 AFSA @work, Official Newsletter of the Arbitration Foundation of Southern Africa, June 2019, https://arbitration.co.za/wp-content/uploads/2019/06/AFSA-Newsletter_JUNE-2019_1.pdf (last accessed 9 December 2021).

54 Robert Wheal, Tolu Obamuroh and Opeyemi Longe, 'Institutional Arbitration in Africa: Opportunities and challenges', White & Case, 17 September 2020, https://www.whitecase.com/publications/insight/africa-focus-autumn-2020/institutional-arbitration-opportunities-challenges (last accessed 9 December 2021).

55 Roland Ziadé and Clement Fouchard, 'New OHADA Arbitration Text Enters Into Force', Kluwer Arbitration Blog, 30 March 2018, http://arbitrationblog.kluwerarbitration.com/2018/03/30/new-ohada-arbitration-text-enters-into-force/ (last accessed 9 December 2021).

Aside from the growing number of arbitration centres, African states are increasingly aligning their legal frameworks to an international standard to make arbitrations in Africa more attractive to the foreign markets. Tanzania revamped its legal framework for arbitration at the national level by passing a new national arbitration law, the Arbitration Act 2020, that came into force in February 2020 to replace its 1931 law. Notably, this new act follows the English Arbitration Act model rather than the UNCITRAL Model Law, and it remains to be seen how this will develop in practice.[56]

Types of disputes in African energy projects

Given the diverse range of contractual arrangements and partnerships that exist in energy-related projects in Africa, disputes arise due to a wide range of issues depending on the stage and phase of the respective project.

Some recent disputes have arisen out of:

- termination of PSAs and other granting agreements;
- financing and operation mechanisms between joint venture partners (eg, disputes under joint operating agreements);
- design and engineering related issues in the construction of projects;
- delays, disruptions, acceleration and mitigation-related claims where projects are delayed or disrupted;
- disputes involving taxation, environmental, labour and other issues;
- disagreement on the currency of payments to be made; and
- nationalisation of resources.[57]

For example, in the Kenyan Menengai project,[58] a geothermal power project, some of the challenges that arose included delayed fulfilment of the condition precedent involving securing letters of comfort, carrying out feasibility studies on the availability of steam, and failing to reach financial closures with financiers in time.

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56 Thomas R Snider, 'Recent arbitration developments in East Africa', Al Tamimi & Company Law Update, November 2020, https://www.tamimi.com/law-update-articles/recent-arbitration-developments-in-east-africa/ (last accessed 9 December 2021).

57 See, eg, Wairimu Keranja, 'Navigating Specialist Energy and Natural Resources Arbitration in East Africa', Kluwer Arbitration Blog, 1 April 2018, http://arbitrationblog.kluwerarbitration.com/2018/04/01/navigating-specialist-energy-natural-resources-arbitration-east-africa/ (last accessed 9 December 2021).

58 Alexander Richter, 'Policy shift in Kenya on private geothermal power project development at Menengai', *Think Geoenergy*, 3 December 2020 https://www.thinkgeoenergy.com/policy-

In an ad hoc arbitration award issued under the rules of arbitration of the South African Association of Arbitrators in January 2020, Frazer Solar GmbH's claims against Lesotho were partially allowed. For reneging on a contract to purchase solar energy equipment under a supply agreement in a project pertaining to the installation of LED lights in all government buildings and homes of public servants over a period of four years, Frazer Solar GmbH was awarded roughly half of the €102 million claim it sought against Lesotho.[59]

An operator and producer of a hydroelectric power station, Pungwe B Power Station, initiated ICC arbitration proceedings against Zimbawe's state-owned electricity company, Zimbabwe Electricity Distribution Company, for the sum of US$8.6 million of electricity delivered from the power plant.[60] The dispute pertained to disagreement over the currency of the payments (ie, US dollars as denominated in the power purchase agreement that Pungwe B claimed or Zimbabwean dollars as the counterparty had successfully argued).[61]

Trends

From a review of recent energy projects and disputes that have taken place from these projects in Africa, a number of trends can be discerned. These include the increasing reliance on renewable energy sources, the relationship between state boundaries and energy resources, and the increased emphasis on localisation, among others.

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shift-in-kenya-on-private-geothermal-power-project-development-at-menengai/ (last accessed 9 December 2021).

59 Sebastian Perry, 'Lesotho on the hook for stalled solar project', *Global Arbitration Review*, 18 May 2021, https://globalarbitrationreview.com/lesotho-the-hook-stalled-solar-project (last accessed 9 December 2021).

60 Jack Ballantyne, 'Zimbabwe hydro dispute heads to ICC', *Global Arbitration Review*, 19 August 2021, https://globalarbitrationreview.com/zimbabwean-hydro-dispute-heads-icc (last accessed 9 December 2021).

61 'Zimbabwe faces arbitration over currency payments', *Energy Voice*, 25 August 2021, https://www.energyvoice.com/renewables-energy-transition/hydro/345307/nre-zetdc-arbitration-dollars/ (last accessed 9 December 2021).

Renewable and sustainable projects

Given its proximity to the equator, solar energy potential in Africa is virtually limitless.[62] With its richness in hydropower, solar and wind, the region has significant potential to meet its growing population's energy demand by way of renewable and sustainable projects.

Some of the key projects in this regard include:

- The fourth largest solar power plant in the world, the Benban Solar Park, in Egypt.[63] As part of Egypt's goal to increase its share of renewable energy from a small fraction in 2019 to 20 per cent by 2022 and 42 per cent by 2035,[64] this solar plant was developed by more than 30 companies from 12 countries.[65] This US$2.1 billion project was constructed and overseen by the state-owned New and Renewable Energy Authority and now provides nearly 1.5 gigawatts to Egypt's national grid. When all the plants are scheduled to be powered up, they will be capable of churning out a combined 1,650 megawatts of electricity – enough to power hundreds of thousands of homes and businesses.[66] Estimates suggest that the share of renewables in Egypt's power generation could be as high as 53 per cent by 2030.[67]

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62 'The Solar revolution in Africa', *Schroders*, 1 March 2017, https://www.schroders.com/en/insights/economics/the-solar-revolution-in-africa/ (last accessed 9 December 2021).

63 Leith Al-Ali, Al Tamimi & Company Law Update, 'Energy Security and Sustainability in the Middle East – Challenges and Opportunities', May 2021, https://www.tamimi.com/law-update-articles/energy-security-and-sustainability-in-the-middle-east-challenges-and-opportunities/ (last accessed 9 December 2021).

64 'Electricity and Renewable Energy', International Trade Administration, Egypt – Country Commercial Guide, 5 September 2021, https://www.trade.gov/country-commercial-guides/egypt-electricity-and-renewable-energy (last accessed 9 December 2021).

65 Aidan Lewis, 'Giant solar park in the desert jump starts Egypt's renewables push', *Reuters*, 17 December 2019, https://www.reuters.com/article/us-egypt-solar-idUSKBN1YL1WS (last accessed 9 December 2021).

66 Andrew Raven, 'A New Solar Park Shines a Light on Egypt's Energy Potential', International Finance Corporation, October 2017, https://www.ifc.org/wps/wcm/connect/news_ext_content/ifc_external_corporate_site/news+and+events/news/cm-stories/benban-solar-park-egypt (last accessed 9 December 2021).

67 IRENA, *Renewable Energy Outlook Egypt*, https://www.irena.org/-/media/Files/IRENA/Agency/Publication/2018/Oct/IRENA_Outlook_Egypt_2018_En.pdf (last accessed 9 December 2021).

- Located in the Northern Cape Province of South Africa, the Redstone project is a concentrated solar power plant expected to deliver clean electricity to over 200,000 households[68] and prevent over 440 metric tons of carbon dioxide emissions annually.[69] Analysts have singled out South Africa as the 'world's most attractive emerging country for solar energy'[70] in light of this project.
- One of the largest solar projects in West Africa is being developed in Guinea.[71] The Khoumagueli solar project will contribute significantly to the country's aim of producing 30 per cent of its electricity from renewable sources by 2030.[72] Guinea's electricity supply is largely derived from hydropower, which can be susceptible to seasonal fluctuations in rainfall and has reportedly led to financial losses to business equivalent to about 4.7 per cent of annual sales.[73]
- As noted above, Kenya has pursued the Menengai geothermal power plant. The completion of the project in 2020 placed Kenya as the first and largest African producer of geothermal energy.[74] However, reported delays in the development of

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68 Claire Volkwyn, 'SA's Largest renewable energy project Redstone CSP achieves financial close', *ESI Africa*, 10 May 2021, https://www.esi-africa.com/industry-sectors/generation/sas-largest-renewable-energy-project-redstone-csp-achieves-financial-close/ (last accessed 9 December 2021).

69 'ACWA Power Starts South Africa's Largest Renewable Energy Project Redstone CSP', *Energy Industry Review*, 11 May 2021, https://energyindustryreview.com/renewables/acwa-power-starts-south-africas-largest-renewable-energy-project-redstone-csp/ (last accessed 9 December 2021).

70 'South Africa World's Most Attractive Emerging country for solar', *PV Magazine,* 29 January 2014, https://www.pv-magazine.com/2014/01/29/south-africa-worlds-most-attractive-emerging-country-for-solar_100014074/ (last accessed 9 December 2021).

71 Guinea also hosts two large hydropower projects, the Kaléta hydropower plant and the Souapiti hydropower plant with a capacity of 240MW and 450MW respectively. 'Guinea doubles its hydroelectric production capacity with the commissioning of the Souapiti hydroelectric facility', Tractebel Engie, 6 September 2021, https://tractebel-engie.com/en/news/2021/guinea-doubles-its-hydroelectric-production-capacity-with-the-commissioning-of-the-souapiti-hydroelectric-facility (last accessed 9 December 2021).

72 Republic of Guinea, 'Intended Nationally Determined Contribution under the United Nations Framework Convention on Climate Change', September 2015, https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Guinea%20First/INDC_Guinea_english_version%20UNFCCC.pdf (last accessed 9 December 2021).

73 'Signed PPA Advances 40-MWac Khoumagueli solar project in Guinea', *Renewable Energy World*, 31 May 2021, https://www.renewableenergyworld.com/solar/signed-ppa-advances-40-mwac-khoumagueli-solar-project-in-guinea/#gref (last accessed 9 December 2021).

74 Boris Ngounou, 'Kenya: Construction of the Menengai geothermal plant is completed', *Afrik21*, 12 October 2020, https://www.afrik21.africa/en/kenya-construction-of-the-menengai-

the project has led to Kenya reversing its policy on involving private project partners in energy projects,[75] and the Kenyan government is now looking to work with state-owned KenGen in the second and third phase of development of the Menengai geothermal fields.[76]

These are significant developments given that approximately 600 million people, or 48 per cent of the continent's population, still have no access to electricity.[77] Studies estimate that Africa could meet nearly a quarter of its energy needs from local and clean renewable energy sources by 2030, with the potential for its share of renewables to increase to two-thirds of its total energy demand by 2050,[78] in line with commitments to the Paris Climate Agreement and the United Nations Sustainable Development Goals. As the number of renewable projects increases, there would likely be a concomitant rise in disputes arising from the operation, management and structure of these projects.

Considering Africa's potential for renewable energy, its progress in adopting renewable energy technologies (RETs) has been slow. In terms of its size and population, Africa is lagging behind as compared to the rest of the world with regard to the deployment of renewable energies.[79] Several factors, including lack of technical know-how, skilled labour, inadequate legal framework and limited policy interest, contribute to the slow pace of the adoption of RETs in the region.[80]

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geothermal-power-plant-is-completed/ (last accessed 9 December 2021).

75 Alexander Richter, 'Policy shift in Kenya on private geothermal power project development at Menengai', 3 December 2020, https://www.thinkgeoenergy.com/policy-shift-in-kenya-on-private-geothermal-power-project-development-at-menengai/ (last accessed 9 December 2021).

76 ibid.

77 IRENA, *Scaling up Renewable Energy Deployment in Africa, Detailed Overview of IRENA's Engagement and Impact*, January 2020, p. 9 https://www.irena.org/-/media/Files/IRENA/Agency/Publication/2020/Feb/IRENA_Africa_Impact_Report_2020.pdf?la=en&hash=B1AD828DFD77D6430B93185EC90A0D1B72D452CC (last accessed 9 December 2021).

78 ibid., p. 6.

79 Gerd Muller and Francesco La Camera, *The Renewable Energy Transition in Africa, Powering Access, Resilience and Prosperity*, https://www.irena.org/-/media/Files/IRENA/Agency/Publication/2021/March/Renewable_Energy_Transition_Africa_2021.pdf (last accessed 9 December 2021).

80 Stephen Karekezi and Waeni Kithyoma, 'Renewable Energy in Africa: Prospects and Limits, NEPAD Energy Initiative', 2-4 June 2003, https://sustainabledevelopment.un.org/content/documents/nepadkarekezi.pdf (last accessed 9 December 2021).

Disputes over state lines

Energy arbitration projects have led to disputes over state lines, aptly demonstrated by the US$4 billion Grand Ethiopian Renaissance Dam project on the Blue Nile River.[81] The construction of this dam has been the subject of tension and long-running dispute between Egypt, Sudan and Ethiopia, after Ethiopia announced that it had started filling the dam's reservoir; Egypt has taken the position that any action relating to the dam should not be undertaken without a legally binding agreement over the equitable allocation of the Nile River.[82] Underlying concerns pertain to the control of the Nile River, Africa's longest river, which Egypt relies on for 90 per cent of its water,[83] but has been underutilised by Ethiopia. There is a possibility that this potential multi-state dispute may escalate to legal proceedings.

In October 2021, the International Court of Justice (ICJ) delivered its ruling in the dispute between Somalia and Kenya pertaining to the maritime boundary delimiting the Indian Ocean, exclusive economic zone, and continental shelf, among others.[84] In its decision, the ICJ largely sided with Somalia and adjusted the equidistance line in favour of Somalia's position. The area that pertained to this dispute is believed to be rich in oil and gas, offering a boost to the economy of whichever country controls it.[85]

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81 With a planned installed capacity of 6.45 gigawatts, the dam will be the largest hydroelectric power plant in Africa when completed. Water Technology Website, https://www.water-technology.net/projects/grand-ethiopian-renaissance-dam-africa/ (last accessed 9 December 2021). Dawit Endeshaw, 'Ethiopia says second filling of giant dam on Blue Nile complete', Reuters, 19 July 2021, https://www.reuters.com/world/africa/second-filling-ethiopias-giant-dam-nearly-complete-state-run-media-2021-07-19/ (last accessed 9 December 2021).

82 John Mukum Mbaku, 'The controversy over the Grand Ethiopian Renaissance Dam, Africa in Focus Brookings', Brookings, 5 August 2020 https://www.brookings.edu/blog/africa-in-focus/2020/08/05/the-controversy-over-the-grand-ethiopian-renaissance-dam/ (last accessed 9 December 2021).

83 Basillioh Mutahi, 'Egypt-Ethiopia row: The trouble over a giant Nile dam', BBC News, 13 January 2020, https://www.bbc.com/news/world-africa-50328647 (last accessed 9 December 2021).

84 Clive Schofield, Pieter Bekker and Robert van de Poll, 'The World Court Fixes the Somalia-Kenya Maritime Boundary: Technical Considerations and Legal Consequence', *American Society of Internal Law*, Volume 25, Issue 25, 8 December 2021, https://www.asil.org/insights/volume/25/issue/25 (last accessed 9 December 2021).

85 Abdi Latif Dahir, 'Why a Sea Dispute Has Somalia and Kenya on Edge', *The New York Times*, 12 October 2021, https://www.nytimes.com/2021/10/12/world/africa/kenya-somalia-maritime-dispute.html (last accessed 9 December 2021).

Local content requirements

Local content requirements (LCRs) are policies imposed by governments that mandate IOCs to use a certain amount of locally supplied services and/or locally manufactured goods, as a precondition to operate in the country. Currently, more than 80 per cent of the resources used in the exploration, development and production of hydrocarbons in Africa come from abroad.[86] In a bid to change this trend, various African governments have imposed LCRs in the form of initiatives to promote the use of local goods and services, increased participation of national labour, and local usage of technology and capital in the entire value chain of the oil and gas industry. Various African governments have amended their energy legislation to include such LCRs. A few notable examples include Senegal and Ghana.

Senegal

Over the past five years, Senegal has attracted various IOCs after a significant offshore oil and gas discovery in 2016, in what is now called the SNE Deepwater Oil Field. The discovery, led by Cairn Energy, is the world's largest oil discovery since 2014.[87]

Senegal's oil and gas sector was previously regulated by the 1998 Petroleum Code. On the back of the oil discoveries, Senegal revised this legislation and introduced a new petroleum code[88] and local content law in February 2019.[89] Senegal has also set itself the target of reaching 50 per cent local content by 2030.[90]

The new petroleum code introduces provisions devoted to LCRs. It mandates the participation of the national private sector in oil operations, contracts relating to the construction of related infrastructure, and supply of services relating to oil and gas projects. It also contains obligations for technology transfer to Senegalese companies.

86 Abdourahmane Diallo, 'Senegal sets up local content monitoring committee', APA news, 1 July 2021, http://www.apanews.net/en/news/senegal-sets-up-local-content-monitoring-committee (last accessed 9 December 2021).

87 'Today, the Market Watch Spotlight falls on Senegal', Africa Oil Week, 18 August 2017, https://africa-oilweek.com/Articles/market-watch-senegal (last accessed 9 December 2021).

88 Law No. 2019-03 of 24 January 2019 Enacting the Petroleum Code.

89 Law No. 1998-05 of 8 January 1998 Enacting the Petroleum Code.

90 Charne Hundermark, 'Senegal Places Local Content at the Center of the Country's Energy Sector Agenda', Africanews, 11 October 2020, https://www.africanews.com/2021/10/11/senegal-places-local-content-at-the-center-of-the-country-s-energy-sector-agenda-by-charne-hundermark// (last accessed 9 December 2021).

In addition, the new framework mandates that oil and gas operators annually submit a content plan that outlines their use of either local or international contractors, service providers or suppliers.[91] In different steps of the project, oil and gas operators must show that they have made efforts to utilise Senegalese personnel and companies, provided that the local personnel and companies are equipped with the required qualifications and capacity.[92]

Recently, the Senegalese government set up a local content monitoring committee, the National Committee for Monitoring Local Content, to enforce and implement the local content policy developed by Senegal.[93]

Ghana

In 2013, Ghana passed the Local Content and Local Participation in Petroleum Activities Regulations. Aimed at developing local capabilities, these regulations required every petroleum agreement or licence between Ghana and IOCs or NOCs to include at least 5 per cent equity participation of indigenous Ghanaian companies.[94] This is a mandatory requirement for any IOC or NOC seeking to conduct operations in the upstream sector of the economy. The regulations also require entities in the petroleum sector to transfer advanced technology along with their recruitment and training programmes to the Ghana National Petroleum Corporation. The Petroleum Commission that was set up in 2011 also has a designated department responsible for monitoring that IOCs and NOCs properly implement the various laws and legislations pertaining to LCRs.[95]

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91 David Stent, 'Senegal's New Local Content Laws', Energy Council, 9 July 2021, https://energycouncil.com/articles/senegals-new-local-content-laws/ (last accessed 9 December 2021).

92 ibid.

93 Charne Hundermark, 'Senegal Places Local Content at the Center of the Country's Energy Sector Agenda', Africanews, 11 October 2020, https://www.africanews.com/2021/10/11/senegal-places-local-content-at-the-center-of-the-country-s-energy-sector-agenda-by-charne-hundermark// (last accessed 9 December 2021).

94 Charles Godfred Ackah and Asaah S Mohammed, *Local Content Law and Practice The Case of Ghana in Mining for Change: Natural Resources and Industry in Africa* (Oxford, March 2020), https://oxford.universitypressscholarship.com/view/10.1093/oso/9780198851172.001.0001/oso-9780198851172-chapter-7 (last accessed 9 December 2021).

95 ibid.

At present, a majority of the resources used in the exploration, development and production of hydrocarbons, as well as in the renewables energy sector in Africa, are still supplied from abroad. African states will need to strive to strike the right balance between maximising local participation and maintaining a stable energy investment regime.

Covid-19

As it has globally, the covid-19 pandemic has similarly impacted the economies of the African continent, and the energy sector is no exception. Lockdown measures worldwide have reduced global energy demand resulting in a steep drop in oil prices.[96] Not all of this is negative for Africa as this may be the incentive needed for Africa to accelerate its development and subsequent reliance on the renewable energy sector. This would suggest an increase in disputes arising from both the oil and gas sector (due to fallout from reduced prices) and renewable energy projects (due to growth in this sector) in Africa.

Political instability

There has been a wide range of issues arising in oil-rich countries that have given rise to arbitration proceedings relating to PSAs. While these disputes often involve issues relating to royalties, taxes, cost recovery, the scope and transfer of rights, price adjustment claims and disputed tax payments, such disputes can also arise as a result of civil unrest, political instability and issues relating to force majeure.[97]

For example, the political upheaval that followed the Arab Spring of 2011 and the overthrow of President Mohamed Morsi in Egypt led to an ICC arbitration claim filed by a Kuwaiti-led consortium against Egypt relating to the termination of a long-term concession agreement that was awarded in 2015 covering the development, building and operation of a container facility on Egypt's Mediterranean coast.[98]

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96 Amanda Mapanda, 'Is the Covid-19 pandemic fuelling the energy transition in Africa?', *African Law & Business*, 8 December 2020, https://iclg.com/alb/15182-is-the-covid-19-pandemic-fuelling-the-energy-transition-in-africa (last accessed 9 December 2021).

97 Stephen P Finizio, 'Energy Arbitration in Africa', *Global Arbitration Review*, 10 May 2018, https://globalarbitrationreview.com/review/the-middle-eastern-and-african-arbitration-review/2018/article/energy-arbitration-in-africa#endnote-001 (last accessed 9 December 2021).

98 Cosmo Sanderson, 'Egyptian authority liable over cancelled port project', *Global Arbitration Review*, 20 February 2020, https://globalarbitrationreview.com/egyptian-authority-liable-over-cancelled-port-project (last accessed 9 December 2021).

Diversity in arbitral tribunals and counsel

The issue of diversity in African-related arbitration has gained increasing attention in the past few years. While the past few years have witnessed a growing number of claims originating from Africa, there has not been a corresponding growth in African nationals involved in the arbitral tribunals or as counsel. Data collected by different arbitration institutions confirms the under-representation of Africans on international arbitral tribunals, especially in arbitrations that are connected to Africa.

- In 2020, 6.8 per cent of the overall number of parties who arbitrated their disputes before the ICC were from African countries. However, in the same time period,[99] the least represented arbitrator nationalities were North Africa (1.1 per cent of the total appointments in 2020) followed by sub-Saharan Africa (1.2 per cent of the total appointments in 2020).[100]
- In 2020, 27 per cent of cases registered under the ICSID Convention involved state parties from sub-Saharan Africa,[101] and, overall, (1) oil, gas and mining, and (2) electrical power and other energy contributed to the most number of cases registered at ICSID (41 per cent of ICSID's total caseload belonged to these two sectors).[102] However, the least represented arbitrator nationalities were from sub-Saharan Africa, with only 2 per cent of arbitrators coming from this region.[103] These figures are in stark comparison to the 47 per cent from Western Europe and 20 per cent from North America.
- At the LCIA, parties from sub-Saharan African countries comprised 11.7 per cent of the overall number of parties in 2020.[104] However, the least represented arbitrator nationalities were from sub-Saharan Africa with a total of 10 appointments.[105] As

99 ICC Dispute Resolution 2020 Statistics, p. 10, https://iccwbo.org/publication/icc-dispute-resolution-statistics-2020/ (last accessed 9 December 2021).

100 ICC Dispute Resolution 2020 Statistics, p. 14, https://iccwbo.org/publication/icc-dispute-resolution-statistics-2020/ (last accessed 9 December 2021).

101 ICSID Caseload Statistics, Issue 2021-1, p. 112, https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics (last accessed 9 December 2021).

102 ibid.

103 ICSID Caseload Statistics, Issue 2021-1, p. 17, https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics (last accessed 9 December 2021).

104 2020 LCIA Annual Casework Report, p. 14, https://www.lcia.org/News/lcia-news-annual-casework-report-2020-and-changes-to-the-lcia-c.aspx (last accessed 9 December 2021).

105 ibid. One from Uganda, six from Nigeria and three from Kenya.

a comparative benchmark, parties from United Kingdom comprised 13.4 per cent of the overall number of parties in 2020, and around 66 per cent of the arbitrators that were appointed were from the UK (337 British and 15 Irish).[106]

Various arbitral institutions have implemented diversity initiatives to respond to the lack of diversity reflected in their arbitrator pools. For example, and as noted above, the ICC Court of Arbitration appointed a regional director for Africa to work closely with the ICC Africa Commission to increase its presence in Africa and attempt to expand the pool of qualified African practitioners who may be appointed in the many ongoing and future disputes in the region.[107] This new role acknowledges the institution's 'efforts to expand the pool of qualified African practitioners who may act in the many ongoing and future disputes arising in the region.'[108] Similarly, the LCIA has created a platform for African users, the LCIA African Users' Council, which has been established to meet the developing needs of the business community.[109]

Along with the arbitral institutions, various groups of practitioners, academics and other arbitration stakeholders have suggested solutions to address under-representation of African arbitrators:

- 'The African Promise', launched in 2019, and modelled on the 'Equal Representation in Arbitration Pledge',[110] seeks to increase the number of Africans appointed as arbitrators, especially in arbitrations connected with Africa, in order to achieve a fair representation as soon practically possible.[111]
- I-ARB Africa tracks international arbitration disputes concerning African parties and seeks to contribute to African arbitration by promoting Africa through developing a list of African arbitrators and directory of African practitioners and experts

106 ibid.

107 International Chamber of Commerce Website, Home, News & Speeches, 'Regional Director role to bolster ICC reach in Africa', 11 May 2021, https://iccwbo.org/media-wall/news-speeches/regional-director-role-to-bolster-icc-reach-in-africa/ (last accessed 9 December 2021).

108 ICC Dispute Resolution 2020 Statistics, p. 6, https://iccwbo.org/publication/icc-dispute-resolution-statistics-2020/ (last accessed 9 December 2021).

109 Membership of the LCIA Users' Councils, LCIA, https://www.lcia.org/Membership/Membership.aspx (last accessed 9 December 2021).

110 In recognition of the under-representation of women on international arbitral tribunals, in 2015 members of the arbitration community drew up a pledge to take action (the Pledge), Equal Representation in Arbitration Website, http://www.arbitrationpledge.com/ (last accessed 9 December 2021).

111 Arbitration in Africa Website, 'The African Promise', https://researcharbitrationafrica.com/the-african-promise/ (last accessed 9 December 2021).

and providing analysis of by African experts on ongoing developments through blog posts and pod casts.[112] I-ARB has published a list titled 'Africa's 100', which contains details of African arbitration practitioners whose experience in arbitration (domestic or international), knowledge of international law or other relevant fields make them eligible to be appointed as arbitrators.[113]

Increasing diversity and inclusion is and ought to remain a top priority over the next few years. Increased participation of African arbitrators in disputes originating from the continent will not only ensure legitimacy of arbitration proceedings, but will also bring to the table additional perspectives in deliberation that would further enable a more comprehensive understanding of parties' positions.

Conclusion

The adage, paradox of plenty, could not be truer when it comes to the African energy sector. The potential for Africa to grow its energy sector, and in particular to develop and rely on its renewable energy source is certainly immense. As these projects grow in size and number, an increase in arbitration disputes will likely be discerned, which suggests that parties will be bringing higher-value claims as well as more complex disputes in their arbitrations.

112 I-ARB Website, About Us, https://www.iarbafrica.com/en/about-us (last accessed 9 December 2021).

113 I-ARB Website, Events, Africa's 100 launch by I-ARB Africa, 14 December 2015, https://www.iarbafrica.com/f/%C3%A9v%C3%A9nement/%C3%A9v%C3%A9nements-pass%C3%A9s/7-africa-s-100-launch-by-i-arb-africa (last accessed 9 December 2021).

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Tom has been ranked for dispute resolution in various rankings in the United Arab Emirates, including Who's Who Legal 2022 and the 2021 Chambers ranking and was recognised in the 2020 Legal 500 rankings. In 2021, Lexology's Client Choice recognised Tom for arbitration and ADR in the UAE.

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Al Tamimi & Company is the largest law firm in the Middle East with 17 offices across 10 countries. The firm has unrivalled experience, having operated in the region for over 30 years.

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We are an international practice. We have extensive experience with arbitrations administered by all of the major international arbitration institutions, including the, ICC, LCIA, SIAC and the Permanent Court of Arbitration, as well as more specialised forms of institutional arbitration and ad hoc arbitrations.

We have significant experience with arbitrations administered within the region and are regularly appointed as counsel in arbitrations administered by the Abu Dhabi Commercial Conciliation and Arbitration Centre, the Bahrain Chamber for Dispute Resolution in partnership with the American Arbitration Association, DIFC-LCIA, the Dubai International Arbitration Centre, the GCC Commercial Arbitration Centre, the Qatar International Centre for Conciliation and Arbitration as well as in ad hoc arbitrations seated in the region. We regularly conduct arbitrations under the laws of and those seated in the UAE, Qatar, Saudi Arabia, Kuwait, Bahrain, Egypt and Oman.

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Mining arbitrations in Africa

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IN SUMMARY

By its nature, mining is a risky business that makes the sector inherently predisposed to disputes. It is thus no surprise that the mining sector has extensively resorted to international arbitration to resolve disputes in Africa in recent years, and 2021 was no exception. A number of new mining arbitrations involving African states were commenced over the past year, including three against the Republic of the Congo, as well as cases involving Mali, Mauritania, Sierra Leone and Cameroon. Most of the new known disputes that have arisen involve commodities that currently constitute a significant portion of African mineral exports, namely gold and iron ore (in addition to oil and gas). However, the push towards achieving net-zero emissions by states and global majors alike has increased global demand for other minerals that are required for the transition to a low-carbon economy. Key technologies required for this transition, including solar, wind, electric vehicles and battery storage, are dependent upon the mining of certain minerals, such as cobalt, copper, rare earths, graphite and lithium. As Africa is one of the largest sources of undeveloped reserves of these minerals, the green transition presents an opportunity for economic growth and development for many African states, as well as many opportunities for investors and miners in sub-Saharan Africa. However, increased global demand and investment in developing these minerals will bring inevitable challenges, with existing conflicts and political risk concerns being exacerbated.

DISCUSSION POINTS

- Volatility associated with the continuing coronavirus pandemic and conflict in some African states increases the risk of mining disputes in 2022
- Increased demand for green transition minerals, such as cobalt, copper, rare earths and lithium, presents an opportunity for investors and economic growth across many African states, but may well increase the potential for disputes to arise

This article aims to provide a concise overview of the risks and characteristics of mining disputes in Africa in the context of the current investment climate, and provide an update on mining arbitrations in Africa over the past year. The world is now over two years into the coronavirus pandemic, and many African governments are still struggling to deal with the unprecedented health crisis, with issues such as vaccine inequality and pandemic-induced poverty damaging the economies of many African states. Recent studies indicate that Africa is the 'most-affected region in the world' by the pandemic, and has resulted in 30–40 million more people living at the poverty line in Africa.[1] The flow-on effects of the global economic crisis are just starting to become more visible, with increasing inequality between rich and poor, debt levels rising significantly, as well as growing areas of unrest in some regions. During the past three months there have been increases in armed violence taking place in Burkina Faso, Niger, Mali, Libya, Nigeria, Cameroon, the Democratic Republic of the Congo (DRC), Kenya, Somalia, South Sudan and Sudan.[2] Debt levels, which were already 'astronomical', particularly in West African countries, have risen to formidable levels, it being estimated that in 2020–2021 debt servicing accounted for an average of 61.7 per cent of government revenues in West Africa.[3] In this environment, governments may be keen to develop mining projects in order to boost employment and their economy, and so foreign investment in mining projects may be welcomed now more than ever.

The likelihood of resource-related disputes is heightened owing to certain factors that – without being Africa-specific – are often prevalent in resource-rich African countries. In particular, mining investments and projects in Africa are often sensitive to political risk, which commonly manifests itself in the form of executive interference due to a climate of political instability, lack of consistent governance and limited infrastructure and public services. A corollary of Africa's structural and political challenges is increased exposure to security threats, ranging from trespass by artisanal miners to

1 Giovanni Valensisi, 'Covid-19 and global poverty: are the least developed countries being left behind?' (2020) 32(5) *The European Journal of Development Research* 1535, 1535–1557.

2 Armed Conflict Location & Event Data Project (ACLED), Regional Overview: Africa 15–21 January 2022 (Web Page, 2022) <https://acleddata.com/2022/01/27/regional-overview-africa-15-21-january-2022/>.

3 Development Finance International & Oxfam, 'The West Africa Inequality Crisis: fighting austerity and the pandemic' (Report, October 2021) p. 5 <https://oxfamilibrary.openrepository.com/bitstream/handle/10546/621300/rr-west-africa-cri-austerity-pandemic-141021-summ-en.pdf>.

attacks by military or paramilitary groups. This article outlines several options available to investors to mitigate these risks, including the use of stabilisation provisions in long-term host state agreements.

Trends in investment arbitrations connected with Africa during 2021

Before looking at the trends that may impact future disputes, it is useful to begin with an overview of the new mining arbitrations involving African states commenced in 2021. As in 2020, the past year saw record numbers of international arbitrations commencing at both the World Bank's International Centre for Settlement of Investment Disputes (ICSID) and the International Chamber of Commerce (ICC). ICSID recorded an all-time high of 66 new cases in 2021, while the ICC recorded 846 new cases, down slightly from 946 new cases in 2020. At ICSID, the proportion of new cases involving sub-Saharan Africa remained steady at 15 per cent of ICSID's overall caseload, while the oil, gas and mining sector remained the largest sector accounting for 25 per cent of new cases. The new ICSID cases in the sub-Saharan Africa region (10 in total) involved Burkina Faso, the Republic of the Congo, Mali, Mauritania, Nigeria, Sudan and Tanzania. Of these 10 cases, nine involved the energy sector, with six of these relating to mining disputes.

There are now a total of four new cases on foot against the Republic of the Congo, all of which relate to the state's decision to revoke iron ore rights and grant them to a third party (which is reported to be beneficially held by Chinese parties). These cases are *EEPL Holdings v Republic of the Congo*, which was commenced at ICISD pursuant to the Congo–Mauritius BIT; *Congo Iron S.A and Sundance Resources Limited v Republic of the Congo*, which was commenced at the ICC pursuant to a contract; *Avima Iron v Republic of the Congo*, also commenced at the ICC under contract; and *Midus Holdings Limited and Congo Mining Ltd SARLU v the Republic of the Congo*, which was commenced at ICSID under the UK–Congo BIT.[4] It is notable that the state's measures at dispute in these matters were taken during a period of record high iron ore prices, triggered by high demand for iron ore as China ramped up steel production during 2020. Sundance Resources also commenced proceedings against the Republic of Cameroon in respect of the same iron ore project the subject of the dispute with the Congo (the Mbalam-Nabeba project).

4 Jack Ballantyne, 'Onslaught of claims against Congo continues', *Global Arbitration Review* (Web Page, 16 November 2021) <https://globalarbitrationreview.com/onslaught-of-claims-against-congo-continues>.

Of these six new mining dispute cases, two of them are against the Republic of Mali. The case of *Menankoto SARL v Republic of Mali* arose out of actions taken by Malian authorities in refusing to grant Menankoto a further one-year extension to their exploration permit, which Menankoto maintained that they were entitled to. Notably, this case was discontinued on 28 January 2022. Separately, the contractual dispute between *AGEM Ltd v Republic of Mali* remains on foot and confidential, however reports are speculating that the dispute stems from a tax issue over a small amount of the sale price of the Sadiola mine. Other recent mining concession cases include *Mauritanian Copper Mines S.A. v Islamic Republic of Mauritania*, which remains confidential, however, reports are speculating that the dispute relates to a temporary suspension of operations at the Guelb Moghrein copper and gold mine in 2012 and 2014.

Interestingly, the DRC turned the tables by commencing claims at the ICC against two Israeli BVI oil companies, owned by Israeli billionaire Dan Gertler. The DRC was reportedly seeking confirmation that the state may terminate oil exploration and exploitation agreements entered with Gertler's companies, Foxwhelp and Caprikat in 2010.[5] The DRC also sought damages of US$153.7 million relating to the company's delays in getting the projects operating. It has recently been reported that the DRC may end the proceedings following an agreement by which Gertler will return mining rights to the government without compensation (following the imposition of sanctions on him by the US). Although not directly related to the mining sector, the use of international arbitration by states to resolve disputes with investors, such as by seeking to declare an agreement lawfully terminated, is relatively novel, and may provide an additional tool in a state's toolkit when dealing with underperforming foreign investors.

With debt levels for many African states already at crippling highs, the prospect of an award ordering the payment of damages to an investor may be leading some states towards faster settlement of their disputes. For example, by coincidence, two unrelated cases involving Mali and Sierra Leone were discontinued on the same day (28 January 2022) after settlements were reached with the respective investors. The first of these cases was *Menankoto v Mali* (noted above), which was commenced on 24 June 2021 and later settled in December, merely six months after it was initiated.

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5 Carlos de los Santos et al, 'International Arbitration Newsletter – December 2021 | Regional Overview: Middle East and Africa', *Lexology*, (Web Page, 27 December 2021) <https://www.lexology.com/library/detail.aspx?g=ec44bfc7-4dac-4a7b-817f-1620f781fa59>.

The cases involving Sierra Leone were commenced by SL Mining, a UK commodities trader, at both the ICC and ICSID and related to the state's cancellation of SL Mining's licence and imposition of an export ban relating to the Marampa iron ore mine. It was reported that an agreement was reached between the parties allowing the mining project to continue and for the export restrictions to be lifted.[6]

ESG and climate change

Despite the ongoing economic, health and security crises driven by the pandemic, the lead-up to the COP26 Climate Change conference in Glasgow in November 2021 saw an increased focus on climate change action from many states and global energy leaders. This brought increasing attention to the concept of a 'just transition'. The notion of ensuring a 'just transition' from fossil fuels to renewable energy was incorporated into the 2015 Paris Agreement. It serves to ensure that the interests of workers and communities are at the centre of decarbonisation efforts.[7] The technological revolution required to address climate change presents significant opportunities, particularly for states endowed with the natural resources used in the production of these technologies, including cobalt, copper, rare earths, graphite, bauxite and lithium. Various African states have significant potential in relation to these commodities – the DRC is home to the largest reserves of cobalt, Guinea has the world's largest reserves of high-grade bauxite, and Zimbabwe, Namibia, Ghana, DRC and Mali have some of the largest reserves of lithium. Significant copper reserves are located in the DRC, Zambia, South Africa and Namibia, while rare earth deposits have considerable potential in Madagascar, Malawi, Kenya, Namibia, Mozambique, Tanzania, Zambia and Burundi. However, the race for these minerals must be tempered by the growing consideration of the social and human rights impact of undertaking new mining operations (as well as closing existing fossil fuel operations). In this sense, the concept of a just transition has been described as putting the 'S' in 'ESG'.

6 Jack Ballantyne, 'Sierra Leone settles mining claims', *Global Arbitration Review* (Web Page, 11 May 2021) <https://globalarbitrationreview.com/sierra-leone-settles-mining-claims>.

7 International Energy Agency, 'Net Zero by 2050: A Roadmap for the Global Energy Sector' (Report, May 2021) p. 167 <https://iea.blob.core.windows.net/assets/deebef5d-0c34-4539-9d0c-10b13d840027/NetZeroby2050-ARoadmapfortheGlobalEnergySector_CORR.pdf>.

All companies, not just those operating in Africa, are being required to show that they comply with high standards of environmental and social governance (ESG). This broad and encompassing term has risen fast to the top of boardroom agendas, requiring policies and frameworks to address all aspects of ESG in the companies' operations, including climate change, sustainability and human rights-related risks.

This is particularly the case in the context of mining investments in Africa, in part because of the specific risks and characteristics outlined in this article. Stakeholders increasingly demand effective actions and heightened levels of transparency in relation to ESG issues, and mining investors seeking finance are increasingly required to demonstrate their ESG credentials. The mining industry is arguably the most exposed to ESG risks, with shareholder activism and NGO participation placing the sector under intensive focus. Particular emphasis is being placed on mining operations in Africa due to a poor historical track record by some foreign companies. For many African states, the harmful actions of some foreign investors in the past justify a focus on compliance by investors with local laws and, increasingly, ESG issues including international environmental and human rights standards. A failure to comply with these laws and standards may result in claims flowing from the termination of contracts or exploitation rights by states, as well as counterclaims being made by states against investors. Mining investors need to be ready to demonstrate their efforts in compliance with local laws and regulations, socio-environmental standards and business human rights principles. 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. Similarly, many new generation bilateral investment treaties (BITs) and free trade agreements (FTAs) entered into by states contain express provisions regarding the states' right to regulate in order to protect public welfare objectives such as public health, safety and the environment.

Thus, it is likely that ESG-related issues will be an increasingly prominent feature in mining arbitrations in Africa, driven by increasing references to the protection of environmental, social and public health objectives in both contractual arrangements and investment treaties. Foreign investors are usually obliged to comply with local laws as a condition of their concession, or as a term in a host state agreement (where there is one). Breaches of these obligations may result in claims against the investor, or

counterclaims by the state. In the context of investment treaty arbitration, the plea of illegality, namely that the investor has failed to comply with local laws, is often pleaded by states 'as a question of admissibility or a question on the merits of the case'.[8]

Resource nationalism

Political risk remains another great challenge currently faced by investors in the mining industry. This is particularly the case in some African countries where political instability, the lack of strong governance and political structures, as well as more limited administration and public services may adversely impact the development and operation of mining projects.

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

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

8 Zachary Douglas, 'The Plea of Illegality in Investment Treaty Arbitration' (2014) 29(1) *ICSID Review* 155, p. 155.

A resurgence of resource nationalism may be driven by increases in commodity prices over the past year or so, particularly in respect of gold and iron ore. The increasing demand for green minerals will also drive up the prices for these commodities, prompting states to take measures designed to enhance the state's share. One significant method by which this can be achieved is the enactment of fiscal legislation increasing the amounts payable to the state (in the form of taxes and royalties). Mining laws enacted over the past few years by Mozambique, Zambia and Ghana all contain a series of measures in furtherance of that objective.

In this climate of increasing resource nationalism, the financial pressure felt by host states is naturally also being felt by (or transferred to) investors, as an increasing number of new state measures affect the profitability and operability of mining projects. From an investor perspective, unforeseen restrictive measures imposed by governments may result in a desire to suspend projects, restrict production or find some other way to protect their investments. Further, given mining companies' general reliance on debt financing, investors may increasingly be forced to take whatever measures they can to meet their repayment obligations. In this context, impacted investors are likely to challenge state measures that they view as confiscatory, punitive or unfairly imposed. Challenges may be based on contracts providing for arbitration as the dispute mechanism, or on investor–state dispute settlement provisions in international investment agreements, such as BITs, linking African host states with partner states around the globe. There are now many examples of African states taking such measures over the past years, including the DRC, Sierra Leone, Mali, Madagascar and Ivory Coast. Many of these measures are also aimed at increasing the amount of taxes and royalties accruing to the state from mining projects, and these fiscal measures have also been the source of disputes.

Managing political risk through host state agreements

Stabilisation of the applicable legal and regulatory framework is increasingly seen as essential for large-scale mining projects, given the often lengthy time frames involved from resource definition to exploitation. In this respect, mining companies are drawing on the experience of the international oil and gas industry, where businesses have long sought to manage the risks of adverse legislative change by including stabilisation clauses and choices of international law in their long-term agreements with host governments. In previous editions of this article, we have looked at the implications of Tanzania's mining reforms of 2017 and 2018, whereby the state sought to introduce a unilateral review and renegotiation of any existing contract containing an 'unconscionable' term and purporting to void any existing contract terms that submit the state to foreign court

jurisdiction. The state also passed the Mining (Mineral Rights) Regulations, abolishing various companies' retention licences for projects and transferring their rights to the government. This resulted in a number of arbitration disputes including three claims being commenced against Tanzania in 2020, with cases launched by Montero Mining pursuant to the Canada–Tanzania BIT, Winshear Gold Ltd pursuant to the Canada–Tanzania BIT, and Indiana Resources Ltd pursuant to the UK–Tanzania BIT. All three of these claims relate to the abolishment of the claimant companies' retention licences pursuant to the 2018 laws. While all of these cases remain on foot, there have been some positive developments with Tanzania entering into two framework agreements with Australian investors in December 2021, namely Black Rock Mining and Strandline Resources. On 13 December 2021, Black Rock Mining, a company listed on the ASX, announced that it had entered into a framework agreement with Tanzania to develop the Mahenge graphite mine.[9] It has been agreed that the project will be undertaken by a joint venture company (Faru Graphite Corporation) in which Tanzania will own a 16 per cent undiluted free-carried interest, with the remaining 84 per cent held by Black Rock (through a UK subsidiary). The framework agreement provides for resolution of disputes through arbitration under the UNCITRAL Rules. On 14 December 2021, Strandline Resources, another ASX-listed company, also announced entry into a framework agreement on similar terms, with the government to acquire a 16 per cent non-dilutable free carried interest in a newly formed joint venture company called Nyati Mineral Sands Limited.[10] Strandline Resources will also hold its interest in the joint venture company through a UK subsidiary.

There are several points to note about these recent announcements. First, both of these projects relate to minerals needed for decarbonisation technologies – namely graphite (in the case of Black Rock), and mineral sands containing zircon, titanium and monazite containing rare earths (in the case of Strandline) – signalling that Tanzania is keen to develop its green minerals economy. Second, in both cases Tanzania accepted a joint venture structure with a free-carried interest granting it a direct interest in the projects and the ability to oversee development from within. However, joint ventures

9 Black Rock Mining Limited, ' Black Rock Mining signs Framework Agreement with Government of Tanzania' (ASX announcement, 14 December 2021) <https://blackrockmining.com.au/framework-agreement-signed-with-the-government-of-tanzania/>.

10 Strandline Resources Limited, 'Strandline signs ground-breaking framework agreement with Tanzanian Government' (ASX Announcement, 14 December 2021) <https://www.strandline.com.au/irm/PDF/f4cb9849-57a4-4a89-9120-92aff4d11dc3/FrameworkAgreementSignedwiththeGovernmentofTanzania>.

are breeding grounds for disputes, including in relation to capitalisation obligations and adjustments to participating interests, as well as procedural issues, which is why it is crucial for any investor entering into such an agreement to be able to rely on an effective arbitration clause. The difficulty faced in the Tanzanian context is the impact of the mining law revisions in 2017, which give Tanzania the right to cancel a mining agreement containing a dispute resolution clause applying foreign laws or selecting a foreign seat. This may have been overcome in the context of Black Rock by specifying that the seat will be the East African Court of Justice. The fact that both companies have used UK holding companies to develop the projects further suggests that they may seek to rely on the protections offered by the UK–Tanzania BIT in the event of future disputes, including the ability to refer disputes to ICSID. Thus, while much uncertainty remains following the 2017 mining reforms, the entry into these framework agreements may signal a thawing in the hostility towards mining investors and the use of international arbitration to resolve natural resources disputes in Tanzania.

Security issues, IHL and the impact on mining disputes

The economic harm caused by covid-19, estimated by one to be a loss of between US$37 billion and US$79 billion in output in Africa alone, appears to have increased tensions in many African states as more people are plunged into poverty than ever before.[11] From an arbitration perspective, in countries where there is armed conflict, host states generally have a duty to protect the physical integrity and private property of their residents and investors, although this may be difficult to achieve in remote or dangerous areas. Mining companies may rely on relevant provisions of their mining concessions or conventions to secure the unimpeded enjoyment of their mining rights. Foreign investors may also rely on the application of the FET and full protection and security standards, which are present in most international investment agreements currently in force. 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.[12] 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

11 The World Bank, 'For Sub-Saharan Africa, Coronavirus Crisis Calls for Policies for Greater Resilience' (Web Page, April 2020) <https://www.worldbank.org/en/region/afr/publication/for-sub-saharan-africa-coronavirus-crisis-calls-for-policies-for-greater-resilience>.

12 Christoph Schreuer, 'Full Protection and Security' (2010) *Journal of International Dispute Settlement* 1, p. 1.

property from occupation and to respond adequately to violent incidents. A series of arbitral awards confirm the application of 'full protection and security' to investments in Africa.

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

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

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

Impact of Chinese investments on African mining disputes

For some time now, China has been Africa's largest trading partner, with Chinese foreign direct investment (FDI) to Africa increasing markedly from around US$75 million in 2003 to US$2.7 billion in 2019. According to the Center for Global Development, China's development banks (Exim Bank of China and China Development Bank) have provided US$23 billion in financing for infrastructure projects in sub-Saharan Africa between 2007 and 2020, which is double the amount

lent by banks in the US, Germany, Japan and France combined.[13] Interestingly, for the first time, China's investment in renewables infrastructure (including thermal solar, hydro, wind, biomass, geothermal and energy storage) has exceeded its investment in fossil fuel infrastructure.[14] While the West has lagged significantly behind China with respect to investment in Africa in recent years, the US may be looking to reinvigorate its relationships, with President Biden's election promise that he will 'renew the United States' mutually respectful engagement toward Africa' including by 'restoring and reinvigorating diplomatic relations with African governments and regional institutions, including the African Union'.[15] However, the extent to which the US re-engagement will have any impact on China's standing as the largest investor in Africa remains to be seen.

For low- and middle-income African countries, repayment of the vast loans provided by China are starting to become a significant problem. In such circumstances, governments may be forced to turn to alternative ways to repay their debts, such as through granting rights and concessions over valuable resource assets. The inability to repay debt will likely reinforce China's economic influence and control over vast reserves of key mineral resources on the African continent. This will likely include securing access to minerals necessary for the transition to renewable energy, including cobalt, copper, rare earths, graphite, bauxite and lithium. The desire to shore up supply of these critical minerals will undoubtedly lead to significant investment competition in states endowed with such resources, which in turn will likely drive disputes both among private investors and between investors and the host state.

One notable characteristic of Sino-African mining contracts over the past decade is the inclusion of commitments to develop or contribute to infrastructure development, as some agreements between African states and China or Chinese state-owned companies contemplate the provision of infrastructure as a means of payment for the resource. These arrangements increase the potential for disputes between foreign investors and host states that can arise not only from the development and operation of mining projects but also from the construction and operation of large-scale

13 Andrea Shalal, 'Chinese funding of sub-Sarahm Africa infrastructure dwarfs that of West, says think tank' (Web page, 9 February 2022) <https://www.reuters.com/markets/us/chinese-funding-sub-saharan-african-infrastructure-dwarfs-that-west-says-think-2022-02-09/>.

14 Ren21, 'Renewables 2021 Global Status Report' (Report, 15 June 2021) p. 17 <https://www.ren21.net/wp-content/uploads/2019/05/GSR2021_Full_Report.pdf>.

15 Biden Harris Democrats 'The Biden-Harris Agenda for the African Diaspora' (Web Page) <https://joebiden.com/african-diaspora/>.

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.

Diversity in African arbitrations

Finally, there has been increased focus by some arbitral institutions on achieving greater geographical diversity in arbitrations in recent times. According to ICSID's statistics report for 2021, arbitrators from sub-Saharan Africa represented only 4 per cent of new appointments, although that is a slight increase from the historical average of 2 per cent.[16] The vast majority of arbitrators continue to hail from Western Europe (43 per cent) or North America (20 per cent). The ICC has sought to ensure geographic diversity through its appointments to the ICC Court, with 13 per cent of its members originating from Africa, 26 per cent from Asia, 39 per cent from Europe, 4 per cent from North America, 15 per cent from Latin America and 3 per cent from Oceania for the 2018–2021 term. However, the same diversity has not yet been achieved when it comes to tribunal appointments, where appointments from a limited pool of arbitrators continues to be the norm in large-scale international disputes. It is likely the shift will need to be driven from the bottom-up, with practitioners and in-house counsel taking the lead to identify and nominate diverse candidates in international arbitrations with connections to Africa. This was recognised in the 'African Promise', launched by academics and practitioners in 2019, which seeks to improve the 'profile and representation of African arbitrators, especially in arbitrations connected to Africa'.[17] The African Promise has now been signed by over 300 signatories, pledging to ensure that African arbitrators are adequately represented on arbitrator rosters and lists of candidates for consideration by clients.[18] Another initiative being driven by practitioners and arbitrators is the African Arbitration Academy, which aims to provide training to arbitration practitioners from Africa in order to 'equip them with the right set of skills to succeed within the international arbitration

16 ICSID, 'The ICSID Caseload – Statistics: Issue 2021-2' (Report, 2022) <https://icsid.worldbank.org/sites/default/files/Caseload%20Statistics%20Charts/The%20ICSID%20Caseload%20Statistics%202021-2%20Edition%20ENG.pdf>.

17 Arbitration in Africa, 'The African Promise' (Report, 2019) <https://researcharbitrationafrica.com/files/promise/An%20African%20Promise%202019.pdf>.

18 ibid.

community'.[19] It delivered its first Flagship Training Programme in 2019, and has developed the Protocol on Virtual Hearings in Africa in response to the pandemic, for which it won several awards.

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19 African Arbitration Academy, Mission Statement, available at: https://www.africaarbitrationacademy.org/.

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Remote hearings and the use of technology in arbitration

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IN SUMMARY

This article analyses the inclination of the arbitration users and community towards the use of videoconferencing and the rise of use of technology in remote hearings. It provides practical tips and recommendations relating to organising remote hearings, and concludes with some of the advantages of holding remote hearings, how the arbitration community and users are accepting it, and how technology paves the way for arbitration in the future.

DISCUSSION POINTS

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

REFERENCED IN THIS ARTICLE

- AAA-ICDR Virtual Hearing Guide for Arbitrators and Parties
- Africa Arbitration Academy Protocol on Virtual Hearings in Africa
- CIArb Guidance Note on Remote Dispute Resolution Proceedings
- Delos Checklist on Holding Arbitration and Mediation Hearings in Times of COVID-19
- International Council for Online Dispute Resolution (ICODR) Guidelines for Video Arbitration
- ICC Guidance Note on mitigating the impacts of COVID-19

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The issue of consent of the parties for holding remote hearings and associated problems

Introduction[2]

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

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

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

Hearings (remote or virtual)

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

2 This article adds some updated information to an article published by the author titled 'The Challenges Raised by COVID-19, Its Impact on the Arbitral Process and the Rise of Video Conferencing', Mohamed Hafez, *International Business Law Journal* (IBLJ), Issue No. 1, 2021, ([2021] Thomson Reuters and Contributors). pages 85–99.

3 Patricia Louise Shaughnessy, 'Chapter 2: Initiating and Administering Arbitration Remotely', in Maxi Scherer, Niuscha Bassiri et al (eds), *International Arbitration and the COVID-19 Revolution*, (Kluwer Law International 2020), p. 27.

4 Jiyoon Hong and Jong Ho Hwang, 'Safeguarding the Future of Arbitration: Seoul Protocol Tackles the Risks of Videoconferencing', 6 April 2020 at: http://arbitrationblog.kluwerarbitration.com/2020/04/06/safeguarding-the-future-of-arbitration-seoul-protocol-tackles-the-risks-of-videoconferencing/.

5 Patricia Louise Shaughnessy, 'Chapter 2: Initiating and Administering Arbitration Remotely', in Maxi Scherer, Niuscha Bassiri et al (eds), *International Arbitration and the COVID-19 Revolution*, (Kluwer Law International 2020), p. 28.

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

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

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

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

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6 Maxi Scherer, 'Chapter 4: The Legal Framework of Remote Hearings', in Maxi Scherer, Niuscha Bassiri et al (eds), *International Arbitration and the COVID-19 Revolution* (Kluwer Law International 2020), p. 68. See another definition of virtual as 'not physically existing as such but made by software to appear to do so'. https://www.lexico.com/en/definition/virtual.

7 ibid.

8 ibid, p. 68.

9 ibid, p. 72.

10 ibid, p. 72.

11 Jiyoon Hong and Jong Ho Hwang, 'Safeguarding the Future of Arbitration: Seoul Protocol Tackles the Risks of Videoconferencing', 6 April 2020 at: http://arbitrationblog.kluwerarbitration.

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

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

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

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com/2020/04/06/safeguarding-the-future-of-arbitration-seoul-protocol-tackles-the-risks-of-videoconferencing/.

12 Jiyoon Hong and Jong Ho Hwang, 'Safeguarding the Future of Arbitration: Seoul Protocol Tackles the Risks of Videoconferencing', 6 April 2020 at: http://arbitrationblog.kluwerarbitration.com/2020/04/06/safeguarding-the-future-of-arbitration-seoul-protocol-tackles-the-risks-of-videoconferencing/.

13 Maxi Scherer, 'Remote Hearings in International Arbitration – and What Voltaire Has to Do with It?', 26 May 2020, at: http://arbitrationblog.kluwerarbitration.com/2020/05/26/remote-hearings-in-international-arbitration-and-what-voltaire-has-to-do-with-it/?doing_wp_cron=1591028792.4605259895324707031250.

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

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

With regard to the tolerance of courts towards videoconferencing, remote and virtual hearings, a landmark judgment was issued on 27 October 2020, where the Egyptian Court of Cassation upheld a decision of the Cairo Court of Appeal refusing to set aside an award issued by the Cairo Regional Centre for International Commercial Arbitration (CRCICA).[19] Among the different matters that the Court of Cassation had dealt with, it hinted at the compatibility of virtual hearings with Egyptian law and the increased reliance on virtual hearings. In this unprecedented judgment, the Court of Cassation made an express reference to the term 'virtual hearings' (in the English language) and this was regarded as an implicit message that virtual hearings are consistent with Egyptian law, which in itself does not include any

14 https://www.nai-nl.org/downloads/Book%204%20Dutch%20CCPv2.pdf.

15 https://www.viac.eu/en/arbitration/content/austrian-arbitration-act-2013#SeatoftheArbTribunal.

16 https://www.elegislation.gov.hk/hk/cap609?xpid=ID_1438403521242_003.

17 Jiyoon Hong and Jong Ho Hwang, 'Safeguarding the Future of Arbitration: Seoul Protocol Tackles the Risks of Videoconferencing', 6 April 2020 at: http://arbitrationblog.kluwerarbitration.com/2020/04/06/safeguarding-the-future-of-arbitration-seoul-protocol-tackles-the-risks-of-videoconferencing/.

18 Maxi Scherer, 'Remote Hearings in International Arbitration – and What Voltaire Has to Do with It?', 26 May 2020, at: http://arbitrationblog.kluwerarbitration.com/2020/05/26/remote-hearings-in-international-arbitration-and-what-voltaire-has-to-do-with-it/?doing_wp_cron=1591028792.4605259895324707031250.

19 Court of Cassation, Economic and Commercial Circuit, judgment dated 20 October 2020, Case No. 18309 for the Judicial Year 89.

direct prohibition of virtual hearings.[20] This is an innovative statement, whereby the Court of Cassation hints that if parties wish to try to set aside arbitral awards on the ground that a hearing is held virtually, this may simply not qualify as a ground.[21]

A number of national courts have themselves conducted remote hearings:

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

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

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

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20 'Egypt's Highest Court Spearheads Arbitration-Friendly Stance by Recognizing Progressive Arbitration Principles and Practices', Herbert Smith Freehills, 2 February 2021, Craig Tevendale, Amal Bouchenaki and Cedric Saliba, at: https://hsfnotes.com/arbitration/2021/02/02/egypts-highest-court-spearheads-arbitration-friendly-stance-by-recognising-progressive-arbitration-principles-and-practices/.

21 Mohamed S Abdel Wahab, 'The Egyptian Court of Cassation Sets Standards and Affirms Arbitration-Friendly Principles and Trends in a Ground-Breaking Judgment', Kluwer Arbitration Blog, 22 December 2020, at http://arbitrationblog.kluwerarbitration.com/2020/12/22/the-egyptian-court-of-cassation-sets-standards-and-affirms-arbitration-friendly-principles-and-trends-in-a-ground-breaking-judgment/.

22 See *Capic v Ford Motor Co. of Australia,* [2020] FCA 486, paragraphs 12–13 (Australian Fed. Ct.)

23 See *Re One Blackfriars v Nygate* [2020] EWHC 845, paragraph 53 (Ch) (English High Ct.) ('the challenges and indeed the upsides of proceeding with a remote trial will apply to both sides equally'). Also see *Municipio de Mariana v BHP Group* [2020] EWHC 928, paragraph 24 (TCC) (English High Ct.) (five principles to determine whether case should be adjourned or proceed remotely).

24 Chapter 15: Procedures in International Arbitration', in Gary B Born, *International Commercial Arbitration* (Third Edition), Kluwer Law International 2020, p. 2,342.

25 Chapter 25: Annulment of International Arbitral Awards', in Gary B Born, *International Commercial Arbitration* (Third Edition), Kluwer Law International 2020, p. 3,451.

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

Videoconferencing incorporated in arbitral institutions' rules and their updates

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

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

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

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

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

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

Arbitral institutions have amended their rules so that videoconferencing can be accommodated. For example, article 24(2) of the Korean Commercial Arbitration Board, International Arbitration Rules of 2016 expressly permits hearings and meetings to

26 ibid, p. 3,451.

27 Though the LCIA was quite innovative in its Arbitration Rules of 2014 as it included a similar article 19.2 , which stipulates 'The Arbitral Tribunal shall organise the conduct of any hearing in advance, in consultation with the parties. . . . As to form, a hearing may take place by video or telephone conference or in person (or a combination of all three).'

be heard at any physical location that the tribunal deems appropriate.[28] Other institutions also expressly allow the tribunal to hold hearings remotely.[29] Other institutions have not issued specific provisions, and remote hearings will be assessed by analogy with other provisions, such as the parties' right to a hearing[30] and the tribunal's broad power to determine procedural matters.[31, 32]

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

Guidance and protocols on virtual hearings and videoconferencing

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

Delos Dispute Resolution has compiled relevant resources on remote and virtual arbitration and mediation hearings under the headings Guidance & Checklists; Protocols; Model Procedural Orders; Webinar Recordings; and Other Resources.[34] The following are some of the guidance and protocols relating to videoconferencing and virtual hearings from different institutions:

- the Africa Arbitration Academy Protocol on Virtual Hearings in Africa;[35]

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28 http://www.kcabinternational.or.kr/common/index.do?jpath=/contents/sub020101&CURRENT_MENU_CODE=MENU0008&TOP_MENU_CODE=MENU0007.

29 See article 13(1) of the HKIAC Arbitration Rules, article 20(2) of the ICDR International Arbitration Rules, article 28(2) of the SCC Arbitration Rules, article 21(2) of the SIAC Arbitration Rules and article 28(4) of the UNCITRAL Arbitration Rules 2010.

30 For example, article 32(1) of the SCC Arbitration Rules, article 24.1 of the SIAC Arbitration Rules and article 17(3) of the UNCITRAL Arbitration Rules.

31 See articles 13(1) and 22(5) of the HKIAC Rules, article 20(1) of the ICDR Rules, article 23(1) of the SCC Arbitration Rules, articles 19(1) and 25.3 of the SIAC Rules and articles 17(1) and 28(2) of the UNCITRAL Arbitration Rules.

32 See Maxi Scherer, 'Remote Hearings in International Arbitration – and What Voltaire Has to Do with It?', 26 May 2020, at: http://arbitrationblog.kluwerarbitration.com/2020/05/26/remote-hearings-in-international-arbitration-and-what-voltaire-has-to-do-with-it/?doing_wp_cron=1591028792.4605259895324707031250.

33 Niuscha Bassiri, 'Conducting Remote Hearings: Issues of Planning, Preparation and Sample Procedural Orders' in Maxi Scherer, Niuscha Bassiri and Mohamed S Abdel Wahab (eds) *International Arbitration and the COVID-19 Revolution* (Kluwer, 2020).

34 https://protect-eu.mimecast.com/s/PC1iCW4DCjkQgRt68QJL?domain=delosdr.org/.

35 https://www.africaarbitrationacademy.org/protocol-virtual-hearings/.

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

CRCICA's experiences with remote hearings and video conferencing

Introduction

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

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

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36 https://go.adr.org/rs/294-SFS-516/images/AAA268_AAA%20Virtual%20Hearing%20Guide%20for%20Arbitrators%20and%20Parties.pdf.

37 https://www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf.

38 https://delosdr.org/checklist-on-holding-hearings-in-times-of-covid-19/.

39 https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf.

40 https://www.hkiac.org/content/virtual-hearings.

41 https://icodr.org/guides/videoarb.pdf.

42 https://protect-au.mimecast.com/s/2oE7CQnMBZfXnxGniQY3OY?domain=kcabinternational.or.kr.

43 See, for instance: https://crcica.org/NewsDetails.aspx?ID=119.

44 See the CRCICA's caseload report for the second quarter of 2020 (Virtual Hearings at the CRCICA) at https://crcica.org/news/2020/06/30/crcica-recent-caseload-2nd-quarter-2020-hearing-at-the-crcica/. Also see the CRCICA's caseload report for the third quarter of 2020 (Virtual Hearings at

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

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

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

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

From 1 January to 31 December 2021, 131 hearings took place using CRCICA's hearing facilities:

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

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

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

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the CRCICA) at https://crcica.org/news/2020/09/30/crcica-recent-caseload-3rd-quarter-2020-virtual-hearings-at-the-crcica/.

45 It is worth mentioning that the number of arbitration cases filed before CRCICA was 1,465 cases as at 31 January 2021. In the first three quarters of 2020, 48 new cases were filed, compared with 51 cases filed during the same period in 2019. Most notably, the year 2020 witnessed a higher number of multi-party proceedings, representing 30 per cent of cases, compared to 12 per cent of cases during the same period in 2019.

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

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

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

Practical tips and recommendations relating to organising remote and virtual hearings

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

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

- Conducting testing sessions: videoconferencing can work well provided the systems are compatible and have been subjected to a testing session in advance of the hearing. For example, checking for technical compatibility with the various software and hardware systems used, IT support and coaching all participants on how to connect during the hearings, to activate and deactivate video and sound, checking functionality of technology and whether adjustments are needed for volume, light, position towards the camera, background noise and the like, among other technical issues.[46] In addition, it is preferable to hold another testing session shortly before the remote hearing is due to begin (eg, one day before).[47]
- Check whether any guidelines or protocols are to be adopted and the procedure for the selection of an online platform.[48]
- Data security and privacy issues:
  - Data security (or cybersecurity): arbitral institutions and service providers both place a strong emphasis on preserving the integrity and security of proceedings.
  - Data privacy (or confidentiality), namely the question whether the remote hearing provider or any other involved third party that stores, transmits or otherwise has access to data during the remote hearing might misuse it outside

46 Alvaro Galindo, 'Arbitration Unplugged Series – Virtual hearing: Present or Future?', 23 May 2020, at: http://arbitrationblog.kluwerarbitration.com/2020/05/23/arbitration-unplugged-series-virtual-hearing-present-or-future/?doing_wp_cron=1591031848.3963639736175537109375.

47 Maxi Scherer, 'Chapter 4: The Legal Framework of Remote Hearings', in Maxi Scherer, Niuscha Bassiri et al (eds), *International Arbitration and the COVID- 19 Revolution*, Kluwer Law International 2020, p. 94.

48 Chahat Chawla, 'International Arbitration During COVID-19: A Case Counsel's Perspective', Kluwer Arbitration Blog, 4 June 2020, at: http://arbitrationblog.kluwerarbitration.com/2020/06/04/international-arbitration-du ring-covid-19-a-case-counsels-perspective/.
Eric Ng, 'Evolution or Revolution? Virtual Hearings and Adaptation in the Face of Global Disruption', in Romesh Weeramantry and John Choong (eds), *Asian Dispute Review*, Hong Kong International Arbitration Centre (HKIAC) 2020, Volume 22 Issue 4, p. 176.

the arbitral proceedings.[49] By way of example, the Seoul Protocol on Video Conferencing in International Arbitration aims to protect the confidentiality of the hearing and its parties through its articles 2.1(c) and 2.2, 3.1 and 8.[50]

- Sitting hours: in a cross-border dispute with various time zones, participants in an arbitration case could be from different jurisdictions and hence it could be quite troublesome to attend the videoconference due to the different time zones. This may adversely impact a party's ability to present its case (although arguably the issues are really not so different from those imposed by jet lag and the fatigue associated with long-distance travel, of which international arbitration practitioners are well aware).[51] Emphasis should be attached to the relevance of giving equality of treatment to counsel from both parties, with any personal inconvenience distributed equally among the parties.[52] Hence, it is preferable to have shorter hearings given the time constraints in different time zones between different jurisdictions and there should be more breaks for the participants in the remote hearing.[53]
- Have a moderator in charge of the remote hearing and someone else to control the camera.[54] Given that not all videoconferencing systems allow hearing participants to see one another at all times, some arbitrators moderate hearings in a manner more similar to telephone conference calls than in-person hearings. To prevent

49 Maxi Scherer, 'Chapter 4: The Legal Framework of Remote Hearings', in Maxi Scherer, Niuscha Bassiri et al (eds), *International Arbitration and the COVID- 19 Revolution*, Kluwer Law International 2020, p. 93.

50 Jiyoon Hong and Jong Ho Hwang, 'Safeguarding the Future of Arbitration: Seoul Protocol Tackles the Risks of Videoconferencing', 6 April 2020 at: http://arbitrationblog.kluwerarbitration.com/2020/04/06/safeguarding-the-future-of-arbitration-seoul-protocol-tackles-the-risks-of-videoconferencing/.

51 Matthew Saunders, 'Chapter 7: COVID-19 and the Embracing of Technology: A 'New Normal' for International Arbitration', in Axel Calissendorff and Patrik Schöldström (eds), *Stockholm Arbitration Yearbook 2020*, Stockholm Arbitration Yearbook Series, Volume 2, Kluwer Law International 2020, p. 106.

52 Alvaro Galindo, 'Arbitration Unplugged Series – Virtual hearing: Present or Future?', 23 May 2020, at: http://arbitrationblog.kluwerarbitration.com/2020/05/23/arbitration-unplugged-series-virtual-hearing-present-or-future/?doing_wp_cron=1591031848.3963639736175537109375.

53 ibid.

54 Neil Kaplan, 'Kaplan: How we must adapt to covid-19', 30 March 2020, at: https://globalarbitrationreview.com/article/1222179/kaplan-how-we-must-adapt-to-covid-19.

participants at a hearing from talking over one another, it may prove useful for the presiding arbitrator to address counsel before they can speak and for all other participants to mute their microphones.[55]

- A number of courts and bar associations have published guidelines on advocacy in remote hearings, suggesting that participants slow down their speaking pace in anticipation of potential delays in transmission, including more pauses to allow questions from the tribunal and maintaining professional appearance and decorum.[56, 57] Having a real-time transcription service is also recommended in case anything is missed or unclear during the remote or virtual hearing.
- Have a secretary to the tribunal or the arbitral institution's case manager assist the tribunal with any technology-related matters. Further, if any participant gets logged out of the hearing, it would be the secretary to the tribunal's or the arbitral institution case manager's function to notice this and request the tribunal to pause the hearing pending the reconnection of the logged-out participant.
- The arbitral tribunal should have access to private deliberations during the hearing.
- There must be a back-up connection in case any fault occurs during the videoconference so the hearing can continue with minimal disruption. This can be done through a different platform. The Seoul Protocol on Video Conferencing in International Arbitration nonetheless provides for this concern through its article 6, which sets out guidelines on 'Test Conferencing and Audio Conferencing Backup'. These guidelines can help smooth the disruption from an unpredicted communication failure and so allow for a quick recovery during a hearing.[58]

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55 Chapter 15: 'Procedures in International Arbitration', in Gary B Born, *International Commercial Arbitration* (Third Edition), Kluwer Law International 2020, p. 2,343.

56 See, for example, the English Administrative Law Bar Association, Guidance to Advocates on Remote Hearings (2020); English Court of Protection Bar Association, Guidance on Effective Remote Hearings (2020); Inns of Court College of Advocacy, Principles for Remote Advocacy (2020); UK HM Courts & Tribunal Services, Video-Hearings: Guidance for Legal Professionals (2020).

57 Chapter 15: 'Procedures in International Arbitration', in Gary B Born, *International Commercial Arbitration* (Third Edition), Kluwer Law International 2020, p. 2.343.
Alvaro Galindo, 'Arbitration Unplugged Series – Virtual hearing: Present or Future?', 23 May 2020, at: http://arbitrationblog.kluwerarbitration.com/2020/05/23/arbitration-unplugged-series-virtual-hearing-present-or-future/?doing_wp_cron=1591031848.3963639736175537109375.

58 Jiyoon Hong and Jong Ho Hwang, 'Safeguarding the Future of Arbitration: Seoul Protocol Tackles the Risks of Videoconferencing', 6 April 2020 at: http://arbitrationblog.kluwerarbitration.com/2020/04/06/safeguarding-the-future-of-arbitration-seoul-protocol-tackles-the-risks-of-videoconferencing/.

- With regard to examining witnesses: the absence of a physical hearing means the tribunal has limited control over who is in the room with the witness. The Seoul Protocol on Video Conferencing in International Arbitration deals with this risk in its article 1.2 by requiring the videoconferencing system to show a reasonable part of the interior of the room in which the witness is located. It also requires, in its article 3.1, the tribunal to verify the identity of each individual present. Alternatively, parties could be requested to use a camera (or cameras) that display the entire room (360 degrees) or the witness could simply be asked to rotate the laptop camera to show the whole room. Tribunals will need to be prepared to be cautious in addressing concerns that witnesses may be utilising a 'phone a friend' approach to dealing with questions on cross-examination.[59]
- Finally, as translating in real time is difficult in virtual hearings, it is recommended to allow for a separate interface to connect to the interpreter's audio feed only.[60]

Consent of the parties for holding remote hearings and associated problems

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

For ongoing arbitral cases, it would be wise to obtain a joint agreement from the parties that no party would seek to vacate the resultant arbitral award following its approval on holding the remote hearing. However, for newly registered cases, the ideal scenario is to have this matter agreed upon as early as possible between the parties and the tribunal in the arbitration (ie, procedural order No. 1). In that case, there are model

59 Matthew Saunders, 'Chapter 7: COVID-19 and the Embracing of Technology: A "New Normal" for International Arbitration', in Axel Calissendorff and Patrik Schöldström (eds), *Stockholm Arbitration Yearbook 2020*, Stockholm Arbitration Yearbook Series, Volume 2, Kluwer Law International 2020, p. 106.

60 ibid, p. 106.

61 Chapter 15: 'Procedures in International Arbitration', in Gary B Born, *International Commercial Arbitration* (Third Edition), Kluwer Law International 2020, p. 2,342.

procedural orders intended to be used by arbitrators, parties and counsel as a checklist of issues and guidelines to address matters that are unique to remote video arbitration proceedings.[62]

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

In relation to the tribunal's power to order remote hearings, parties generally object either on the basis that they are entitled to an oral hearing that necessitates a physical hearing, or on the basis that a remote hearing would violate the principle of fair and equal treatment. Some parties may also refer to provisions of applicable institutional rules, noting either that those rules do not specifically mention the power of the tribunal to order a remote hearing, or interpreting provisions requiring an in-person hearing as requiring an in-person 'physical' hearing.[63]

If the arbitration agreement is silent regarding holding remote hearings and if the applicable national law or institutional arbitration rules do not contain any particular provision on remote hearings, the solution then is to refer to the tribunal's broad power to organise procedural matters. National arbitral laws, as well as institutional rules typically provide that, absent any agreement by the parties, the arbitral tribunal may

62 For example, see Annex II 'Suggested Clauses for Cyber-Protocols and Procedural Orders Dealing with the Organisation of Virtual Hearings' in the ICC's Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic at: https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf. Also see the International Institute for Conflict Prevention and Resolution (CPR)'s Annotated Model Procedural Order for Remote Video Arbitration Proceedings at: Annotated Model Procedural Order for Remote Video Arbitration Proceedings
Also see AAA-ICDR Model Order and Procedures for a Virtual Hearing via Videoconference at: https://go.adr.org/rs/294-SFS-516/images/AAA270_AAA-ICDR%20Model%20Order%20and%20Procedures%20for%20a%20Virtual%20Hearing%20via%20Videoconference.pdf. Also see Annex III to the Africa Arbitration Academy Protocol on Virtual Hearings in Africa provides a Model Arbitration Clause (including Virtual Hearing Option) at: https://www.africaarbitrationacademy.org/protocol-virtual-hearings/.

63 Eric Ng, 'Evolution or Revolution? Virtual Hearings and Adaptation in the Face of Global Disruption', in Romesh Weeramantry and John Choong (eds), *Asian Dispute Review*, Hong Kong International Arbitration Centre (HKIAC) 2020, Volume 22 Issue 4, p. 175.

'conduct the arbitration in such manner as it considers appropriate'[64] and 'decide all procedural and evidential matters'[65] or 'determine the procedure to the extent necessary, either directly or by reference to a statute or to rules of arbitration'.[66, 67]

Renowned Egyptian arbitrator Mohamed Salah Abdel Wahab shared a succinct six-point pathway to deal with this matter with *Global Arbitration Review*:[68]

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

64 For example, see article 19(2) of the UNCITRAL Model Law.

65 For example, see article 34(1) of the English Arbitration Act, section 34(1).

66 For example, see article 182(2) of the Swiss Private International Law Act.

67 Maxi Scherer, 'Chapter 4: The Legal Framework of Remote Hearings', in Maxi Scherer, Niuscha Bassiri et al. (eds), *International Arbitration and the COVID-19 Revolution*, Kluwer Law International 2020, p. 76.

68 Alisson Ross, 'What if parties don't agree on a virtual hearing? A pandemic pathway', 6 May 2020, https://globalarbitrationreview.com/what-if-parties-dont-agree-virtual-hearing-pandemic-pathway. 'It puts the focus on the applicable law and governing procedural rules, then it considers four different separate scenarios: where the law or rules expressly refer to the need for an in-person, physical hearing; where they expressly refer to the possibility of virtual hearings or use of technology; where they are silent on the issue and no inferences can be drawn; and where the law and rules are inconsistent.'

69 See, for example, articles 13.1 and 22.5 of the HKIAC Rules, articles 19 and 22(2) of the ICC International Arbitration Rules, article 20.1 of the AAA-ICDR Rules, article 14.5 of the LCIA Rules, article 23(1) of the SCC Rules, articles 19.1 & 25.3 of the SIAC Rules and articles 17(1) and 28(2) of the UNCITRAL Arbitration Rules.

70 Maxi Scherer, 'Chapter 4: The Legal Framework of Remote Hearings', in Maxi Scherer, Niuscha Bassiri et al (eds), *International Arbitration and the COVID- 19 Revolution*, Kluwer Law International 2020, p. 76.

> *if the settings enable the parties to fully present their case in an adversarial way. Here, the particular circumstances of each party will shape the content of the right at stake, and help the tribunal decide.*[71]

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

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

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

Conclusion

Among the many advantages that remote or virtual hearings provide is that they can lead to saving time and eliminate the necessity of travelling to other countries; not to mention easing related logistics and avoiding a great deal of administrative hassle, which often weighs down on the process, such as visas, temporary work permits,

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71 María Solana Beserman Balco, 'COVID-19 and new ways of doing arbitration: are they here to stay?' in João Bosco Lee and Flavia Mange (eds), *Revista Brasileira de Arbitragem*, (© Comitê Brasileiro de Arbitragem CBAr & IOB; Kluwer Law International 2020, Volume XVII Issue 67), p. 133.

72 Chapter 25: Annulment of International Arbitral Awards', in Gary B Born, *International Commercial Arbitration* (Third Edition), 3rd edition (© Kluwer Law International; Kluwer Law International 2020), p. 3451.

73 Chapter 15: Procedures in International Arbitration', in Gary B Born, *International Commercial Arbitration* (Third Edition), 3rd edition (© Kluwer Law International; Kluwer Law International 2020), p. 2342.

74 Chapter 15: Procedures in International Arbitration', in Gary B. Born, *International Commercial Arbitration* (Third Edition), 3rd edition (© Kluwer Law International; Kluwer Law International 2020), p. 2342.

arrangements for venue and accommodation, and the provision of food and beverages, to name but a few.[75] In support of this view, Lucy Greenwood has initiated the 'Green Pledge', 'a campaign for greener arbitration' with guiding principles aimed at minimising the environmental footprint of arbitration. In addition, there is a great need for greater diversity and more inclusiveness in arbitration.[76] Arbitrator appointments should reflect the entire international community of users, which is not the case today. Parties and institutions need to ensure that there is diversity in all respects: gender, age, racial, geographical, religious, and professional backgrounds. Remote arbitration procedures and remote hearings will enable arbitrators located anywhere on the globe to arbitrate in a case without regard to travel times and costs.[77]

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

It would be incorrect to say that remote or virtual hearing services represent a revolution in the arbitral process; rather, they could be regarded as an evolutionary change.[79] Such evolutionary innovation is what follows after the original offering is refined to a point where it becomes an effective and in-demand solution.[80] The dynamic nature of international arbitration and its community have provided a perfect environment to foster this accelerated evolution. When one considers the non-technical innovations

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75 Nassif BouMalhab and Nour Al Jaghoub, COVID-19 Middle East Arbitration: Weathering the COVID-19 Storm, 12 April 2020, at: https://www.clydeco.com/en/insights/2020/04/covid-19-arbitration-weathering-the-covid-19-storm.

76 Greenwood Arbitration, The Campaign for Greener Arbitrations, Guiding Principles, https://www.greenwoodarbitration.com/greenpledge N.B. The Greener Arbitration campaign won the Global Arbitration Review 2020 prize for the Best Development GAR Award.

77 Patricia Louise Shaughnessy, 'Chapter 2: Initiating and Administering Arbitration Remotely', in Maxi Scherer, Niuscha Bassiri et al (eds), *International Arbitration and the COVID-19 Revolution*, Kluwer Law International 2020), p. 47.

78 ibid, p. 46.

79 Eric Ng, 'Evolution or Revolution? Virtual Hearings and Adaptation in the Face of Global Disruption', in Romesh Weeramantry and John Choong (eds), *Asian Dispute Review*, Hong Kong International Arbitration Centre (HKIAC) 2020, Volume 22, Issue 4, p. 176.

80 Clayton M Christensen, *The Innovator's Solution: Creating and Sustaining Successful Growt*h (2003, Harvard Business Press), p. 49.

that have led to increased efficiencies in arbitration (such as, for example, the use of Redfern schedules or the use of witness conferencing), it becomes evident that evolution, normalisation and refinement of these innovations have been undisputed. Remote or virtual hearings should be considered as yet another of these procedural innovations.[81]

81 Eric Ng, 'Evolution or Revolution? Virtual Hearings and Adaptation in the Face of Global Disruption', in Romesh Weeramantry and John Choong (eds), *Asian Dispute Review*, Hong Kong International Arbitration Centre (HKIAC) 2020, Volume 22, Issue 4, p. 177.

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

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

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Whose losses are they anyway? And why this matters in damages assessment

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IN SUMMARY

The approach to quantifying losses may differ significantly depending on who the claimant is. In this article, we consider how the quantification of a claimant's claim may be influenced by the identity and characteristics of the claimant in two contrasting, non-specific scenarios.

DISCUSSION POINTS

- Assessment of damages
- Enterprise value versus equity value
- Company-level losses versus shareholder-level losses
- Characteristics of shareholders

Introduction

In November 1925, Mahatma Ghandi wrote, 'No two men are absolutely alike, not even twins, and yet there is much that is indispensably common to all mankind'.[1] In his essay, the justly revered lawyer and political ethicist was dealing with considerably weightier matters than the topic of this article. Nevertheless, we posit that his words are instructive even for our purposes. International arbitration disputes are, by their nature, characterised by individual facts and circumstances that are often complex and nuanced. Yet, commonalities can be observed across different situations.

In this article, we consider how the quantification of a claimant's claim in two contrasting, non-specific scenarios may be influenced by the identity and characteristics of the claimant. The scenarios we consider are:

- a claim for lost profits by Company A following an alleged breach by Company B to supply complex machinery to a particular specification or within a specified time frame; and
- a claim by Shareholder X, a shareholder in Company Z, which considers its interests as a minority shareholder to have been unfairly prejudiced by Shareholder Y, the majority shareholder.

When quantifying losses, it is important to understand the context and purpose of the analysis being performed, and to identify the appropriate framework for the quantification of losses earlier rather than later in the dispute resolution process. We explain in both situations identified above that the quantification of the claimants' claims can be significantly influenced by considerations pertaining to the identity or characteristics of each claimant. This is particularly germane in a region such as the Middle East, where the beneficial ownership of large businesses is often concentrated within one or a handful of key individuals or organisations.

Scenario 1: an entity's lost profits in the event of a contractual breach

Often, tribunals need to determine what losses are suffered by an entity following an alleged contractual breach by a counterparty. For example, suppose Company A contracts with Company B to purchase complex machinery that may increase the efficiency of Company A's production processes. Company B will also likely commit to supply that machinery to a particular specification or within a specified time frame.

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1 *The Mahatma and The Poet: Letters and Debates between Gandhi and Tagore, 1915–1941*, Part II, Chapter 8, 'The Poet and the Charka'.

If Company B breaches these obligations, Company A could suffer losses, including 'lost profits'. Typically, a claim for lost profits would be based on the difference, in monetary terms, between: (i) the present value of the net cash flows Company A would have earned if Company B had supplied the machinery in accordance with the terms of the contract in question; and (ii) the present value of the net cash flows Company A stands to earn as a result of a delay or non-supply of this machinery. In this instance, Company A may receive the agreed piece of machinery later than anticipated (which may cause delays in manufacturing products and earning revenue and profit). It may also involve Company A having to find another alternative piece of machinery, which may be more expensive or not as effective.

In the following subsections, we explain the established methods for identifying both projected net cash flows relevant to an assessment of Company A's lost profits, and the risk or uncertainty pertaining to these cash flows, which may be influenced by the entity's capital structure and industry factors. We then discuss the importance of preparing cash flow projections that are consistent with Company A's characteristics, as well as industry and macroeconomic factors.

Which cash flows matter for an assessment of Company A's losses?

It is likely that, in the circumstances described above, Company A will be the claimant in any dispute against Company B. This is because Company A is party to the contract that has allegedly been breached, and it is Company A whose financial position will be impacted by the alleged non-performance of Company B.

An assessment of Company A's lost profits requires an assessment of the net cash flows that would have been earned in the absence of the alleged contractual breach, and an assessment of the net cash flows that Company A stands to earn in fact.

In assessing damages suffered by an entity (in this case Company A), the relevant net cash flows to consider are known as, 'free cash flows to the firm'. Noted valuation commentators Shannon Pratt and Roger Grabowski define free cash flows to the firm as, 'cash that a business or project does not have to retain and reinvest in itself in order to sustain the projected levels of cash flows in future years'.[2] As such, it reflects cash generated by the operations of a project or business that is available to be paid to an entity's providers of capital, including lenders and equity investors. Importantly,

2 *Cost of Capital, Applications and Examples*, Third Edition, Pratt & Grabowski, 15.

therefore, the cash flows relevant to an assessment of Company A's losses are projected before the deduction of any interest to be paid to Company A's lenders (or repayment of loans), and the payment of any dividends to shareholders.

Any assessment of Company A's losses should be based on its operating cash flows pertaining to the project in question. This encompasses cash inflows related to the sale of products, and cash outflows related to the manufacture of products, the purchase of materials, and the payment of salaries. It may also be necessary to allocate a certain proportion of total overhead costs that Company A incurs to the project in question. It excludes financing cash flows such as debt drawdowns, investments from shareholders, debt repayments, interest payments and dividends.

Is an entity's borrowing relevant to an assessment of lost profits?

Although an assessment of Company A's losses is based on a projection of free cash flows to the firm, which excludes financing cash flows, this does not mean that Company A's capital structure is irrelevant to an assessment of its losses.

Adverse changes to an entity's risk of default can affect operating cash flows. Aswath Damodaran, a professor of finance at the Stern School of Business at New York University, notes that, 'the operating income, for many firms, will drop as the default risk increases. . . for instance, a bond rating below investment grade may trigger significant losses in revenues and increases in expenses'.[3]

More widely, capital structure is an important input into the calculation of Company A's weighted average cost of capital (WACC). WACC represents the weighted average rate of return required by an entity's investors, including both shareholders (who provide equity capital) and lenders (who provide debt capital), in order to provide capital to the entity. Koller, Goedhart and Wessels explain that, 'since free cash flow [to the firm] is the cash flow available to all financial investors (debt, equity and hybrid securities), the company's WACC must include the required return for each investor'.[4]

In a calculation of Company A's losses, projected free cash flows to the firm are discounted at a rate equal to Company A's WACC. Discounting converts future cash flows into a monetary lump sum amount as at the date of assessment and reflects: (i) the time value of money, or that a dollar today is worth more than a dollar in the

3 *Investment Valuation*, Second Edition, Damodaran, 583.

4 *Valuation: Measuring and Managing the Value of Companies*, McKinsey, Fifth Edition, Koller, Goedhart & Wessels, 235.

future, as it can be invested and earn a return; and (ii) the uncertainty of future cash flows (both in the amount of the cash flow and the anticipated time at which they will be earned).

All else equal, a higher WACC will reduce losses, and loss calculations can be highly sensitive to changes in the WACC applied. As a firm's leverage increases beyond an optimal ratio of debt to equity, WACC increases.[5] This arises primarily as shareholders require increased returns to compensate for increased risks associated with an equity investment in an entity with high levels of third-party debt, to which the interests of shareholders are subordinated. Accordingly, to the extent that cash flows are discounted at a WACC calculated with reference to an entity's projected actual capital structure, the entity's borrowing could materially change the result of an analysis to quantify losses.

Are Company A's characteristics relevant?

In short, 'yes'. As noted above, the starting point for an assessment of Company A's lost profits is to project the cash flows that Company A would have earned in the absence of the alleged contractual breach, and to compare these to the net cash flows that Company A stands to earn in fact.

In preparing cash flow projections, it is important to reflect Company A's features and circumstances, so far as possible. Furthermore, cash flow projections should reflect the most probable results (calculated by reference to a probability weighted forecast) in a given scenario, rather than those that result from overly optimistic or cautious assumptions.

Accordingly, assumptions underlying projections should be consistent with the business in question. Often, past performance is used to inform projections about future financial performance. In the present example, Company A's past results may provide evidence of its profit margins, growth rates, market share and its performance relative to budgets and peers. Additionally, contemporaneous correspondence, agreements, meeting minutes, business plans and projections may provide evidence as to Company A's plans and expectations. For example, evidence that Company A was planning to embark on a capital expenditure programme to meet anticipated growth in demand for its products may support assumptions as to future growth in excess of recent trends.

5 *Investment Valuation*, second edition, Damodaran, chapter 15.

It is also important to consider prevailing market conditions in the industry and economy in question. Often, such data is valuable to assist the preparation of reliable, robust projections. Industry considerations are also relevant to an assessment of WACC, as the cost of equity is typically measured with reference to returns earned on equity investments in comparable businesses.

Scenario 2: claim for unfair prejudice

Damages experts are also instructed in circumstances where the claimant is a shareholder in an entity. We now consider a scenario in which Shareholder X is a minority shareholder, and Shareholder Y is a majority shareholder, in Company Z, an unlisted logistics company. Shareholder X considers that contrary to the terms of a shareholder agreement entered into between Shareholder X and Shareholder Y, its interests as a minority shareholder have been unfairly prejudiced. The shareholders' agreement contains provisions for Shareholder X to elect for its ownership interest in Company Z to be purchased by Shareholder Y, in such circumstances.

In the following subsections we outline key considerations in undertaking a valuation exercise on behalf of a shareholder, in circumstances such as those outlined above.

A key distinction between a claim by a shareholder of an entity and a claim by the entity itself is that the shareholders have what is often described as a 'residual' interest in an entity's assets, meaning the value left over after all other claims – such as amounts owed to providers of debt – have been paid. It is important that this is accurately reflected in an analysis to value Shareholder X's ownership interest in Company Z. The characteristics of the shareholding may also be important. For example, practitioners often argue, particularly in the case of minority shareholdings, that it is appropriate to apply a discount to account for the absence of a ready market in which to dispose of a shareholding in Company Z, as it is a private company.

Which cash flows matter to value Shareholder X's shares?

We previously explained that, to assess an entity's losses arising from an alleged contractual breach, it is necessary to project the change in free cash flows to the firm that have arisen due to the alleged wrongful conduct. Free cash flows to the firm reflects cash generated by the operations of a project or business that is available to be paid to an entity's providers of capital, including lenders and equity investors.

If Company Z is valued based on the discounted net present value of projected free cash flows to the firm that Company Z generates (which is commonly referred to as a 'DCF analysis'),[6] the result of the calculation provides the 'enterprise value' of Company Z. Enterprise value corresponds to the theoretical purchase price for an entire company, including the value attributable to an entity's shareholders and its providers of debt. Accordingly, to determine the equity value of Company Z, a valuer would need to reduce the result of their calculation by the market value of Company Z's net debt,[7] and claims from any other non equity investors.

Alternatively, a valuation of Company Z's equity could be based on the discounted value of a projection of Company Z's free cash flows to equity. Free cash flows to equity represent the amount of cash a business generates that is available to be distributed to its shareholders, after accounting for financing-related outflows such as the repayment of debt, and interest payments.

Under this approach, the valuer would discount projected future cash flows to equity at a discount rate equal to Company Z's cost of equity rather than its WACC. Cost of equity is typically higher than WACC. This is primarily because equity investors require a higher return than providers of debt, to reflect that equity investors are exposed to greater risk, as their returns are subordinate to amounts owed to providers of debt capital. Additionally, debt costs are typically tax deductible for companies, whereas dividend payments to shareholders are not.

Accordingly, the value of Shareholder X's equity interest in Company Z could be assessed based on an analysis of Company Z's free cash flows to the firm (and net debt is subsequently deducted) or free cash flows to equity. As noted by Koller, Goedhart and Wessels, 'both methods lead to identical results when applied correctly'.[8] However, Professor Damodaran emphasises the risks of improper application of either method. He explains:

6 For a discussion on the use of a DCF analysis and other valuation methods, see 'Valuation in International Arbitration' by Noel Matthews and Andrew Wynn of FTI Consulting in *The Middle Eastern and African Arbitration Review* 2016.

7 Net debt reflects the value of debt outstanding plus the value of the company's cash balance.

8 *Valuation: Measuring and Managing the Value of Companies*, McKinsey, Fifth Edition, Koller, Goedhart & Wessels, 104.

> *The key error to avoid is mismatching cashflows and discount rates, since discounting cashflows to equity at the cost of capital will lead to an upwardly biased estimate of the value of equity, while discounting cashflows to the firm at the cost of equity will yield a downward biased estimate of the value of the firm.*[9]

Are Shareholder X's characteristics relevant?

The present scenario involves an assessment of the value of Shareholder X's shares in Company Z. On the face of it, Shareholder X's characteristics are not particularly relevant to the value of Company Z's shares. The value of its shareholding in Company Z derives from Company Z's ability to generate cash that can be distributed as dividends or reinvested for the purposes of obtaining capital appreciation. If Shareholder X is a dermatologist with no experience in the logistics industry, or a serial bankrupt with a miserable commercial track record, this is likely of little relevance to the value of shares in Company Z (unless Shareholder X also manages or operates Company Z, which could change matters somewhat!).[10]

Conversely, the characteristics of Shareholder X's shareholding may be relevant to an assessment of its value. For example, Company Z is a private company. This means that its shares are not traded on a centralised market, and may not be readily obtainable by parties that may wish to purchase shares. Practitioners often argue, particularly in the case of minority shareholdings in private companies, that it is appropriate to apply a 'marketability discount', which is described by Emory as, 'a general term in business valuation referring to impairment of value for reasons relating to marketability and/or liquidity'.[11] Bajaj, Denis, Ferris and Sarin explain the basis for such a discount as follows:

> *investors value marketability. Therefore, other things being equal, investors will pay more for an asset that is readily marketable than for an otherwise identical asset that is not readily marketable.*[12]

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9 *Investment Valuation*, Second Edition, Damodaran, page 19.

10 If the standard of value applied to the valuation is market value, then the characteristics of Shareholder X are explicitly excluded from any such analysis, as market value considers a hypothetical willing seller.

11 'The Value of Marketability as Illustrated in Initial Public Offerings of Dot-Com Companies May 1997 through March 2000', 1997, Emory, page 1.

12 ibid.

There are a number of factors that influence the marketability or liquidity of a minority interest. These include:

- whether the shareholder has a put option or other such right, providing liquidity;
- whether the company pays regular cash dividends – a company that pays regular cash dividends is more marketable than one that does not because it provides a regular monetary return on investment rather than just capital appreciation;
- the number of available buyers – the number of buyers will impact the relative bargaining power of the buyers and sellers;
- the likelihood of the company going public or being acquired;
- whether the shareholder has tag-along or drag-along rights, providing liquidity if another shareholder sells its stake;
- whether there are any restrictive transfer provisions that would prevent the shareholder from exiting, such as a 'lock-in' for a certain time period;
- the financial strength and position of the company; and
- the size of the interest relative to the total number of shares and other shareholdings.

There are different approaches to estimate the marketability discount appropriate in a given scenario. These are mostly based on attempts to compare prices for readily marketable assets to prices for similar or the same assets where there is restricted marketability.[13] In practice, the available methods can give rise to a wide range of proposed discounts, and the appropriate level of discount can be hard to quantify with certainty based on empirical data. In applying such a discount, valuers should ensure that they explicitly state the methodology they have used and the information they rely upon to formulate an estimate of the appropriate discount.

Finally, in the present circumstances, the shareholder agreement between Shareholder X and Shareholder Y may stipulate that the buy-out price is to be calculated without any discount to the pro-rata value of the shareholding. If this is the case, discounts and premia that could apply to a valuation of Shareholder X's shareholding based on the characteristics of the shareholding – such as the marketability discount or a minority discount[14] – could be inapplicable for contractual reasons. Valuers are likely to rely on counsel to interpret the terms of such clauses.

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13 'Firm Value and Marketability Discounts', 2001, Bajaj et al, page 2.

14 A minority discount is the economic concept that the ownership of a portion of a company (less than 50 per cent) may be worth less than the pro-rated valuation of the company. This concept is premised on the fact that a shareholder with less than half of the available shares does not have control of the company and, therefore, cannot manage the company, set strategic direction,

Conclusions

The two scenarios we consider above are simplified, generic situations. Nevertheless, they demonstrate that the quantification of claims can be significantly influenced by considerations pertaining to the identity or characteristics of the claimant. In general, there are established approaches to deal with these issues. To ensure that a tribunal is able to rely on the valuations conclusions provided, the valuer must understand the context and purpose of the analysis being performed, and identify the appropriate framework for the quantification of losses. Failure to do so may result in overstated or understated claims that provide limited use for a tribunal making an award of damages.

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or declare dividends without agreement from other shareholders. The level of such a discount depends on various factors, including the corporate governance structure in place and the legal protections for minority shareholders. These vary by country and by company.

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FTI Consulting is an independent global business advisory firm dedicated to helping organisations manage change, mitigate risk and resolve disputes: financial, legal, operational, political and regulatory, reputational and transactional. Individually, each practice is a leader in its specific field, staffed with experts recognised for the depth of their knowledge and a track record of making an impact. Collectively, FTI Consulting offers a comprehensive suite of services designed to assist clients across the business cycle – from proactive risk management to the ability to respond rapidly to unexpected events and dynamic environments.

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IN SUMMARY

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

DISCUSSION POINTS

- Angola's development
- Arbitration law and the growing arbitration culture
- Creation of arbitration centres
- Special regimes in relation to arbitration
- Accession to and ratification of the ICSID Convention

REFERENCED IN THIS ARTICLE

- Angolan Voluntary Arbitration Law
- Angola's bilateral investment treaties (BITs)
- Cotonou Agreement
- New York Convention
- ICSID Convention
- UNCITRAL Model Law on International Commercial Arbitration

According to the World Bank statistics,[1] Angola has a population of 32.8 million people and recorded a gross domestic product of US$58.3 billion in 2020.

Notwithstanding the recent slowdown, Angola has experienced exponential economic growth since the end of the civil war in 2002, having created conditions to become more attractive to investments, both domestic and international, in several economic areas. In spite of that, according to the Statistical Bulletin published by the National Bank of Angola (BNA) on 9 December 2021,[2] after a period of recovery in terms of net foreign direct investment (FDI) in Angola that started in 2017, when FDI reached US$8.7 billion, 2019 recorded an FDI of just US$1.7 billion. In 2020, there was a small increase in FDI to US$1.9 billion, with the first half of 2021 recording an FDI of US$824.7 million.

The country's development in recent years, in line with Africa's general economic performance, has not, however, been entirely matched by an expeditious and resourceful judicial system capable of duly responding to the growing number of disputes that any developing economy generates. Nevertheless, the Angolan executive branch is focused on enhancing the efficiency of the judicial system and on the modernisation of its legal framework, with measures such as the adoption of new legislation (eg, the amendment of the Private Investment Law, a new General Regime of Financial Institutions and a new Legal Framework for Security over Moveable Assets).

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

In addition, in August 2019, an ambitious privatisation programme known as PROPRIV was approved by Presidential Decree No. 250/19, which enshrines the full or partial privatisation of over 190 companies that are either public companies or companies where the state holds equity. This privatisation programme started in late 2019 and the corresponding privatisation procedures of the companies listed

1 Available at the World Bank's website at https://data.worldbank.org/country/angola.

2 Available at the National Bank of Angola's website at https://www.bna.ao/#/banco/pesquisado/340/Relat%C3%B3rios.

therein are scheduled for execution up until 2022. A new update to that privatisation programme was approved in July 2021, through Presidential Decree No. 182/21. Considering the lengthy 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 quick, neutral and specialised access to justice if a dispute arises, and therefore the introduction of arbitration agreements into such contracts will most certainly be a reality.

Arbitration in Angola

Voluntary Arbitration Law

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

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

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

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

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

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

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). If nothing is specifically agreed by the parties in that respect, the law establishes that the award must be rendered within six months of the acceptance of the last-appointed arbitrator. Experience shows that this is a very tight deadline and, therefore, it is wise for the parties and the arbitrators to agree on a more realistic time limit for the issuance of the arbitral award.

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

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

Arbitral awards produce the same effects as judicial decisions rendered by state courts and are enforceable when condemnatory (article 33 of the Angolan Arbitration Law). Additionally, and as discussed further below, Angola is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and has recently ratified its accession to the ICSID Convention.

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

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

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

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

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

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

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

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

In contrast to domestic arbitration, the Angolan Arbitration Law establishes as a default rule that arbitral awards rendered in the context of international arbitration are unappealable, unless the parties have agreed on the possibility of appeal and set the terms of that appeal (article 44 of the Angolan Arbitration Law). This rule is in line with best practice in international arbitration.

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

Institutional arbitration

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

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

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

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

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

Special regimes

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

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

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

Another important regime is provided by the Private Investment Law, approved by Law No. 10/18 of 26 June 2018 and amended by Law No. 10/21 of 22 April 2021, which defines the principles underlying private investment in Angola and regulates the benefits and aid provided by the Angolan state to private investors, as well as their rights, duties and guarantees. Article 15 of this law states that disputes regarding disposable rights may be resolved through alternative means of dispute resolution, notably negotiation, mediation, conciliation and arbitration, provided that no special law submits those disputes to the exclusive jurisdiction of judicial courts or to mandatory arbitration.

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

- the Securities Code, approved by Law No. 22/15 of 31 August 2015, in its articles 131 and 223;
- the Legal Regime of Compensatory Measures, approved by Law No. 20/16 of 29 December 2016, in its article 26;
- the General Regime of Financial Institutions, approved by Law No. 14/21 of 19 May 2021, in its article 43; and

- the Law on Public-Private Partnerships, approved by Law No. 11/19 of 14 May 2019, in its article 20.

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. The process of ratification began with Resolution No. 38/2016, published in the Official Gazette on 12 August 2016.

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

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

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

Investment arbitration in Angola

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

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

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

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

Second, Angola is a party to nine bilateral investment treaties (BITs) that are currently in force, having ratified three new BITs in 2021. As such, Angola is presently a party to BITs with Spain, Turkey, the United Arab Emirates (UAE), Italy, Cape Verde, Germany, Russia, Portugal and Brazil. These BITs establish the typical set of rights and guarantees granted to foreign investors, including fair and equitable treatment, compensation for expropriation, national and most-favoured-nation treatment and non-discrimination. The limited size of Angola's network of BITs requires the investor to carefully structure its investments in order to benefit from the protection of a treaty.

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

- BIT with Spain – failing resolution through amicable discussions:
  - dispute resolution by the competent judicial court of the territory in which the investment was located;
  - ad hoc arbitration under the UNCITRAL Arbitration Rules; or
  - institutional arbitration before ICSID and under the ICSID Additional Facility Rules, if one of the states is not a party to the ICSID Convention.
- BIT with Turkey – failing resolution through amicable discussions:
  - dispute resolution by the competent judicial court of the territory in which the investment was located;
  - institutional arbitration before ICSID;
  - ad hoc arbitration under the UNCITRAL Arbitration Rules.
- BIT with the UAE – failing resolution through amicable discussions:
  - institutional arbitration before ICSID; or
  - ad hoc arbitration under the UNCITRAL Arbitration Rules.
- BIT with Italy – failing resolution through amicable discussions:
  - 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.
- BIT with Cape Verde – failing resolution through amicable discussions:
  - ad hoc arbitration; or

    - institutional arbitration before ICSID and under the ICSID Convention, provided both Angola and Cape Verde are parties to this Convention.
- BIT with Germany – failing resolution through amicable discussions:
    - dispute resolution by the judicial courts of the host state;
    - ad hoc arbitration under the UNCITRAL Arbitration Rules;
    - institutional arbitration before ICSID and under the ICSID Convention, provided both Angola and Germany are parties to this Convention; 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.
- BIT with Russia – failing resolution through amicable discussions:
    - dispute resolution by the judicial courts of the host state;
    - ad hoc arbitration under the UNCITRAL Arbitration Rules, unless the parties choose other rules;
    - institutional arbitration before ICSID and under the ICSID Convention, provided both Angola and Russia are parties to this Convention; or
    - institutional arbitration before ICSID and under the ICSID Additional Facility Rules, if both Angola and Russia or at least one of these states are not a party to the ICSID Convention.
- - BIT with Portugal – failing resolution through amicable discussions:
    - dispute resolution by the judicial courts of the host state;
    - ad hoc arbitration under the UNCITRAL Arbitration Rules;
    - institutional arbitration before ICSID and under the ICSID Convention;
    - if one of the states is not a party to the ICSID Convention, 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.

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

Through Presidential Decree No. 122/14 of 4 June 2014, Angola approved model provisions for BITs to be executed by Angola in the future (Angola's 'model BIT'). These provisions continue to include some of the main rights typically granted to foreign investors under investment treaties. However, according to Angola's model BIT, and in contrast to the BITs currently in force between Angola and foreign states, those rights are not enforceable through investor-state arbitration, but rather through

consultations between the contracting states. In the event of failure of those consultations, the dispute shall be solved through state-to-state dispute resolution via the International Court of Justice.

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

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

Angola is also a member of several multilateral treaties that establish either arbitration clauses or other alternative dispute resolution mechanisms. One example of these treaties is the Cotonou Agreement, signed between the European Union and African, Caribbean and Pacific countries, in which Angola participates via the Southern African Development Community. This agreement advises the contracting parties entering into investment agreements to thoroughly study the main clauses aimed at protecting the investment, including, among other things, the provision for international arbitration in the event of any disputes between the investor and the host state. Moreover, the Cotonou Agreement also establishes that the signatory states shall cooperate and support each other in the necessary economic and institutional reforms and policies that contribute to the creation of a safe environment for the investment. One of the areas where this cooperation is specifically foreseen is the modernisation and development of mediation and arbitration systems. The Cotonou Agreement also submits any dispute between the signatory parties arising from its interpretation or application to a Council of Ministers. If the Council of Ministers is not successful in solving the dispute, either party may request that the matter be referred to arbitration, and the procedure to be applied, unless the arbitrators decide otherwise, shall be the one that is established in the regulation of the Permanent Court of Arbitration.

The Cotonou Agreement was extended in 2021 and is expected to be replaced by the 'post-Cotonou Agreement', which has already been signed by the chief negotiators of the European Union and the African, Caribbean and Pacific countries.

Accession to the ICSID Convention

After a protracted period, the President of the Republic of Angola published Letter of Accession No. 1/21 of 21 October 2021, through which the accession of Angola to the ICSID Convention was ratified. However, there is, as yet, no record of this ratification instrument having been deposited before ICSID, which is the last step for accession to the Convention.

By acceding to the ICSID Convention, Angola accepts that foreign investors from an investor state may have the right to bring an international investment arbitration against Angola, as host state, conducted before ICSID, thus giving potential foreign investors a layer of protection that may be decisive on their decision to invest. Therefore, accession to the ICSID Convention is another milestone in Angola's plan to create an attractive legal environment for foreign investment, and to boost and diversify the economy.

Angola's accession to the ICSID Convention is another major step towards the protection of foreign investors in the country, as it allows foreign investors to submit their investment disputes to arbitration proceedings outside Angola.

Conclusion

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

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

At a time when many are questioning whether investment arbitration is coming to an end as a means to resolve investment disputes (especially since the *Achmea* ruling), Angola has been taking decisive steps towards the development and modernisation of its legal framework, with the recent ratification of the ICSID Convention being proof of its commitment to create an environment that is more friendly to investors and arbitration.

FILIPE VAZ PINTO

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Filipe Vaz Pinto has been a partner at Morais Leitão since 2014. He co-heads the 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 the Executive Commission of the Portuguese Committee of ICC.

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

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

RICARDO DO NASCIMENTO FERREIRA
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Ricardo do Nascimento Ferreira joined Morais Leitão in 2005. Ricardo has been a partner since 2020 and, since 2018, he has led one of the litigation and arbitration teams within the department. He also co-leads Morais Leitão intellectual property department, where he is responsible for intellectual property litigation.

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 listed by W*ho's Who Legal: Arbitration* as a Future Leader and has been consistently listed in *Best Lawyers* and other directories.

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

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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 has also been a consultant for ALC Advogados since 2019.

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), Cape Verde (VQP Advogados) and Mozambique (MDR 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.

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

The team has solid academic training and vast knowledge in several areas of law and activity sectors, enabling its members to advise clients with high-quality technical expertise and responsiveness.

ALC Advogados is very active in private investment, corporate, oil and gas, and 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.

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Egypt

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IN SUMMARY

This article outlines the main features of Egypt's arbitration legal framework and covers key developments in the arbitration field during 2021, including for the Cairo Regional Centre for International Commercial Arbitration (CRCICA). It provides a brief overview of the new laws issued on the jurisdiction of the Constitutional Court and developments in sports arbitration. It also highlights the main arbitration principles established by the courts in 2021 concerning, among other things, pathological arbitration clauses, annulment of orders issued by arbitral tribunals and limitations on the application of the estoppel doctrine.

DISCUSSION POINTS

- Legal framework for arbitration in Egypt
- The CRCICA's role in international arbitration
- Sports arbitration developments
- Arbitrations where state organs and companies are parties
- Arbitration principles established by the Egyptian courts

REFERENCED IN THIS ARTICLE

- Egyptian Arbitration Act
- Civil and Commercial Procedures Law
- Sports Law No. 71 of 2017
- Law No. 137 of 2021 amending the Egyptian Supreme Constitutional Court Law No. 49 of 1979
- Court of Cassation, challenges Nos. 1964 and 1968 of JY 91, dated 8 June 2021
- Cairo Court of Appeal, Circuit (3), challenge No. 16 of JY 137, dated 25 February 2021
- Court of Cassation, challenge No. 6887 of JY 77, dated 23 January 2021
- Court of Cassation, challenge No. 12262 of JY 90, dated 24 June 2021

Egypt was one of the first countries in the region to introduce an arbitration law. It enacted the Egyptian Arbitration Act No. 27/1994 (the Arbitration Act) based on the UNCITRAL Model Law on International Commercial Arbitration (1985). It 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.[1] 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.

Egypt has become more arbitration-friendly through the courts' repeated findings that defective arbitration clauses are valid arbitration agreements,[2] and through legislation widening the scope of the matters that may be resolved by compromise, including matters that are classically regarded as matters of public law – for example, tax disputes,[3] custom disputes[4] and certain crimes under the Investment Law of 2017,[5] as well as the Criminal Procedural Law.[6] Egypt signed the New York Convention on 2 February 1959 and it entered into force on 8 June 1959. Egypt has signed and ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) in 1972[7] and is a party to 115 bilateral investment treaties (BITs), 28 of which are not yet in force and 15 of which have been terminated.[8] In 2021, three new investment treaty cases were registered with the International Centre for Settlement of Investment Disputes (ICSID) against Egypt. To date, a total of 38 cases against Egypt have been registered with ICSID. Of these 38 cases, nine are currently pending.[9]

1 Article 1 of Arbitration Act No. 27 of 1994.
2 Cairo Court of Appeal, Circuit (8), challenge No. 55 of JY 134, dated 16 September 2018 and Cairo Court of Appeal, Circuit (50), challenge No. 59 of JY 135, dated 28 November 2018.
3 Article (138) of Tax Law No. 91 of 2005.
4 Article (64) of the New Customs Law No. 207 of 2020.
5 Articles (90) and (93) of Investment Law No. 72 of 2017.
6 Article (18)-bis (a) of the Criminal Procedural Law.
7 https://icsid.worldbank.org/about/member-states/database-of-member-states.
8 https://investmentpolicy.unctad.org/international-investment-agreements/countries/62/egypt?type=bits.
9 https://icsid.worldbank.org/cases/case-database.

The Arbitration Act defines an arbitration agreement as an agreement in which the parties agree to resolve, by arbitration, all or part of a dispute that arose or may arise between them in connection with a specific legal relationship, contractual or otherwise.[10] Since 2005, the Cairo Court of Appeal (the Court of Appeal) has held that the arbitration agreement is considered to be the constitution of an arbitration and 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.[11]

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;[12] and
- the arbitration agreement must be in writing, otherwise it shall be null and void.[13] 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.[14]

The Arbitration Act grants parties the freedom to choose the procedural law that will be applied by the arbitral tribunal, including their right to subject the arbitration to the applicable rules of any institution or arbitration centre in or outside Egypt. However, if the parties fail to agree on this matter, the arbitral tribunal will be granted the freedom to select the applicable procedural law.[15] It is established through judgments

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

11 Cairo Court of Appeal, Circuit 91 – Commercial, Case No. 95 of120 JY, dated 27 April 2005.

12 Article (11) of Arbitration Act No. 27 of 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 of JY 117, dated 25 February 2002).

13 Article (12) of Arbitration Act No. 27 of 1994.

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

15 Article (25) of the Arbitration Act No. 27 of 1994.

of the Egyptian courts that, except for rules related to public policy, arbitral tribunals are not bound by norms considered mandatory in domestic litigations,[16] except where these norms are considered 'basic guarantees of adjudication'.[17]

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.[18] 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.[19] The enforcement order shall be submitted after the lapse of the 90-day period prescribed for filing the nullity action and it will be issued after verifying that certain conditions have been met.[20] The enforcement of foreign arbitral awards in Egypt is governed by the Convention on the Enforcement of Foreign Arbitral Awards (the New York Convention),[21] and, as such, are subject to the same enforcement rules applicable to national arbitral awards under the Arbitration Act.[22]

The Court of Appeal previously rendered a judgment 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 as those for enforcing a final arbitral award – that is, by an order on application without notification of, or hearing, the parties. The court went further and required the interim measure:[23]

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

16 Court of Cassation, challenge No. 547 of JY 51, dated 23 December 1991; Court of Cassation, challenge No. 1259 of JY 49, dated 13 June 1983.

17 Court of Cassation, challenge No. 145 of JY 74, dated 22 March 2011.

18 Article (55) of Arbitration Act No. 27 of 1994.

19 Article (56) of Arbitration Act No. 27 of 1994.

20 Article (58) of Arbitration Act No. 27 of 1994.

21 Some jurists take the view that the Arbitration Act and the Egyptian Civil and Commercial Procedures Law No. 131 of 1948 (articles 296–301) also apply.

22 Cairo Court of Appeal, Circuit (7), challenge No. 55 of JY 135, dated 6 February 2019.

23 Cairo Court of Appeal, Circuit (7), challenge No. 44 of JY 134, dated 9 May 2018.

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.[24]

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 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 Civil and Commercial Procedures Law (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.

Setting aside arbitral awards

Pursuant to article 53 of the Arbitration Act, arbitral awards can only be challenged by annulment proceedings. An award may be annulled for several reasons including that it contradicts public policy, there was no valid arbitration agreement, the tribunal did not apply the law agreed upon by the parties, one of the party's right of defence was violated or, as is the case more recently, there is a complete absence of reasoning (unless the parties agree not to provide any reasoning).[25] Annulment proceedings could only be brought within 90 days of the valid notification of the award debtor, and the 90 days will not commence even if the counterparty became aware of the award through other means.[26]

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24 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 authorise 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.'

25 Cairo Court of Appeal, Circuit (1), challenge No. 65 of JY 137, dated 4 February 2021.

26 Cairo Court of Appeal, Circuit (3), challenge No. 56 of JY 135, dated 24 June 2020.

The Supreme Constitutional Court held that the right to bring annulment proceedings against arbitral awards is a constitutional one. Additionally, the Court of Appeal held that if the parties agreed in the arbitration clause that the arbitral award is final and no party may challenge it, this cannot prevent either party from filing a nullity suit. However, waiver of an annulment lawsuit after the issuance of the arbitral award is permitted under Egyptian law.[27]

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 Court of Cassation took the view that annulment proceedings are allowed under the treaty and that the treaty does not contradict the Arbitration Act regarding the right to request annulment,[28] overturning a previous Court of Appeal judgment.[29]

There is a consensus among Egyptian courts that an annulment claim may not extend to reviewing the substance of the arbitral award to determine its convenience or to review the determination of the arbitrators in understanding the facts or applying the law since the annulment lawsuit is not an appeal.[30]

CRCICA in 2021

The CRCICA is the main arbitral centre in Egypt and is one of the leading arbitral institutions. 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 the CRCICA's status as a non-profit international organisation to be that of an international body enjoying judicial immunity in practising its role as an arbitration institution; and thus it may not act as defendant in challenging its arbitration-related function.

27 Cairo Court of Appeal, challenge No. 78 of JY 131, dated 4 May 2015.

28 Cairo Court of Appeal, Circuit (62), challenge No. 39 of JY 130, dated 6 August 2018.

29 Cairo Court of Appeal, challenge No. 39 of JY 130, dated 5 February 2014.

30 Court of Cassation, challenge No. 11713 of JY 89, dated 27 February 2020. See also: Court of Cassation, challenge No. 18309 of JY 89, dated 27 October 2020. See also, Cairo Court of Appeal, Circuit (1), challenge No. 7 of JY 137, dated 8 September 2020.

In 2021, the CRCICA recorded its second-highest number of annual registrations since 2016. A total of 83 cases were filed with the CRCICA in 2021, including 17 ad hoc proceedings administered by the Centre.[31]

The CRCICA's caseload in 2021 involved disputes related to construction, corporate restructuring agreements, banking and finance, oil and gas, investment treaty claims, telecommunications, tourism, hospitality, export–import, media and entertainment, legal representation, real-estate development, business development, lease agreements and apartment purchase agreements.[32] The CRCICA has also highlighted that Arabic was used more than English in cases in 2021, with a ratio of 3:1.[33]

In August 2021, the CRCICA launched its Dispute Board Rules.[34] It registered its first dispute board case in 2021, in which it will act as the appointing authority.[35]

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

The CRCICA continued its responsiveness to the covid-19 outbreak in 2021. Its promotion of remote hearing solutions has led to a diversification of the types of hearings held at the CRCICA. The Centre saw an increase in the use of virtual hearings; in the second quarter of 2021, there were 13 physical hearings, 18 fully remote hearings and eight hybrid hearings.[36]

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31 Alison Ross, Cairo centre reveals 2021 case numbers, published in *Global Arbitration Review* (9 February 2022).

32 CRCICA Caseload Report 2nd Quarter 2021 available at: https://crcica.org/news/2021/07/01/caseload-report-2nd-quarter-2021-crcica-registers-a-record-number-of-cases-in-a-first-half-of-a-year/. Alison Ross, Cairo centre reveals 2021 case numbers, published in *Global Arbitration Review* (9 February 2022).

33 Alison Ross, Cairo centre reveals 2021 case numbers, published in *Global Arbitration Review* (9 February 2022).

34 CRCICA Dispute Board Rules available at: https://crcica.org/pageDetails.aspx?Id=ElseXXlz2FA=.

35 Alison Ross, Cairo centre reveals 2021 case numbers, published in *Global Arbitration Review* (9 February 2022).

36 CRCICA Caseload Report 2nd Quarter 2021 available at: https://crcica.org/news/2021/07/01/caseload-report-2nd-quarter-2021-crcica-registers-a-record-number-of-cases-in-a-first-half-of-a-year/.

Key developments in 2021

New competencies added to the Supreme Constitutional Court

In the second half of 2021, the Egyptian Parliament debated a draft amendment of the Egyptian Supreme Constitutional Court Law, which grants the Court the jurisdiction to review the constitutionality of international organisations' and bodies' decisions, foreign court judgments and foreign arbitral awards to be enforced against Egypt. The final text of the amended law limited the Court's review to the decisions of international organisations and bodies, and foreign court judgments to be enforced against Egypt, but did not include foreign arbitral awards.[37] The amended law also granted the Prime Minister the power to request the Court to discard these decisions and judgments or the obligations resulting from them if they are found to violate the Constitution.[38]

Non-banking financial disputes

The Regulation on Non-Banking Financial Markets and Instruments provides for the establishment of an arbitration centre by a presidential decree to resolve disputes arising out of the application of the laws governing non-banking financial transactions, subject to the parties' agreement on arbitration. Presidential Decree No. 335 of 2019 was issued in this regard, establishing the Non-Banking Financial Disputes Arbitration Centre (the NBF Centre). The NBF Centre is competent in all disputes that arise from application of the laws concerning non-financial transactions, in particular disputes between shareholders, partners or members of companies and entities that work in the non-banking financial markets.

Due to the growth of the number of companies offering consumer finance, the head of the Financial Regulatory Authority issued Decree No. 869 of 2021, requiring that the agreement to resort to arbitration in consumer finance contracts should be a separate agreement between the parties.[39]

37 Article 1 of Law No. 137 of amending the Egyptian Supreme Constitutional Court Law No. 49 of 1979.

38 Article 1 of Law No. 137 of 2021 amending the Egyptian Supreme Constitutional Court Law No. 49 of 1979.

39 The Head of the Financial Regulatory Authority Decree No. 869 of 2021.

Sports arbitration

The Sports Law No. 71 of 2017 (the Sports Law) was enacted to regulate sports matters. It is considered to be the first comprehensive sports law in Egypt, where sports matters were previously regulated 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 cases where an arbitration clause is included in a contract or regulation binding on the parties of the dispute.[40]

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

According to the Sports Law, the Sports Centre shall consider the Olympic Charter and the international criteria of the relevant sports' associations. Furthermore, the Centre shall consider the fundamental procedural guarantees and principles of the CCPL. The Sports Law empowered the Olympic Committee to issue its own mediation and arbitration rules, which are set out in Decision No. 88 of 2017. As per the Sports Law, absent a provision in it or in the Sports Centre's rules, the Arbitration Act shall apply.[41]

Recent amendments were made to the statute of the Sports Centre setting the rules for the enforcement of the awards and orders as per the exequatur procedures of the Arbitration Act.[42]

Sports federations maintained their position regarding including arbitration in their statutes as a means to settle the disputes of the respective sport. The statutes were approved by the president of the Egyptian Olympics Committee in 2021. The new sports federation statutes that incorporated settlement of disputes via arbitration in

40 Article (66) and article (67) of the Sports Law No. 71 of 2017.

41 Article 70 of the Sports Law No. 71 of 2017.

42 Article 1 of the President of the Egyptian Olympics Committee Decree No. 4 of 2021.

2021 included the statute of the Muay Thai Federation,[43] the amended statute of the Fencing Federation,[44] the statute of the Paralympic Volleyball Federation,[45] the statute of the Dragon Boat Federation,[46] the statute of the Baseball and Softball Federation (under establishment),[47] the statute of the Roll ball Federation,[48] the statute of the Jeet Kune Do Federation[49] and the new statute of the Football Federation.[50]

Settlement of Football Federation disputes

The former statute of the Football Federation provided for the jurisdiction of the Court of Arbitration for Sport (CAS) for all football-related disputes.[51] The new statute now differentiates between domestic disputes and disputes that include a foreign element.[52] Domestic disputes must be referred to the Egyptian Sports Settlement and Arbitration Centre as a last resort after exhausting all internal dispute settlement channels. Awards rendered by the Sports Centre may be challenged before the CAS,[53] while international disputes (with foreign elements) can be referred directly to the CAS.[54]

Annulment of Sports Centre awards

Several annulment proceedings were brought in respect of arbitral awards rendered under the Sports Law. The Egyptian courts' jurisprudence is not consistent on whether such annulment proceedings can be brought forward under the Arbitration

43 The President of the Egyptian Olympics Committee Decree No. 24 of 2019. (Published on 10 February 2021.)
44 The President of the Egyptian Olympics Committee Decree No. 13 of 2020. (Published on 22 April 2021.)
45 The President of the Egyptian Olympics Committee Decree No. 9 of 2021.
46 The President of the Egyptian Olympics Committee Decree No. 12 of 2020. (Published on 1 August 2021.)
47 The President of the Egyptian Olympics Committee Decree No. 17 of 2018. (Published on 15 December 2021.)
48 The President of the Egyptian Olympics Committee Decree No. 27 of 2019. (Published on 28 December 2021.)
49 The President of the Egyptian Olympics Committee Decree No. 3 of 2020. (Published on 29 December 2021.)
50 The President of the Egyptian Olympics Committee Decree No. 20 of 2021.
51 Article 13 of the President of the Egyptian Olympics Committee Decree No. 329 of 2017.
52 Article 69 of the President of the Egyptian Olympics Committee Decree No. 20 of 2021.
53 Article 69 of the President of the Egyptian Olympics Committee Decree No. 20 of 2021.
54 Article 69 of the President of the Egyptian Olympics Committee Decree No. 20 of 2021.

Act. In some cases, the Court of Appeal decided that such proceedings are subject to the annulment procedures defined under the Sports Centre's rules, which are given precedence over the Arbitration Act by the Sports Law.[55] 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.[56]

In contrast, there were other judgments by the Court of Appeal holding that sports arbitration awards are subject to the annulment procedures stipulated in the Arbitration Act.[57] Confirming the same view, the Court of Appeal set aside a sports arbitration award because it was made by three arbitrators, while the default clause of the rules of the Sports Centre requires, in the absence of an agreement, that the tribunal is composed of a sole arbitrator; and because the award was not signed by the three arbitrators.[58]

Arbitrations where state organs and companies are parties

Several decrees of 2021 show that state organs are generally accepting of arbitration. For example, the statute regulating agreements concluded by the Social Housing and Real Estate Financing Fund,[59] the statute regulating agreements concluded by the Nuclear Energy and Electricity Generation Authority[60] and the statute regulating agreements concluded by the Egyptian National Railways Authority[61] all provide for an option for the parties to agree to resort to arbitration.

55 Cairo Court of Appeal, Circuit (7), challenge No. 40 of JY 135, dated 5 December 2018, Cairo Court of Appeal, Circuit (62), challenge No. 22 of JY 135, dated 2 July 2018, and Cairo Court of Appeal, Circuit (1), challenge No. 6 of JY 138, dated 9 December 2021.

56 Cairo Court of Appeal, Circuit (8), challenge No. 45 of JY 135, dated 20 January 2019. See also, Cairo Court of Appeal, Circuit (7), challenge No. 73 of JY 135, dated 4 May 2019.

57 Cairo Court of Appeal, Circuit (50), challenge No. 47 of JY 135, dated 25 November 2018.

58 Cairo Court of Appeal, Circuit (91), challenge No. 9 of JY 136, dated 9 April 2019. Also, Cairo Court of Appeal, Circuit (50), challenge No. 46 of JY 135, dated 27 January 2019.

59 The Minister of Housing, Utilities and Urban Communities Decree No. 576 of 2021.

60 The Minister of Electricity and Renewable Energy Decree No. 44 of 2021.

61 The Minister of Transportation Decree No. 191 of 2021.

Some state-owned companies are now also allowed to agree to arbitrate with third parties as an alternative mean to settle disputes. The statutes of Egyptair Holding Company[62] and the Egyptian Holding Company for Airports and Air Navigation[63] now include an option to agree to resort to arbitration.

However, to arbitrate in administrative contracts, the arbitration agreement must be approved by the competent minister or by whomever assumes his or her authority with respect to independent public authorities.[64] The power to approve the arbitration agreement may not be delegated.[65] The approval of the competent minister for the validity of an arbitration agreement is a matter of public policy.[66] Egyptian courts had held that the absence of ministerial approval invalidates the arbitration agreement.[67]

Principles from the Egyptian courts issued in 2021

Derogation from the public policy law applicable to the dispute

The dispute in question arose out of a build-operate-transfer (BOT) contract in Damietta Port that ended with a multimillion ICC award in favour of a major investor against Damietta Port Authority (DPA). The dispute mainly revolved around the validity of a settlement agreement approved by the Cabinet of Ministers, which the ICC tribunal found to be invalid. By applying the rules of private law, the arbitral tribunal classified the contract as a contract for works and unanimously refused the enforcement of the amicable settlement agreement and its annexes. The DPA then filed an annulment lawsuit before the Court of Appeal,[68] which dismissed the challenge and considered the award valid. However, the Court of Cassation reversed the decision[69] and decided to set aside the ICC award. The Court considered the BOT agreement to be an administrative contract. As such, there are some stages that require

62 The Minister of Civil Aviation Decree No. 874 of 2021.

63 The Minister of Civil Aviation Decree No. 875 of 2021.

64 Article (1) of the Arbitration Act as amended by Law No. 9 of 1997.

65 CRCICA ad hoc arbitration case No. 793 of 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.

66 Administrative Judiciary Court, Investment and Economics Disputes Section, 7th Section, case No. 11492 of JY 65 JY, dated 7 May 2011.

67 CRCICA Arbitration Case No. 676 of 2010, award dated 21 August 2011, *Journal of Arab Arbitration*, Issue No. 17, pp. 263–264.

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

69 Court of Cassation, challenges Nos. 1964 and 1968 of JY 91, dated 8 June 2021.

the administration (the DPA) to take some procedures to conclude, amend or even terminate the agreement. These procedures include the issuance of administrative decisions by the competent authorities, which include decisions by the Cabinet of Ministers. The Court found that although these decisions are connected to the agreement, they are administrative decisions that are not within the contract and could only be challenged by a cancellation lawsuit that falls within the exclusive jurisdiction of the state counsel. Furthermore, the Court concluded that the arbitral tribunal applied the rules of private law to an administrative contract. The Court considered that applying the rules of private law instead of public law (administrative law) to an administrative contract (concession agreement) constitutes a violation of public policy as the application of administrative law to an administrative contract is a public policy matter. The Court reasoned that the administration has exceptional authority related to its power to regulate, amend and terminate an administrative contract to operate public utilities. The Court further found that the arbitral tribunal's application of private law amounted to an exclusion of the applicable law (which requires application of the administrative law to administrative contracts). Unlike the finding of the Court of Appeal, the Court of Cassation found that the DPA cannot waive the rights it had because they are not financial rights and obligations, and they are not subject to compromise. The Court added that treating both parties equally would be against public policy as the administration (the DPA) should have exceptional powers and authorities in management of the public utility (Damietta Port).

Competent court to decide on the enforceable award when two arbitral awards are in conflict

In October 2021, the Supreme Constitutional Court[70] decided that it is not competent to decide on which arbitral award that should be enforced if two arbitral awards are in conflict. The Court found that it is only competent to decide on the enforcement of specific judgments if more than one is issued by courts of different judicial bodies (eg, ordinary courts and state counsel). It held that awards issued by different arbitral tribunals are considered to be issued by the same judicial body because all tribunals are regulated by the same legislative instrument (the Arbitration Act). Finally, the Court determined that the court stipulated in article (9) of the Arbitration Act is the competent court to determine which award should be enforced in case of conflict. In case of international arbitration, the Court of Appeal would be the competent court.

70 Supreme Constitutional Court, challenge No. 37 of JY 41, dated 9 October 2021.

Persons with criminal records can now sit as arbitrators in absence of any objections

Pursuant to article (16) of the Arbitration Act, any person who is a minor or who is prohibited from practising civil rights due to a judgment against him or her for a crime that relates to honour (eg, theft and counterfeiting of money) may not sit as an arbitrator. In one case, one of the arbitrators was previously imprisoned for one year for counterfeiting money, which is one of the disqualifying crimes. However, the parties were aware of this fact and none of them raised any objections during the proceedings. Thereafter, the losing party decided to file an annulment lawsuit to annul the arbitral award on the basis that one of the arbitrators is prohibited from sitting as an arbitrator for his criminal record. The Court of Cassation[71] found that the party filing the challenge was aware of that fact and had not raised any objection during the proceedings. Thus, the issued award was not annulled for this reason.

Limitations on the estoppel doctrine

The Court of Appeal has put in place some limitations on the estoppel doctrine previously established by some courts.[72] In its award, the arbitral tribunal decided that a party is estopped from claiming its right if it remained silent for 11 years. The Court of Appeal decided that this would constitute a deviation from the public policy rule of the limitation period to apply the estoppel doctrine.[73] This also constituted failure to apply the law applicable to the dispute.

Partial annulment for not allocating the arbitration costs according to the parties' agreement

In April 2021, the Court of Appeal[74] annulled an award issued by a CRCICA tribunal for applying the CRCICA's Arbitration Rules for allocation of costs of arbitration between the parties to the dispute. The parties had previously agreed in their arbitration agreement that the costs would be equally divided among them. However, the tribunal decided that the losing party would bear 75 per cent of the costs, relying on article (46) of the CRCICA Arbitration Rules that entitles the tribunal to make the losing party bear the costs. This was found by the Court to be against the arbitration agreement and it partially annulled the award with regard to the arbitration costs.

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71 Court of Cassation, challenge No. 6887 of JY 77, dated 23 January 2021.

72 Court of Cassation, challenge No. 18309 JY 89, dated 27 October 2020.

73 Cairo Court of Appeal, Circuit (7), challenges Nos. 11 and 12 of JY 137, dated 22 December 2021.

74 Cairo Court of Appeal, Circuit (3), challenges Nos. 41 and 45 of JY 137, dated 28 April 2021.

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

The Court of Cassation has previously adopted a position that an incorrect assessment of damages is not a ground for annulment because, in the eyes of the Court, the assessment of compensation is considered a question of fact and thus falls outside the scope of the action for annulment.[75] However, in 2020, the Court of Appeal[76] reviewed an annulment action for an arbitral award between an investor and the Libyan government rendered by a tribunal seated in Egypt. The tribunal in that case awarded approximately US$960 million to the investor as damages. In its judgment, the Court of Appeal found that it is necessary to find harm to order compensation. As such, compensation must be proportionate to the damage. If compensation is excessively disproportional to the damage, it would be considered extremely unjust and in violation of public policy (represented by the rules of equity and fairness). The Court held that an arbitral award may be annulled if it included – clearly and explicitly – compensation that is unjust, extremely unfair, extremely excessive in relation to the damage or disproportionate and unreasoned. Similarly, in another judgment, the Court implied that it has jurisdiction to review the tribunal's assessment of compensation if it was extremely unfair, abusive or invented.[77]

However, in 2021, the Court of Cassation[78] confirmed its stance and reversed the Court of Appeal's decision. It confirmed that even if the arbitral tribunal is wrong in its assessment of compensation, this is a discretionary matter that does not amount to a ground for annulment of the arbitral award because it is not one of the grounds of annulment exclusively stipulated in article 53 of the Arbitration Act.

Annulment for issuing arbitral awards 'in the name of the people'

The Court of Appeal[79] recently annulled an award for being issued 'in the name of the people'. The Court found that only courts can, by virtue of the constitution and the law, issue judgments 'in the name of the people'. It is yet to be seen if this judgment will be upheld by the Court of Cassation.

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75 Court of Cassation, challenge No. 3299 of JY 86, dated 13 March 2018. See also, Court of Cassation, challenge No. 414 of JY 71, dated 8 January 2009.

76 Cairo Court of Appeal, Circuit (1), challenge No. 39 of JY 130, dated 3 June 2020.

77 Cairo Court of Appeal, Circuit (1), challenge No. 61 of JY 134, dated 12 August 2020.

78 Court of Cassation, challenge No. 12262 of JY 90, dated 24 June 2021.

79 Cairo Court of Appeal, Circuit (8), challenge No. 55 of JY 136, dated 18 February 2021.

Pathological arbitration clauses could be valid

In a case in 2021, the parties agreed on the right of any of the parties to resort to arbitration, in accordance with the Arbitration Act, with the Cairo Centre, the Alexandria Centre for International Arbitration or the Alexandria Economic Court. Accordingly, one of the parties referred their dispute to the CRCICA. The Court of Appeal[80] considered this to be an agreement between the parties to authorise the party that commences the proceedings to choose the dispute resolution method, whether before the Cairo Centre or the Alexandria Centre, or to resort to courts. As such, this agreement of the parties should be respected.

Liquidation of letters of guarantee

In a recent judgment, the Court of Appeal[81] held that, if the underlying contract includes an arbitration agreement, the Court is competent to cease liquidation of a letter of guarantee until the arbitral tribunal decides the case.

Non-suspension of the arbitral proceedings pending a challenge before the constitutional court is not a reason for annulment

The Court of Appeal[82] refused to set aside an arbitral award on the grounds that the arbitral tribunal refused to suspend the proceedings pending determination of the Supreme Constitutional Court on the competent court as per article 31 of the Supreme Constitutional Court Law. In these proceedings, while the arbitration proceedings were ongoing, the appealing party filed a claim before the domestic courts and then filed a challenge before the Supreme Constitutional Court for the Court to determine the competent court, which would be either the arbitral tribunal or a domestic court. The arbitral tribunal found that the challenge before the Supreme Constitutional Court was made for the sole purpose of prolonging the proceedings and refused to suspend the arbitration proceedings. The Court of Appeal confirmed the findings of the arbitral tribunal and confirmed that not suspending the arbitration proceedings pending the decision of the Supreme Constitutional Court is not a matter of public policy and not one of the grounds for annulment of arbitral awards.

80 Cairo Court of Appeal, Circuit (3), challenge No. 16 of JY 137, dated 25 February 2021.

81 Cairo Court of Appeal, Circuit (3), challenge No. 60 of JY 137, dated 27 January 2021.

82 Cairo Court of Appeal, Circuit (4), challenges Nos. 70 and 75 of JY 137, dated 5 December 2021.

Inexistence lawsuit must be filed before the competent court and not the Court of Appeal

The Court of Appeal[83] found that a forged arbitration award is not subject to an annulment lawsuit; rather, it is subject to a lawsuit for inexistence of the award. In this case, the Court of Appeal decided that it lacks jurisdiction over the inexistence lawsuit for an arbitral award.

Orders issued by the arbitral tribunal are not subject to annulment lawsuit

The Court of Appeal[84] decided that it is only competent with regard to the annulment lawsuit filed for final awards. Thus, awards that do not settle the dispute are not subject to an annulment lawsuit. In its reasoning, the Court stated that if it is possible to file an annulment lawsuit before the award is rendered, this will lead to distribution of the dispute between domestic courts and arbitral tribunals and would delay its resolution.

Signature of all pages of the arbitral award does not necessarily lead to its annulment

The Court of Appeal[85] refused to annul an arbitral award for not signing all the pages of the award. The Court found that the rationale behind a signature on every page of the arbitral award is to ensure that all the members of the tribunal have deliberated before issuing the award. In the case before the Court, one of the arbitrators refused to sign and issued a dissenting opinion, which the Court found as evidence that the tribunal has deliberated before issuance of the award.

Controversy over the extension of arbitration agreements to third parties

In April 2021, the Court of Appeal[86] issued a judgment that refused an annulment lawsuit filed by one of the parties for not being represented during the arbitral proceedings. That party claimed that it was not represented in the proceedings as the person claiming its representation had a power of attorney from the managing director of its Egyptian subsidiary, while the actual party was a branch of the parent company and not the subsidiary. The Court found that the parent company was correctly represented because the managing director of the Egyptian subsidiary was in fact the representative of the parent branch on the board of directors of the Egyptian

83 Cairo Court of Appeal, Circuit (4), challenge No. 19 of JY 137, dated 4 July 2021.
84 Cairo Court of Appeal, Circuit (3), challenge No. 35 of JY 137, dated 27 January 2021.
85 Cairo Court of Appeal, Circuit (2), challenge No. 100 of JY 135, dated 14 August 2021.
86 Cairo Court of Appeal, Circuit (3), challenge No. 74 of JY 137, dated 28 April 2021.

subsidiary. This could potentially mean that in certain cases the courts may be willing to pierce the corporate veil and determine that the parent company can have the same representative as a subsidiary.

In another case, the Court of Appeal[87] found that a third-party subsidiary may not be adjoined in the arbitration proceedings without its consent. In its reasoning the Court held that the arbitration agreement is limited to its parties, and none of the parties may adjoin or make claims against a third party without the agreement of the parties to the arbitration agreement and the approval of the third party.

A party that was not party to the arbitration proceedings cannot request its annulment even if it harms that party

The Court of Appeal[88] has set a principle that a third party cannot request annulment of an arbitral award regardless of the extent of damage it sustains from the issuance of the award. It confirmed that only parties to the arbitral proceedings can challenge the arbitral award.

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87 Cairo Court of Appeal, Circuit (3), challenge No. 49 of JY 137, dated 25 February 2021.

88 Cairo Court of Appeal, Circuit (1), challenge No. 53 of JY 136, dated 5 April 2021.

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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 seven partners, one of counsel, three counsels and 12 senior associates and 42 fee earners. Grounded in both common and civil law jurisdictions, our team provides our clients with comprehensive dispute resolution services in Arabic, English and French. Our primary goal is to effectively manage risk and resolve disputes pursuant to clients' strategic interests – whether through amicable negotiation, litigation, arbitration or other ADR mechanisms.

Matouk Bassiouny & Hennawy's arbitration team headed by Dr Amr A Abbas is active in CRCICA, ICC, CAS, LCIA, DIAC and ICSID arbitral proceedings governed by different laws, including Algerian law, Egyptian law, Saudi law and UAE laws. We represent clients in high-value, high-profile disputes in a diverse range of sectors, including automotive, construction, heavy industry, manufacturing, maritime, oil and gas, pharmaceutical, real estate, telecommunications, media and entertainment, and tourism.

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Recent Developments in Arbitration in Ghana

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IN SUMMARY

This article sets out some of the key developments in arbitration practice in Ghana.

DISCUSSION POINTS

- Status of the LCIA as a competent authority within the ADR Act
- Enforcement of arbitral awards
- Revocation of an arbitrator's authority
- Challenge of an arbitral award

REFERENCED IN THIS ARTICLE

- ADR Act – Alternative Dispute Resolution Act, 2010 (Act 798)
- New York Convention – Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
- LCIA – London Court of International Arbitration
- FCC Rules – Federation of Cocoa Commerce Tribunal Rules

Introduction

Ghana's Alternative Dispute Resolution Act, 2010 (Act 798, the ADR Act) came into force on 31 May 2010 repealing the Arbitration Act, 1961 (Act 38). Since then, the ADR Act has remained the key legislation regulating the practice and procedure of alternative dispute resolution methods, including arbitration, in Ghana. The ADR Act has not been amended since coming into force.

Ghana's ADR Act is modelled largely after the UNCITRAL Model Law on International Arbitration of 1985, as amended in 2006. The ADR Act, in keeping with many other arbitration legislations, is hinged on party autonomy and gives disputants significant independence in framing the dispute resolution process to best suit their context. The ADR Act recognises the separability of arbitration agreements and provides in express language that the arbitration clause shall be treated as distinct from the main agreement.[1] Therefore, a defect with the main agreement does not compromise the express intention of the parties to have their disputes resolved by arbitration.[2] Agreements to arbitrate are not to be inferred. The ADR Act insists on the existence of a written agreement as proof of the intention of the parties to have their dispute resolved by arbitration.[3] Letters, telex, fax, email or other similar means of communication may suffice as written communication for the purpose of triggering into existence an arbitration agreement.[4] The exchange of a statement of claim, and defence in which the existence of an agreement is alleged by one party and not denied by another may suffice as a written agreement.[5] As a basic rule, not all matters are arbitrable. Matters relating to (1) the national or public interest, (2) the environment, (3) the enforcement and interpretation of the Constitution, and (4) any other matter that by law cannot be settled by an alternative dispute resolution method are therefore excluded. Section 1(d) leaves open the scope of the matters that cannot be resolved by arbitration with the attendant risk that matters that were previously considered as arbitrable may be subsequently rendered as not arbitrable.

1 Section 3 of the Act.
2 ibid.
3 Section 2(1) to (3) of the Act.
4 Section 2(4)(a) of the Act.
5 Section 2(4)(b) of the Act.

In keeping with the need for arbitration agreements to be respected, and upheld, the ADR Act gives a party to an agreement prescribing arbitration as the dispute resolution method the right to timeously ask the court to stay proceedings and refer the matter to arbitration.[6]

Section 6 of the ADR Act allows a counterparty to a suit to which there is an arbitration clause to make an application to the court for the matter to be referred to arbitration upon entry of appearance (conditional).[7] The key consideration for the court in determining an application of this nature is whether there was a prior agreement between the parties for all arbitrable disputes to be referred to arbitration.[8]

An application under section 6 shall be on notice to the other party, who shall be accorded the right to proffer a response on why the matter ought not be referred to arbitration. If the application is granted, it will operate as an automatic stay of the proceedings in court.[9] However, all interlocutory orders made in that proceedings shall be made to stand except contested by a party to the proceedings.[10]

The timing of applications under section 6(1) of the ADR Act have been strictly scrutinised by the Ghanaian courts. A party waives their right to ask for a matter to be referred to arbitration once they file a defence to contest a case on its merits.

In *De Simone Ltd v Olam Ghana Ltd*,[11] the plaintiff sued the defendant for a breach of a contract, which contained a clause requiring the parties to settle disputes arising from the contract through arbitration. The defendant filed an application asking the court to refer the parties to arbitration in accordance with the terms of their contract, after pleadings had closed and the trial had commenced. The trial court and court of appeal refused this application. On further appeal to the Supreme Court, the issue the court had to determine was at which point a party waived its right to ask for a referral to arbitration. The court held that once a statement of defence was filed to contest the case on its merits, the defendant had waived its right to ask for a referral to arbitration.

6 Section 6(1) of the Act.
7 Section 6(1) of the Act.
8 Section 6(2) of the Act.
9 Section 6(3) of the Act.
10 Section 6(4) of the Act.
11 Supreme Court decision with Suit No. Civil Appeal No. J4/03/20180) (delivered on 28 March 2018).

A court, when faced with facts that the court believes is capable of being resolved by arbitration, may, with the consent of the parties, refer the matter to arbitration.[12] Section 7(5) of the ADR Act provides that where a court realises that an action is the subject of an arbitration agreement, the court is required to stay proceedings and refer the dispute to arbitration. From the language of section 7(5) of the ADR Act, the court's duty is not to entertain any action containing an arbitration clause, and there is no time limit within which the court may refer the dispute to arbitration. The key event for the referral of the dispute to arbitration is when it comes to the court's realisation. However, this literal and liberal view was watered down by the Supreme Court in *De Simone Limited v OLAM Ghana Limited*.[13] In this case, both the High Court and Court of Appeal took the view that the court's duty was simply to refer the matter to arbitration on realising that there was an arbitration clause in place. However, on a further appeal to the Supreme Court, the court took the view that the literal interpretation of the section 7(5) was counter-productive, and risks not respecting the intention of the parties to waive their right to arbitrate – thereby undermining the party autonomy principle underlying the arbitration process. The Court noted that:

> *Section 7(5) of the Act may only be exercised where there has not been mutual waiver by the parties of their arbitration rights. To construe it otherwise would be to empower the court to overrun the freedom of the parties to annul their arbitration agreement and resort to the court to have their dispute resolved.*

Arbitration continues to emerge and serve as a strong alternative to dispute resolution by national courts. Various national courts, including the Supreme Court, have affirmed the need to respect the wishes of parties seeking to resolve their disputes in other alternative forums. In *BCM Ghana Ltd v Ashanti Gold fields Ltd*,[14] the Supreme Court urged courts to 'strive to uphold dispute resolution clauses in agreements' since it is 'sound business practice' to do so. Similarly, the Supreme Court in *Republic v High Court (Commercial Division, Accra) Ex-Parte: GHACEM Limited (AJ FANJ Construction*

12 Section 7(1) of the Act.

13 (J4/03/2018) [2018] GHASC 22 (28 March 2018).

14 (2005-2006) SCGLR 602.

& Engineering Limited as an interested party),[15] in recognition of the parties' express choice to resolve their disputes outside of the court's framework, urged restraint on the side of the courts in interfering with arbitral proceedings. According to Dotse JSC:

> *What must be noted is that the provisions in Act 798 on arbitral proceedings must be considered as alternative methods of resolution of disputes, and therefore, in our view, the intervention of the High Court, unless expressly provided for and in clear instances devoid of any controversy, must be very slow and cautious.*

Overview of review

This review considers developments in arbitration in Ghana from a legislative and case law point of view. The first part of the review considers recent legislation, and how they affect the use of arbitration as a dispute resolution method. The second part of the review focuses on developments from the law courts.

Part one

Legislative developments

The ADR Act remains the primary legislation regulating the practice of arbitration in Ghana. That said, diverse legislation incorporates arbitration as a dispute resolution method. Depending on the legislation, the resort to arbitration may be compulsory or recommendatory. For instance, in the High Court (Civil Procedure) (Amendment) Rules, 2020 (CI 133),[16] courts are now required to 'enquire from parties [at the time that issues are being set and agreed on for trial] if the parties are willing to attempt settlement of the case by alternative dispute resolution or other methods', which includes arbitration.[17] Similarly, the parties may request at the time that issues are being agreed on to attempt settlement through arbitration.[18] In the case of matters pending before the commercial courts, CI 133 imposes a positive duty on courts to 'encourage the amicable resolution of commercial claims and early settlement of pending commercial litigation by the voluntary action of the parties'.[19]

15 Civil Motion No. J5/29/2018, 30 May 2018.
16 Which came into force on 9 November 2020.
17 Order 32(1)(1B) of CI 133.
18 Order 32(1)(1A) of CI 133.
19 Order 58(4) of CI 133.

In what can be described as a significant leap for arbitration, Ghana's recent Land Act, 2020 (Act 1036)[20] incorporates arbitration as a mandatory dispute resolution procedure in matters 'concerning any land or interest in land'. Section 98(1) of Act 1036 provides that:

> *An action concerning any land or interest in land in a registration district shall not be commenced in any court unless the procedures for resolution of disputes under the Alternative Dispute Resolution Act, 2010 (Act 798) have been exhausted.*

Section 98 is commendable to the extent that it compels parties to a land dispute to resort to arbitration (or any other ADR method). That said, section 98's insistence on alternative dispute resolution (including arbitration) as a first step in resolving land disputes in registration districts poses some fundamental challenges. The lawmakers in drafting section 98 seem to have glossed over the fact that the ADR methods under the ADR Act are not interim or pre-litigation dispute resolution processes. On the contrary, these are full-fledged dispute resolution methods, and as a result, resort to arbitration automatically excludes the parties from having the merits of their case being heard in court (which may be their preferred means of dispute resolution). It is further an open question whether taking away the rights of persons to resort to national courts, with specialised land courts, is a desirable outcome. But for all its faults, section 98 of Act 1036's insistence on alternative dispute resolution methods in complementing an area traditionally reserved for the national courts may be construed as proof of the growing acceptance of arbitration in the public space.

Part two

Enforcement of arbitral awards

The ADR Act sets out the conditions and steps that a person in whose favour an arbitral award has been made must comply with. These conditions and steps are contained in section 59 of the ADR Act.

First, the award must have been made by a competent authority under the laws of the country in which the award was made.[21] Second, a reciprocal arrangement must be in place between Ghana and the country in which the award was made or the award

20 The Land Act came into force on 23 December 2020.

21 Section 59(1)(a) of the Act.

must have been made under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention) or under any other international convention on arbitration ratified by Parliament.[22]

The ADR Act places an obligation on the party seeking to enforce the award to also (1) produce the original award or an authenticated copy of the award in the manner prescribed by the law of the country in which the award was made;[23] and (2) produce a copy of the agreement relied on by the parties to initiate the arbitration or a duly authenticated copy of the arbitration agreement.[24] The ADR Act further insists that there must be no pending appeal against the award in any court under the law applicable to the arbitration.[25]

These statutory steps must be complied with strictly and failure to do so will render an application to enforce an arbitral award unsuccessful.[26]

Further, the court will not grant leave to enforce an arbitral award if (1) the award has been annulled in the country in which the award was made;[27] (2) the party against whom the award was made was not given sufficient notice to enable that party to present its case;[28] (3) a party lacking legal capacity was not properly represented;[29] (4) the award deals with issues not submitted to arbitration;[30] or (5) the award contains a decision beyond the scope of the matters submitted for arbitration.[31]

From a review of section 59 (dealing with the enforcement rules and condition), a court may refuse to enforce an arbitral award for a variety of reasons, including the failure on the part of the applicant to prove the existence of an arbitral award, the legal or juridical basis for the award, or for more substantive concerns including an arbitrator exceeding his or her mandate and complaints of non-compliance with the rules of natural justice.

22 Section 59(1)(b) and (c) of the Act.
23 Section 59(1)(d)(i) of the Act.
24 Section 59(1)(d)(ii) of the Act.
25 Section 59(1)(e) of the Act.
26 *Boyefio v NTHC Properties Ltd* [1997-98] 1 GLR 768–786.
27 ibid.
28 Section 59(3)(a) of the Act.
29 Section 59(3)(c) of the Act.
30 Section 59(3)(d) of the Act.
31 Section 59(3)(e) of the Act.

Developments in enforcement of foreign arbitral awards

Failure to demonstrate the existence of an agreement pursuant to which an award was made

In *Dutch African Trading Company, BV (BATC) v West African Mills Company Limited*,[32] the Commercial Court, Accra refused to enforce an arbitral award on the grounds that the applicant could not demonstrate that there was a written agreement pursuant to which the award was made as required under section 59(d)(ii) of the ADR Act. In this case, the parties had entered into 12 separate agreements all of which provided that the agreements were subject to the Federation of Cocoa Commerce (FCC) Tribunal Rules in London. Rule 1(1.3) of the FCC rules stated that 'any dispute arising out of, or relating to, and any contract for the sale and/or purchase of cocoa beans and/or cocoa product . . . shall be referred to FCC arbitration.' The High Court judge formed the opinion that the FCC rules as incorporated into the various agreements did not qualify as an 'agreement pursuant to which the award was made' and therefore, the statutory conditions for the enforcement of the arbitral award have not been met. According to the judge:

> *the Applicant's failure to produce such an agreement is a clear vindication that no such arbitration agreement exists. That in the absence of the required arbitration agreement to afford the Court the opportunity to examine the agreement, the jurisdiction of the Court to even consider the application for leave for the enforcement of the award cannot be properly invoked. That the failure of the Applicant to show that the Award was made in accordance with the mandatory provisions of Section 57 and 59 of Act 798 is fatal to the application and same ought not to proceed further.*

The authors understand that the High Court's decision has been overturned on appeal. The High Court's conclusion that the incorporation of the FCC's rules did not suffice as an agreement pursuant to which the award was made was unnecessarily technical and did not consider the commercial reality that parties may prefer to simply incorporate secondary agreements into their primary agreements without necessarily reproducing the same. In any event, nothing in the body of the ADR Act specifically excludes the incorporation arbitral clauses in agreements.

32 High Court decision with Suit No. CM/MISC/0384/2020 (delivered on January 2020).

Status of the LCIA as a competent authority under the laws of the country in which the award was made

Shakari Limited v The Broad Bank Home Limited[33] dealt with whether the London Court of International Arbitration was a competent authority within the ADR Act. The applicant was a limited liability company registered under the laws of Mauritius. The respondent was a Ghanaian company. The parties entered into an agreement under which the applicant agreed to arrange and provide a loan to the respondent. The main agreement entered into by the parties – a facilitation agreement – contained a dispute resolution clause. The arbitration clause required all disputes to be settled by arbitration under the rules of the London Court of International Arbitration.

The respondent breached its obligations under the agreement, and the applicant triggered the processes for the holding of an arbitration. A sole arbitrator was appointed. Both parties participated in the arbitration and an award was made in favour of the applicant. The applicant took steps to have the arbitration award enforced at the High Court, Accra.

The respondent opposed the application for leave to enforce the arbitral award. The thrust of the respondent's opposition was that the application for leave to enforce the arbitral award was not compliant with section 59(1)(a) of the ADR Act. Section 59(1)(a) of the ADR Act requires the High Court before whom an application is placed for leave to enforce an arbitral award to satisfy itself that the award was made by a 'competent authority under the laws of the country in which the award was made'. It was the respondent's contention that the LCIA did not qualify as a 'competent authority' in this context, and as a result, its award should not be recognised. In response, the applicant pointed out the LCIA's reputation as a renowned arbitral institution, and as a result asked the court to take judicial notice of the status of the LCIA.

The court dismissed the respondent's opposition regarding the status of the LCIA and went ahead to grant the applicant leave to enforce the arbitral award. In the High Court's view, 'Pacta Sunct Non-Servanda means agreements must be honoured. The fact that both parties consented to and fully participated in the arbitration proceedings is . . . res ipsa. No tenable challenge has been mounted against the process.'

33 High Court decision delivered with Suit No. MISC/0183/2018 (delivered on 21 December 2019).

Waiver of right to arbitrate and applications for stay of proceedings

The right to arbitrate is preserved for those whose desire to arbitrate is evident and manifest in their conduct, and not those asserting this right in a cavalier manner, only 'shouting' arbitration as an afterthought and seeking a reference to arbitration as a way of putting a spanner in the works of the other party. At various levels, the court's policy is not to grant a stay of proceedings to persons who do not act timeously. These persons are considered as having waived their right to arbitrate.

In *Carbon Commodities DMCC v Trust Link Ventures*,[34] the Court of Appeal was concerned with the circumstances under which a party to an agreement containing an arbitration clause could be said to have waived their right to arbitrate.

In this case, the parties entered into a contract for the sale and supply of fish. The supplier was Carbon Commodities. The recipient was Trust Link Ventures. Difficulties arose between the parties in the implementation of the contract. The plaintiff alleged it had fulfilled its side of the bargain. The defendant expressed dissatisfaction with the way the plaintiff provided the service. The defendant alleged that the plaintiff supplied the wrong fish species, and the quantities supplied were not in line with the contract for the sale and supply of the fish. The contract for the sale and supply of fish contained an arbitration clause that provided that any dispute arising out of or in connection with the agreement shall be submitted to an arbitral tribunal with a seat in Zurich.

The plaintiff, in obvious breach of the agreement, commenced an action in court. The defendant who was required to take the initial steps of moving to have the action referred to arbitration failed to do so. The defendant filed a motion for discovery (which was successful); a motion for security for costs (which was not successful); an initial statement of defence that did not challenge the jurisdiction of the court; participated in mediation sessions under the Commercial Court rules with the aim of arriving at a mutual settlement; sought leave of court to amend its statement of defence; and introduced a counterclaim. All these steps were taken before the defendant asked the court to stay proceedings and refer the matter to arbitration.

The question before the High Court and subsequently the Court of Appeal was whether the parties by their mutual conduct had waived their right to resolve their disputes in arbitration. The High Court thought so. On an appeal to the Court of Appeal, the Court of Appeal further agreed with the High Court that the defendant had waived its right, by virtue of its conduct, to have the dispute resolved by arbitration.

34 Court of Appeal decision with Suit No. H1/63/2020 (delivered on 22 April 2021).

The Court of Appeal noted that considering the actions and conduct of the defendant, the defendant could not legitimately have argued that it had not waived its right to arbitrate considering the numerous steps that it took.

Unlike the *Carbon Commodities DMCC* case, in *Imperial Homes Limited v Victoria Bright & 2 Ors*,[35] the first defendant brought the existence of the arbitration agreement to the court's attention at the earliest opportunity, and both the High Court and the Court of Appeal upheld her right to have the matter referred to arbitration.

The plaintiff and the first defendant entered into an agreement for the development of residential properties. The first defendant provided the land, and the plaintiff was supposed to undertake the actual construction and pay the first defendant some money. Before the completion of the agreement, the first defendant terminated the agreement she had with the defendants. On the back of the termination, the plaintiff commenced legal action at the Land Division of the High Court, Accra. The first defendant immediately moved to have the matter referred to arbitration.

The plaintiff resisted the action on the grounds that there were other defendants to the action who were not party to the arbitration agreement between the plaintiff and the first defendant, and, as a result, it was inappropriate for the High Court to order for the referral of the suit to arbitration. The High Court agreed with the first defendant and referred the matter to arbitration. On an appeal to the Court of Appeal, the Court of Appeal upheld the High Court's ruling that the present case was one that ought to be referred to arbitration in line with the parties' explicit wishes and desires. On the question of whether it was appropriate to refer the dispute to arbitration considering that there were two other entities who were not parties to the agreement, the Court of Appeal noted that those two had not opposed the first defendant's application for the referral of the suit to arbitration. According to the Court of Appeal, 'the 2nd and 3rd defendants clearly must be aware of the 1st defendant/respondent's application for an order to stay the proceedings and to refer plaintiff's action to arbitration. They were perfectly entitled if they were so minded opposing the said application. They chose not to oppose the application.'

Challenge of an arbitral award

Section 58 of the ADR Act provides that 'an arbitral award may subject to this Act be set aside on an application by a party to the arbitration'. From the ADR Act, the capacity to challenge an arbitral award is confined only to a party to the arbitration.

35 Court of Appeal decision with Suit No. H1/114/2017 (delivered on 20 May 2021).

However, in *Ivy Bruku Whalley v Bolton Portfolio Limited*,[36] the Commercial Court, Accra took an interesting turn on the question of whether a non-party to an arbitration proceeding may take steps to have the arbitral proceedings set aside. The court answered the question in the affirmative. In this case, the arbitral award made various findings that affected the director position of the applicant who was not a party to the arbitration. It was on the back of the findings affecting his position as a director that the applicant sought to have the arbitral award set aside. In the view of the judge:

> *since the applicant herein even though a stranger to the arbitral proceedings stands affected and has evinced his desire to be heard, he is clearly clothed with capacity to have the arbitral award that affects him set aside and this he has done by hauling the two parties involved in this arbitral proceeding before this court to show cause why the award should not be set aside.*

Even though the judge relied on general principles of civil procedure that permit a stranger to a dispute to set aside an unfavourable judgment, sub silentio the judge was suggesting that the applicant ought to have been made a party to the arbitral proceedings possibly by way of a joinder and therefore given the opportunity for his side of the matter to be dealt with.

Revocation of an arbitrator's authority

In probably the first of its kind in Ghana, the Commercial Court, Accra was in *Adamus Resources Ltd v Prof. Albert K Fiadjoe & 3 Ors*[37] faced with an application seeking the revocation of the authority of an arbitral panel on the grounds of impartiality. Section 18 of the ADR Act sets out the grounds upon which an arbitrator's authority may be revoked. A party to the arbitration proceedings may apply for the revocation of the authority of the arbitrator.[38] To successfully remove an arbitrator, one or more of the following conditions must be present: (1) there is sufficient reason to doubt the impartiality of the arbitrator;[39] (2) arbitrator does not possess the qualification or experience required under the arbitration agreement or as agreed by the parties;[40] (3) the arbitrator is physically and mentally incapable or there is justifiable doubt as to

36 High Court decision with Suit No. CM/MISC/0385/2021 (delivered on 23 June 2021).
37 High Court decision with Suit No. CM/Misc/0740/2021.
38 Section 18(1) of the Act.
39 Section 18(2)(a) of the Act.
40 Section 18(2)(b) of the Act.

the arbitrator's capability;[41] an (4) the arbitrator has refused or failed to conduct the arbitral proceedings properly or use reasonable despatch in conducting the proceedings or making an award.[42]

In the *Adamus Resources Limited* case, the applicant was unhappy with the conduct of the arbitrators – specifically some decisions that the arbitrators had made. These decisions included the decision of the arbitrators to grant interim measures against the applicant, effectively preventing the applicant from selling and exporting gold. In the view of the applicant, the grant of the interim measures was not necessary as damages would have sufficed. The applicant also alleged that the arbitrators compelled it to respond to a legal argument when it had explained to the arbitral tribunal that its lawyer was indisposed, and therefore was not available for the proceedings. The applicant further alleged that the arbitrators failed to stay proceedings even when the arbitrators were aware of proceedings to revoke their authority. The Commercial Court, running the applicant's complaints through the test set out in section 18(2) of the ADR Act, concluded that (1) the applicant had failed to convince the court regarding its claim of impartiality against the arbitrators; (2) nothing on record showed that the arbitrators were incapable of conducting the arbitration; and (3) nothing on record suggested that the arbitrators had failed to conduct the arbitration proceedings properly.

The court recognised that while the applicant was unhappy with the way the arbitrators exercised their discretion, that was not sufficient grounds for the applicant to seek the removal of the arbitrators. In the words of the court, 'the Applicant might have been aggrieved by the rulings in the proceedings, rightly or wrongly and his right to challenge is given the [ADR] Act. I however do not see a demonstration by the Arbitrators of prejudice against the Applicant, neither do I see them being biased.'[43]

Conclusion

Arbitration as a dispute resolution method continues to serve as a formidable alternative to dispute resolution offered by national courts. This growth is in some measure due to the symbiotic relationship between the traditional and formal dispute resolution methods. At the level of the national courts as well, deliberate attempts are being made to incorporate arbitration in the dispute resolution process – even in cases where the parties did not opt for arbitration. The ADR Act makes provision for the High

41 Section 18(2)(c) of the Act.

42 Section 18(2)(a) of the Act.

43 See pages 18 to 19 of the *Adamus* decision.

Court to support the arbitral process in matters such as the taking and preservation of evidence, the grant of interim injunctions, and the appointment of a receiver.[44] The growth of the arbitration practice is further evidenced by the steady growth in case law and judicial pronouncements on a variety of points. These points include the challenge of arbitration awards, the revocation of the authority of arbitration, and the waiver or otherwise of arbitration agreements and clauses.

44 Section 39 of the Act.

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AudreyGrey is a legal, tax and professional services firm providing corporate law, tax advisory and compliance, company secretarial, regulatory compliance and strategic advisory services to local and international corporations looking to enter Ghana. Our areas of focus include corporate and commercial law, taxation, labour, immigration, compliance and insolvency law as well as the accounting and finance aspects of these functions. Our team aims to create value for our clients and ensure them a seamless entry into preferred markets while ensuring that they operate at their optimal capacity. We are licensed regulated by the General Legal Council.

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IN SUMMARY

While Kuwaiti courts in general honour parties' agreements to arbitrate, in 2021 the Kuwaiti Cassation Court handed down a couple of judgments that deviated from this well-established practice. The two surprising judgments were issued by the Cassation Court in disputes involving commercial agencies and construction contracts, respectively. In both cases, the Court set aside the arbitration agreement and assumed jurisdiction over the disputes. This article will shed light on those two judgments and provide a general overview of arbitration in Kuwait, with a focus on the conditions required to be satisfied for a valid arbitration agreement and the enforceability of foreign awards.

DISCUSSION POINTS

- Arbitration agreements under Kuwaiti law
- Arbitration in disputes arising from commercial agencies and distributorships
- Article 702 of the Kuwaiti Civil Code and capacity to enter into arbitration agreements
- Apparent authority, subsequent approval and estoppel
- Enforcement of arbitral awards

REFERENCED IN THIS ARTICLE

- Court of Cassation, Challenges No. 3784, 3980 of 2019, Commercial Circuit No. 4, dated 27 May 2021
- Court of Cassation, Challenge No. 3963 of 2019, Commercial Circuit No. 2, dated 7 February 2021
- Court of Cassation, Challenge No. 2195 of 2018, Commercial Circuit No. 4, dated 28 March 2019

Overview of arbitration in Kuwait

Unlike certain other Arab countries, Kuwait did not adopt the UNCITRAL Model Law on International Commercial Arbitration, nor did it enact a separate piece of legislation to regulate arbitration. Instead, arbitration is still governed by specific provisions under the Kuwaiti Civil and Commercial Procedures Law (KCCPL),[1] namely articles 173 to 188. However, as the KCCPL was promulgated more than 40 years ago, and its provisions regulating arbitration are not exhaustive or updated, there is a legislative vacuum with regard to various issues relating to arbitration, which are left to be resolved by Kuwaiti courts (which are generally influenced by the jurisprudence of Egypt and other civil law system countries).

We will focus in this section on (1) the arbitration agreement (and its requirements as set out in article 173 of the KCCPL) and (2) the conditions of enforcement of local and foreign arbitral awards.

Arbitration agreement

Kuwaiti law generally permits parties to an agreement to select arbitration as a dispute resolution mechanism. Arbitration agreements are regulated under article 173 of the KCCPL. Article 173 lists the various formalistic requirements to be satisfied and the matters that may be subject to arbitration. It provides:

> *Arbitration may be agreed upon in respect of a particular dispute, and likewise, in respect of all disputes arising from the execution of a specific agreement.*
>
> *Arbitration shall not be proved except in writing.*
>
> *Arbitration shall not be permissible in respect of matters where conciliation is not permitted; and arbitration shall not be valid except in respect of a party who has the capacity to dispose of the litigated right.*
>
> *The subject matter of the dispute must be determined in the arbitration agreement, or during the proceedings, even if the arbitrator is authorized to act as amiable compositeur, otherwise arbitration shall be void.*
>
> *Courts shall not assume jurisdiction over the disputes which were agreed to be referred to arbitration. The plea for lack of jurisdiction may be relinquished, either expressly or implicitly.*
>
> *Arbitration shall not include summary matters unless otherwise expressly agreed upon.*

1 Decree-Law No. 38/1980 Promulgating the Code of Civil and Commercial Procedures.

It appears from the above that article 173 provides for certain requirements to be satisfied in order for an arbitration agreement to be valid. Similar to any other contract, arbitration requires valid consent by both parties (that is, valid offer and acceptance).[2] While one may argue that article 173 does not require the arbitration clause to be in 'writing' in order to be valid, and that writing is only required for evidentiary purposes, limiting the means of proof of the arbitration agreement to writing suggests that an oral arbitration agreement, while theoretically possible, would not be feasible in the absence of any written evidence. For instance, proving an arbitration agreement's existence by witness testimony is not a viable option in view of the clear text of article 173, which expressly states that the existence of an arbitration agreement shall only be proved by evidence in 'writing'.

Another essential requirement is defining the scope of the arbitration agreement. Under article 173, the arbitration agreement must specify the matters to be referred to arbitration. Therefore, the arbitration agreement may not be drafted with any ambiguity as to the matters covered by it. In the absence of such determination in the arbitration agreement, the parties may agree on the scope of the arbitration during the proceedings, which is likely to take place at the initiation of the proceedings (eg, request for arbitration, terms of reference, etc).

Another issue that arises in this context is arbitrability (ie, whether the disputed matter may be subject to arbitration). In this regard, article 173 explicitly excludes certain disputes from being resolved through arbitration, that is matters where conciliation is not permitted. However, certain matters that may be subject to conciliation are non-arbitrable, including but not limited to criminal and labour matters. It is also worth noting that, unlike some other Arab countries in the region (eg, Lebanon), it is a well-established jurisprudence in Kuwait that disputes arising from commercial agency and distributorship contracts may be referred to arbitration.

In view of the above, if a contract provides for arbitration and the requirements and conditions set forth under article 173 are satisfied, Kuwaiti courts should, as a general premise, decline jurisdiction over disputes arising under a contract that provides for referral of disputes to arbitration. Yet, there are various complications that may arise out of the arbitration agreement and that may lead the Kuwaiti courts to exercise their jurisdiction over the dispute and set aside the agreement to arbitrate, as will be further explained below.

2 Offer, acceptance and general conditions of contract are addressed in articles 31 to 52 of Decree-Law No. 67/1980 Promulgating the Civil Code.

Enforcement of arbitral awards

While the KCCPL does not distinguish between domestic and international arbitration, nor does it include a specific definition of domestic and foreign arbitral awards per se (as is the case of numerous civil law countries), yet it draws a distinction between foreign and domestic arbitral awards in terms of enforcement and challenge. In this regard, it is inferred from article 200 of the KCCPL that the Kuwaiti legislator adopted a territorial approach (ie, the seat of arbitration and the place of issuance of the arbitral award) rather than an objective (ie, a dispute involving foreign and local parties or relating to cross-border transactions, etc) in order to distinguish between local and international arbitral awards. Under article 185 of the KCCPL, awards issued in Kuwait shall be enforced through a request submitted to the President of the Court, after depositing the award with the Clerks Department, in order for the award to be stamped with the writ of execution.

Enforcement of foreign arbitral awards (ie, those issued outside Kuwait) is governed by the provisions of the KCCPL relating to the enforcement of foreign judgments and awards; namely articles 199 and 200, as well as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the Convention).[3] Kuwait is a signatory to the Convention, and as such, the courts of Kuwait will (subject to articles 199 and 200 of the KCCPL, as discussed below) recognise and enforce arbitral awards rendered in other jurisdictions that are also signatories to the Convention, in a manner similar to the enforcement of a foreign judgment, through the submission of an application to the Kuwaiti courts without the latter re-examining the merits of the dispute.

Article 199 of the KCCPL states that foreign judgments will be enforced by the Kuwaiti courts if the following conditions are satisfied:

- the courts of the jurisdiction in which the judgment was issued must afford reciprocal treatment to judgments issued by Kuwaiti courts;
- the judgment was issued by a court of competent jurisdiction according to the law of the jurisdiction in which it was issued;
- the parties were duly summoned to appear and were duly represented at the proceedings;
- the judgment is res judicata according to the law of the jurisdiction in which it was issued;

3 New York Convention on the recognition and enforcement of foreign arbitral awards became part of the Kuwaiti legal system by virtue of Decree-Law No. 10 of 1978.

- the judgment does not contradict any prior judgment or order rendered by Kuwaiti courts; and
- the judgment does not contain anything in conflict with general morals or public order of Kuwait.

Pursuant to article 200 of the KCCPL, the provisions applicable to foreign judgments as contained in article 199 (as referred to above) also apply to foreign arbitral awards. To satisfy the 'reciprocity' requirement, the foreign jurisdiction in which the arbitral award is rendered must also have ratified the Convention (or be party to another treaty with Kuwait providing for reciprocal enforcement of arbitral awards). In addition to the conditions listed above, article 200 provides that the subject matter of the dispute must be a matter that may be referred to arbitration under Kuwaiti law and the award must be enforceable in the jurisdiction in which it was rendered.

As mentioned above, the Kuwait Cassation Court (the highest court in Kuwait) requires, in accordance with article 4 of the Convention, the party seeking the execution of the foreign arbitral award to submit certain documents along with its application for enforcement, which are as follows:

- the original version of the award or a true copy thereof;
- the original arbitration agreement; and
- if the award or the arbitration agreement, or both, are not drawn up in Arabic, a translation of the documents must be provided to Kuwaiti courts. The translation must be certified by an official or sworn translator or one of the members of the diplomatic or consular corps.

While providing the Court with the above-noted documents would create a legal presumption that the award should be enforceable, as per article 5 of the Convention, the party against whom the execution action is filed may challenge the enforcement of the arbitral award and consequently circumvent such presumption (ie, the automatic enforceability of the foreign award) by providing the Court with evidence showing any of the following:

- the parties to the arbitration agreement (according to the relevant law) lacked capacity, or said agreement is not valid under its governing law or, failing any indication in this respect, under the law of the country where the award was rendered;
- the party against whom the award is being enforced was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present its case;

- the award is ultra petita, as it examined a different issue not contemplated by, or not falling within, the terms of the arbitration agreement. Having said this, it should be noted that if the relief granted in respect of the matters that were agreed to be arbitrated can be dissociated from those that fall beyond the scope of the arbitration agreement, the former may still be recognised and enforced separately;
- the composition of the arbitral tribunal, or the arbitration proceedings were not in accordance with the parties' agreement, or in the absence of such agreement, were not in accordance with the requirements under the law of the seat of arbitration; or
- the award has not yet become binding on the parties, or has been set aside or suspended by a competent court, or under the law of the country in which that award was rendered.

The recognition and enforcement of an arbitral award may also be refused if the competent courts in the country where recognition and enforcement is sought, find that:

- the subject matter of the dispute is not arbitrable under the law of that country; or
- the recognition or enforcement of the award would be contrary to the public policy of that country.

Of relevance in this regard, a question arose before the Kuwaiti courts as to the application of the conditions set under article 199 of the KCCPL, particularly that the foreign arbitral award must not contradict a prior judgment issued by a Kuwaiti court. In a dispute raised before a Kuwaiti court in 2016 between an Italian company and a Kuwaiti counterparty, the Court of Appeals issued a judgment nullifying the arbitration agreement, while the Italian defendant in the Kuwait court litigation was at the same time pursuing arbitration before the ICC. The arbitral tribunal in the ICC proceedings issued an award in favour of the Italian entity and a sister company, pursuant to which an enforcement action was initiated before the Kuwaiti courts on behalf of the sister company, seeking enforcement of the arbitral award on the basis of the Convention. The Kuwaiti party challenged the enforcement on the basis of article 199 arguing that there existed a previous judgment issued by a Kuwaiti court which contradicts the arbitral award.

The matter was appealed before the Cassation Court, which concluded that as the sister company was not a party to the judgment issued by the Kuwaiti courts, the Kuwaiti judgment was not binding on it and consequently, the Court ordered the enforcement of the award. Of particular importance, we note that the Court of Cassation ruled that a judgment issued by the Kuwaiti courts must have been

issued between the same parties and regarding the same dispute, in order to block the enforcement of a conflicting foreign arbitral award. In this regard, the Cassation Court emphasised the following:

> *In addition, it is established in the jurisprudence of this Court that judgments are only binding on the parties thereof and that such binding effect is a public order matter; therefore, notwithstanding that the condition that the foreign arbitral award should not contradict with any judgment previously issued by a Kuwaiti court was provided for in the Kuwaiti procedural law only and without any reference to the same in the Convention's articles, however, it comes as part of the condition set by the Convention that the arbitral award should not contain anything that violates the public order, as the contradiction between the foreign award and the domestic judgment is a form of violation of the public order in the country of the judge where the execution is requested, because it negates the presumption of validity and truth which are the main features of the national judgment, on the basis that issuing a judgment which contradicts a previous judgment entails a denial of the res judicata nature of this judgment which must be respected and abided by, and which constitutes a legal error and a violation of the public order. Accordingly, the contradiction between the arbitral award and a judgment or order previously issued in the State of Kuwait does not occur except when the award contradicts a previous judgment that was rendered in the same dispute that the arbitral award adjudged, as this contradicts the res judicata nature of such judgment in a way that makes their execution together impossible.*[4]

State sovereign immunity and arbitration

The general premise in Kuwaiti practice is that administrative contracts concluded with the government should be governed by Kuwaiti laws and subject to the exclusive jurisdiction of Kuwaiti courts. In certain sectors, such as public–private partnership (PPP) projects, the governmental authority may agree on arbitration as the dispute resolution mechanism in accordance with the PPP Law.[5] Also, governmental entities entering into agreements with foreign parties with regard to a transaction or a project to be implemented outside Kuwait may agree to foreign law and international arbitration.

4 Cassation Court, Challenge No. 2195 of 2018, Commercial Circuit No. 4, Dated 28 March 2019.

5 Article 29 of the Public Private Partnership Law No. 116 of 2014.

In this vein, a question arises regarding the governmental entities' sovereign immunity under Kuwaiti law. Similar to numerous jurisdictions around the world, in order to answer this question a distinction should be made between 'immunity from jurisdiction' and 'immunity from execution'. On the one hand, Kuwaiti laws do not protect governmental entities from being sued by private investors before Kuwaiti courts or (where, and to the extent permitted) arbitral tribunals. For example, a governmental entity may be validly involved as a party in arbitration proceedings relating to a PPP agreement, or a project or transaction implemented outside Kuwait. However, under Kuwaiti law, the state's private and public assets enjoy sovereign immunity from enforcement that may not be waived except by a special law. Consequently, even if a governmental entity is successfully sued by way of arbitration or before the courts, the foreign investor may not attach the assets of the state located in Kuwait based on the arbitral award or court judgement issued in its favour. However, attaching the state's assets outside of Kuwait may be possible subject to the laws of the jurisdictions where such assets are located. State-owned companies are also subject to the same sovereign immunity regime as governmental bodies. That said, it should be noted that Kuwaiti government ministries and other public entities usually honour their obligations by participating in agreed arbitration proceedings and executing unfavourable awards.

Recent trends of the Kuwaiti Cassation Court

The risk befalling arbitration agreements in commercial agency disputes (Cassation No. 3963 of 2019 Commercial Circuit No. 2, Dated 7 February 2021)

In 2015, a Kuwaiti agent (the claimant) dealing in pharmaceutical and medical products initiated litigation proceedings before local courts seeking statutory compensation from both a German pharmaceutical company (the principal) and its newly appointed Kuwaiti agent (the new agent), as a result of the allegedly unjustified termination of the agency relationship. The claimant argued before the Kuwaiti courts that the collusion between the principal and the new agent led to the termination of its agency agreement, which resulted in substantial material and moral damage. Accordingly, the claimant requested the Kuwaiti courts to compensate it for the sustained damage in accordance with articles 282 and 284 of the Kuwaiti Commercial Code, which provide

the local agent with fair compensation upon termination of the relationship with the foreign principal, even if the termination is the result of the expiry of the term of the agreement.[6]

The Court of First Instance recognised the claimant's and principal's agreement on arbitration as the chosen dispute resolution mechanism and refrained from exercising its jurisdiction over the subject dispute. Unsatisfied with the judgment, the claimant challenged the same before the Court of Appeals, which also upheld the parties' arbitration agreement and confirmed the first instance judgment.

The claimant challenged the Court of Appeals' judgment before the Kuwaiti Cassation Court raising various arguments, among which, that the arbitration agreement should be set aside as the subject matter of the dispute involves examining the liability of the new agent who is a non-signatory party to the arbitration agreement. The claimant further argued that the dispute against the new agent may not be dissociated from the dispute against the principal, and as such, Kuwaiti courts should have jurisdiction to hear the subject dispute in its entirety.

In 2021, the Cassation Court accepted the claimant's arguments, disregarded the arbitration clause and decided to refer the case back to the Court of First Instance to examine its merits. In its reasoning, the Cassation Court first explained the different concepts applicable to the arbitration agreement, inter alia, its consensual nature, that arbitration is an exceptional route of settling disputes, the importance of specifying the scope of the arbitration agreement and that the intention of the parties should be interpreted narrowly so as to limit the effect of the arbitration agreement to those parties only. The Court, then, ruled that the arbitration agreement, which was designed to settle disputes arising from a specific contractual relationship, should not be expanded to cover other disputes, even if the latter and the original disputes are interrelated. The Court added that if such interconnection cannot be dissociated, Kuwaiti courts must exercise their jurisdiction over all the subject disputes and set aside the arbitration agreement between the principal and the terminated agent. The Court reasoned its decision by noting that the settlement of interrelated disputes should have one solution only.

This new approach by the Cassation Court would, in our view, undermine arbitration agreements included in agency/distributorship agreements. Based on this decision, a terminated agent, intent on evading an already agreed arbitration arrangement, would only need to join the new agent to its compensation claim in order to set

6 Decree-Law No. 68/1980 Promulgating the Commercial Code.

aside the arbitration agreement and force the foreign principal to pay compensation under Kuwaiti laws, notwithstanding the agreement to refer disputes to foreign arbitration and the application of a foreign law.

The above-noted judgment also runs contrary to the earlier principles established by the Kuwaiti Cassation Court.[7] In similar previous cases, the Cassation Court concluded that the preliminary issue to be disposed of at the outset is whether a former agent is entitled to statutory compensation and such issue can only be determined on the basis of the contract between the former agent and the principal, and by the dispute resolution mechanism provided for in the said contract, be it arbitration or otherwise. Further, the courts usually refrained from addressing the collusion claim by the former agent against the new agent on the basis that it is prematurely filed pending the determination of the principal's liability. In other words, the arbitral tribunal would need first to adjudicate the claim under the main agency contract and whether the agent is entitled to statutory compensation. Subsequently, and depending on the outcome of the arbitral process, the state courts would then examine the issue of whether or not the new agent colluded with the principal and whether it is jointly responsible with the principal to compensate the terminated agent.

This recent reversal of position by the Cassation Court and the obvious contradiction between its settled position and its recent judgment on interrelated agency disputes make it imperative that the Court unifies its approach and stick to its earlier position allowing for the settlement of agency or distribution disputes by arbitration if agreed by the parties. This unification of approach is desirable as, while the precedents of the Cassation Court are not legally binding on the lower courts, the latter use Cassation Court judgments as a guide in interpreting and applying the law.

Construction contracts and arbitration agreements (Challenges No. 3784, 3980 of 2019 Commercial Circuit No. 4, Dated 27 May 2021)

In 2017, a lower-tier subcontractor (sub-subcontractor) brought an action against the subcontractor seeking the recovery of its unpaid fees and dues and the release of its bank guarantees and tax retention. The Court of First Instance held that it has no jurisdiction to review the subject claim as the relevant subcontract agreement

7 Court of Cassation, Challenges No. 2175 and 2191 of 2013, Commercial Circuit No. 3, Dated 19 January 2015.

is back-to-back with the agreement concluded between the main contractor and subcontractor, which includes an arbitration clause. The Court of Appeals upheld the first instance judgment and confirmed its lack of jurisdiction.

The lower-tier subcontractor challenged the appellate judgment before the Cassation Court on the basis that the subcontractor and the main contractor challenged the jurisdiction of the Kuwaiti courts only after submitting their defense on the merits. According to the lower-tier subcontractor, this constituted a relinquishment of their right to challenge the jurisdiction of Kuwaiti courts.

In 2021, the Cassation Court cancelled the appellate judgment and exercised its jurisdiction over the dispute. In its decision, the Cassation Court explained that the fact that the low-tier subcontract was back-to-back was not sufficient in and of itself to include disputes arising thereunder within the ambit of the arbitration agreement in the subcontract agreement. The Cassation Court further considered that the extension of the arbitration agreement to the low-tier subcontract would require explicit consent of the contracting parties. The Court justified its reasoning on the following legal grounds: (1) the independence of the legal relationship between the parties; (2) privity of contract; and (3) that the arbitration agreement may not be transferred from one contract to another in the above-noted scenario.

The impediment to arbitration arrangements under article 702 of the KCC

As discussed above, Kuwaiti courts generally honour the parties' agreement to arbitrate and decline their jurisdiction to hear the disputes agreed to be subject to arbitration. Yet, litigants sometimes attempt to avoid arbitration by raising or claiming the nullity of the arbitration agreement, relying in this respect on article 702 of the Kuwaiti Civil Code (KCC), which stipulates the following:

> *There must be a special mandate for every disposition which is not an act of management, particularly for donations, sale, composition, mortgage, admission and arbitration, as well for making an oath and representation before Courts.*

Article 702 is interpreted to require a 'special mandate' in relation to the authority to bind a company to arbitration. The Kuwaiti Court of Cassation has ruled on occasions that article 702 of the KCC requires a special mandate to agree to arbitration, not being a typical act of management for which the usual general authorisation would suffice. Therefore, the party who seeks to avoid arbitration sometimes relies on the

above-noted article, arguing that the person who agreed to arbitration and signed the subject agreement, which includes the arbitration clause lacked the special mandate referenced in article 702.

That said, it should be noted that there are many other precedents where the Kuwait Cassation Court recognised the validity of the arbitration agreement notwithstanding any alleged deficiency in the capacity of the person signing it on behalf of the company, based on the following legal theories:

Apparent authority

Apparent authority is a well-established legal principle in Kuwaiti jurisprudence. The Kuwaiti Court of Cassation has confirmed on a number of occasions that the concept of apparent authority was developed to align with the development of commercial transactions and in order to preserve the stability of legal positions based on apparent factors (eg, Court of Cassation judgment No. 204 of 1987 rendered on 22 February 1988).

Apparent authority applies where an agent acts on behalf of a principal without having the necessary authorisation to carry out such action, or where the agent acts in a manner that exceeds the limits of his or her mandate. The Court of Cassation has confirmed on a number of occasions (including in its judgment in Case No. 489 of 2000 rendered on 11 May 2002) that the following three conditions should be satisfied in order to establish apparent authority:

- the agent acts on behalf of the principal without authorisation;
- the third party dealing with the agent acted in good faith and was under the assumption that the agent was acting on behalf of the principal; and
- the existence of external factors attributed to the principal enhancing the third party's assumption that there is a valid agency.

In determining whether the aforementioned conditions are met, Kuwaiti courts will look into all of the surrounding facts of the dispute. The burden of proof as to whether the three conditions are satisfied will be on the party invoking apparent authority and would be a question of fact which would be determined at the courts' discretion.

Subsequent approval

Ratification of acts initially carried out without authorisation is recognised under Kuwaiti law. In this regard, article 61(1) of the KCC provides as follows:

> *If a person concludes a contract, on behalf of another without representation therefrom, or exceeds the limit of his representation by concluding the contract, the consequences of this contract shall not be accrued to the principal, unless approved by him according to law.*

Based on the above, if an agent (eg, manager, chairman or an officer of a Kuwait company) enters into an agreement with a third party on behalf of the company he or she represents but without its express approval, and the company approves the agreement at a later stage, such agreement between the company and the third party would be considered valid as from the initial date of entering into the agreement. The Kuwaiti Court of Cassation confirmed this principle in several judgments (see, among others, Judgment No. 28 of 1988; rendered on 27 February 1989).

Depending on the facts, a possible argument confirming the subsequent approval could possibly be based on the amendment of the original agreement (containing the arbitration clause) and its implementation over several years. In this vein, the Kuwaiti Court of Cassation decided that the implementation of the agreement over several years, during which the company received money based on the terms of the agreement without challenging the authority of the person signing on its behalf, may be interpreted as subsequent approval of both the agreement and the arbitration clause contained therein (Court of Cassation Case No. 225 of 2005 issued on 29 April 2006).

Estoppel

Kuwaiti laws do not expressly provide for the estoppel concept. However, there are certain rules in relation to the conclusion of agreements and parties performing them in good faith and equitable manner, which are akin to the concept of estoppel. In this regard, there are precedents by the Kuwaiti Cassation Court that recognised such equitable principles, thereby paving the way for the application of the estoppel principle in practice.

As such, it is clear from the above that the Kuwaiti Cassation Court's position is contradictory at times. On the one hand, in some instances the Court nullified the arbitration agreement for lack of the special authorisation to sign it in accordance with article 702 of the KCC. On the other hand, the Court at other times relied on different legal principles such as apparent authority and subsequent approval in order to maintain the validity of the arbitration agreement. The increasing number of judgments upholding the latter position suggests that the Kuwaiti courts are favouring the implementation of agreed arbitration agreements in circumstances where it is deemed that article 702 is being misused or manipulated.

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Ahmed has been included in *The Legal 500 Hall of Fame*, which highlights individuals who have received constant praise by their clients. In *Chambers and Partners*, Ahmed is highlighted for his 'strong litigation acumen'. Sources explain that he is 'one of the deans of the Kuwaiti Bar'.

Ahmed has published various articles in prestigious publications such as the Oxford Business Group and the *International Financial Law Review* (*IFLR*). He has lectured in many workshops and spoken at various conferences, the most recent being the ICC Conference held in Kuwait in January 2020 and GAR Dubai in November 2021.

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IN SUMMARY

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

DISCUSSION POINTS

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

REFERENCED IN THIS ARTICLE

- Lebanese Code of Civil Procedure
- Lebanese Code of Obligations and Contracts
- Lebanese Code of Commerce
- Law No. 48 Regulating Public–Private Partnerships
- Lebanese Court of Cassation, Decision No. 14/2014 dated 25 January 2014
- Court of Cassation, First Chamber, Decision No. 56 date 24 October 1958

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]

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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).

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

6 Official Website: https://www.ccib.org.lb/en/.

7 Official Website: http://ciarb-lebanon.org/.

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.

8 For example, Beirut Court of Appeal, Decision No. 767/2008 dated 20 May 2008, Lebanese Court of Cassation Decision No.14/2014 dated 25 January 2014.

- Contracts for commercial representation. Article 5 of Decree Law No. 34, dated 5 August 1967, provides for the exclusive jurisdiction of Lebanese courts in respect of disputes arising out of commercial representation agreements. However, it should be noted that in recent years the Lebanese courts have adopted a more permissible stance towards the arbitrability of such disputes in specific circumstances.[9]

Arbitrators: appointment and challenges

Appointment of arbitrators

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

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

Challenge of arbitrators

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

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

- if an arbitrator was a legal representative or an agent of one of the parties or one of the parties appointed him or her as an arbitrator in a previous case;[13]

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.

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

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

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

The parties' representatives

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

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

Intervention of domestic courts

Domestic courts' support to the arbitral procedure

The President of the court of first instance may act as the judge in support of arbitration if required. Such support includes the appointment of arbitrators where the parties have failed to designate an arbitrator or where designation of an arbitrator is not carried out by the relevant arbitral institution. The Lebanese legislation further

14 Article 120(6) LCCP.

15 Article 770 LCCP.

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).

16 Article 810 LCCP.
17 Article 783 LCCP.
18 Article 812 LCCP.
19 Article 779 LCCP.

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

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

Recourse against a decision on exequatur

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

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

Challenge of arbitral awards

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

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

20 Article 799 LCCP.
21 Article 800 LCCP.
22 Article 819 LCCP.

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

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

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

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

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

International investment agreements and other treaties with investment provisions

Private actors investing in Lebanon benefit from the protection of a number of international investment agreements and from other treaties with investment provisions, which provide for recourse to arbitration in case of dispute. These include 52 bilateral investment treaties (BITs) signed by Lebanon, 43 of which are in force.

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

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

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

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

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23 The ICSID Convention was signed by Lebanon on 26 March 2003 and entered into force in Lebanon on 25 April 2003.

24 The Arab Investment Agreement was signed by Lebanon on 26 November 1980 and entered into force on 7 September 1981. In 2019, Lebanon ratified (by Law No. 120 dated 29 March 2019) the 2013 amendments to the 1980 Arab League Investment Agreement (Unified Agreement for the Investment of Arab Capital in the Arab States).

25 The OIC Investment Agreement entered into force in February 1988.

26 The EC–Lebanon Association Agreement was signed on 17 June 2002 and entered into force on 1 April 2006.

27 The EFTA–Lebanon FTA was signed on 24 June 2004 and entered into force on 1 January 2007.

28 The Lebanon–US TIFA was signed on 30 November 2006 but has not entered into force.

29 The ICIEC Agreement was signed by Lebanon on 26 December 1993.

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

The Lebanese Investment Law[30]

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.[31] It applies to investors willing to benefit from its provisions.[32] Lebanon's pro-investment arbitration position could also be inferred from several factors. In addition of the Lebanese courts being generally supportive and respectful of arbitration proceedings, all the Lebanese BITs contain arbitration clauses, and the Lebanese government is open to arbitration in general as governmental entities tend to include arbitration clauses in the contracts they sign with investors.

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

In the case of a dispute between IDAL and a foreign or national investor,[33] 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.[34] Under the Investment Law, a number of features pertaining to arbitration must be agreed upon in advance.

30 Law No. 360 of 16 August 2001.

31 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.

32 ibid.

33 '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.'

34 Article 18 of the Investment Law.

Lebanon has been the subject of a few investor-state investment disputes.[35] However, as the country is currently facing an unprecedented economic and financial crisis, this will likely lead to a significant increase in investment-related disputes.

Recent developments in international arbitration in Lebanon

Arbitration under the new Public–Private Partnerships Law

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

This law was enacted ahead of the CEDRE Conference[36] (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.[37]

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.[38]

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35 There have been five recorded cases in which Lebanon has acted as respondent, with the first being brought before the Cairo Regional Centre for International Commercial Arbitration (CRCICA) in 2000 (*Eastern Company v Lebanon*), based on publicly available information from the UNCTAD website, available at: <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/116/lebanon/investor>.

36 CEDRE is an acronym for 'Conférence Economique pour le Développement par les réformes et avec les entreprises' (Economic Conference for Development through Reforms and with Businesses).

37 Rania Ghanem, '11.8 billion promised at the Paris CEDRE Conference' (Businessnews.com.lb, 6 April 2018) available at: http://www.businessnews.com.

38 Article 10(15) of the PPP Law.

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

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

Arbitration in the Lebanese oil and gas legislation

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

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

Article 38 of the model EPA provides that the parties shall submit any dispute, controversy or claim arising out of or relating to the EPA to binding arbitration, subject to the other provisions of the EPA, and if the dispute, controversy, or claim cannot be resolved during a negotiation period specified in previous articles.

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

a) The dispute shall be settled by arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce, hereinafter referred to as the 'ICC Rules of Arbitration';

b) The place of any arbitration pursuant to these provisions shall be Paris, France;

c) The law applicable to the merits of the dispute shall be Lebanese law;

d) The language of the arbitration shall be English, and the English version of this EPA and the decree no 10389/2013 (PAR) may be used in such arbitration to the extent there is no conflict with the Arabic version;

e) The arbitral proceedings shall be confidential; and

f) The arbitral panel shall be composed of three (3) arbitrators to be appointed in accordance with the ICC Rules of Arbitration, provided that, upon mutual agreement of both Parties, the arbitration may be conducted by a sole arbitrator appointed pursuant to the ICC Rules of Arbitration.

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

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

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

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

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

Chinese investments are becoming more present in Lebanon. In fact, the Lebanese government has been very supportive of the One Belt One Road Initiative. The Lebanese Minister of Economy signed a memorandum of understanding (MoU) with

the government of China on 'joint promotion of cooperation in the framework of the Silk Road economic belt and the 21st Century Maritime Silk Road initiative'. The MoU was concluded during an official visit to China to participate in the China-Arab States Expo 2017 held between 5 and 7 September 2017 in the city of Yinchuan. The IDAL aims to encourage foreign investments in Lebanon including Chinese investments.

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

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

a) The settlement of disputes between a contracting party and an investor of the other contracting party (Art. 8 of the BIT):

There is an initial cooling off period of six months, during which the parties may engage in negotiations to settle their dispute. Should the negotiations fail, the competent court of the contracting party accepting the investment has jurisdiction to hear the case. However, if the dispute relates to the amount of compensation and cannot be settled through negotiations, either party may submit the dispute to an ad hoc arbitral tribunal under the UNCITRAL Arbitration Rules.

b) The settlement of disputes between contracting parties (Art. 9 of the BIT): Such disputes shall be settled through diplomatic channels within a period of six months, failing which, the dispute shall be submitted upon the request of either contracting party to an arbitral tribunal consisting of three members. If both arbitrators fail within two months after their appointment to reach an agreement regarding the chairperson, the latter shall be appointed by the President of the International Court of Justice upon request of either contracting party. Further, the arbitral tribunal shall issue its decision in accordance with the general principles of law, the provisions of the BIT, as well as the generally accepted principles of international law. Subject to other provisions agreed upon by the contracting parties, the arbitral tribunal shall determine the procedure of the arbitration.

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

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

Force majeure framework under Lebanese law

The general Lebanese legal framework does not provide a definition of 'force majeure'; rather, this was developed through jurisprudence and doctrine. Force majeure clauses are subject to contractual liberty under Lebanese law and parties can agree the types of event that qualify as force majeure events in their agreement.[39] Lebanese doctrine and jurisprudence confirm that force majeure extinguishes contractual liability when the applicable conditions are met and when it is relied on as a basis for the non-performance of obligations.[40] Article 342 of the Code of Obligations and Contracts 1932 refers to force majeure as an event that renders the performance of contractual obligations impossible and that 'the debtor must prove the existence [of]'.[41] In such cases, the obligations that were not performed due to said event are extinguished and no longer enforceable.[42]

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

- the event must have been unforeseeable;[43]
- the event must have been irresistible (ie, unavoidable);[44] and
- and the debtor must have had no hand in the event's occurrence (ie, the event must be unrelated to the debtor).

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

39 Mustapha Al-Awji, *Civil Law*, Vol 2 (tort liability), El-Halabi, 2009, p. 118.

40 ibid, p. 110.

41 Article 342 of the Code of Obligations and Contracts.

42 ibid, article 341.

43 Court of Cassation, First Chamber, Decision No. 56 dated 24 October 1958, *Baz*, 1958, p. 94, cited in Sader, *Volume on Torts*, 2008, p. 165, para. 4.

44 ibid.

However, parties may still contractually agree to abide by the terms of their contract even in cases of force majeure. This right is specifically enshrined in Law 160/20, which provides that parties to a contract can waive their right to benefit from the suspension of time limits, provided that such waiver is express and in writing.[45]

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.[46] 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.

45 Law 160/20, article 4.

46 Law No. 82 published in the Official Gazette on 18 October 2018. Zeina Obeid and Valeria Spagnolo, 'An alternative solution: judicial mediation', International Law Office, 10 January 2019.

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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. She 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.

Established in 1987 as Obeid Law Firm, Obeid & Partners 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 with offices in Dubai, Beirut and Paris 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 & Partners 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.

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Mozambique

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IN SUMMARY

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

DISCUSSION POINTS

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

REFERENCED IN THIS ARTICLE

- The Mozambican Arbitration, Conciliation and Mediation Law
- The 2004 Constitution of the Republic of Mozambique
- The Mozambican Code of Civil Procedure
- The Mozambican Mega-Projects Law
- The Mozambican Investment Law
- The Mozambican Administrative Procedure Law
- The Mozambican Mining Law
- The Mozambican Petroleum Law
- Mozambique's Rovuma Basin Decree-Law

Since 2010 and especially 2013, foreign direct investment has increased in Mozambique. According to the statistics released by the 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	2.678 billion
2019	2.181 billion

According to the UNCTAD's World Investment Report 2021, foregin direction investment (FDI) inflows into the country increased by 6 per cent to US$2.3 billion in 2020, up from US$2.2 billion in 2019, despite the global economic crisis triggered by the covid-19 pandemic. In 2020, the stock of FDI was about US$45.4 billion. The implementation of the US$20 billion investment led by Total (France) in the liquefied natural gas (LNG) project in the country slowed but continued, despite the pandemic. The evolution of FDI influx will depend on liquefied natural gas potential, in particular the investments planned by Anadarko and ExxonMobil in export terminals.

Mozambique's main foreign investors (in terms of currency inflows) are currently the United Arab Emirates, Mauritius, China, Italy, the United States, South Africa, Portugal and Turkey.

Mozambique has been attracting 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. The extractive industry sector has been the sector attracting the most FDI in the past two decades.

The international situation of the covid-19 pandemic, along with the political instability caused by armed insurgency in the country's northern province of Cabo Delgado, negatively affected the Mozambican economic situation in 2020 and 2021, restricting the normal development of projects with many relying on foreign investment and international travels. Nevertheless, private sector transactions are expected to increase in 2022.

Over the past two decades, the government has been consistently implementing reforms and sound economic policies to create a favourable business climate and attract foreign direct investment.

Mozambique's potential in terms of natural resources is undeniable, as well as clean energy sources. Also, there is an extensive area of arable land and a coastline of 2,700 kilometres with huge tourism potential, in addition to the potential for exploiting the respective resources.

Natural gas is expected to be the fastest growing fossil fuel until at least 2035. The Coral Sul FLNG project involving the design of a floating natural gas liquefaction unit, to be installed offshore, with a production capacity of 3.37 million tonnes per annum (MTPA) is an investment of US$7 billion and is expected to generate direct profits of around US$39.1 billion, of which the state will receive US$19.3 billion over 25 years. The first production of natural gas and respective liquefaction through the floating platform Coral Sul FLNG is scheduled for the second half of 2022. The hydrocarbon will be exported to different markets around the world, allowing the world demand for natural gas to be met, particularly at this critical time of energy transition, and the respective revenues could be used to implement other structuring and transformational projects in Mozambique.

The Mozambique LNG project led by Total (currently put on hold) envisages the development of the Golfinho-Atum field through the construction and operation of a natural gas liquefaction plant (LNG) with two liquefaction trains with a nominal capacity of just over 6 MTPA each, for the processing and sale of domestic gas, to enable the exploitation of 13.8 trillion cubic feet of recoverable natural gas over 25 years, two submarine pipelines and 23 production boreholes and infrastructures. The total investment is US$20 billion and it is expected to generate direct profits in the region of US$60.8 billion of which about US$30.9 billion will go to the state over 25 years.

Recently, in the energy sector the government announced the construction of the Mphanda Nkuwa Dam project. More or less at the same time, in December 2021, the Central Térmica de Temane power project and the Cuamba Solar Power Station project both reached financial close.

Reports state that in December 2021, the World Bank approved a US$300 million grant from the International Development Association (IDA) to support the government's efforts to expand access to energy and broadband services and to strengthen the operational performance of the country's electricity utility.

Also recently, the world's largest electric car company, Tesla signed an agreement to obtain materials used in electric batteries from graphite extracted at the Balama mine in the northern province of Cabo Delgado.

In 2021, Mozambique received a payment of US$6.4 million from the Forest Carbon Partnership Facility (FCPF) for reducing carbon emissions by 1.28 million tonnes since 2019, and was the first country to receive payment from a World Bank trust fund for this reason.

According to African Economic Outlook 2021, although there was a 2.1 per cent reduction of gross domestic product in 2020, African economic growth was projected to grow by 3.4 per cent in 2021. It is hoped that Mozambique will follow this growth projection, since Mozambique's gross domestic product is expected to grow by 2.3 per cent in 2021 and 4.5 per cent in 2022.

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 being outside Mozambique, alongside a relatively modern dispute resolution framework and a progressive familiarity and supportive attitude of judicial courts to arbitration.

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

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

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

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

International legal sources of arbitration

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

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

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

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

On the other hand, subject to the conditions laid down in the New York Convention, Mozambican courts must recognise and enforce arbitral awards rendered in other New York Convention contracting states and, conversely, arbitral awards rendered in Mozambique may also be enforced in other New York Convention contracting states. In this respect, it should be noted that Mozambique, under the terms permitted by the New York Convention, made a reciprocity reservation, in the sense that it reserves the right to apply the Convention only when arbitral awards have been rendered in the territory of another contracting state.

The enforcement of foreign arbitral awards rendered in New York Convention contracting states requires prior recognition proceedings subject to the New York Convention rules and limits and also to article 1094 of the Mozambican Code of Civil Procedure (approved by Decree-Law No. 44.129 of 28 December 1961, as amended by Decree-Law No. 1/2009 of 24 April 2009). These proceedings take place before the Supreme Court and, at least in accordance with the law, are 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 (the 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 the Investment Law (Law No. 3/93 of 24 June, regulated by Decree-Law No. 43/2009 of 21 August and as amended by Decree-Law No. 48/2013 of 13 September), 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, the United Kingdom, France, Germany, Italy, Mauritius, the Netherlands and Portugal. Investors may consider the structuring of their investments in Mozambique 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).

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 Organisation of Islamic Cooperation and, although it has not attracted much attention until recently, it provides a number of investment protections, including, with some differences from the 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, Bahrain, Egypt, Indonesia, Morocco, Nigeria, Qatar, Saudi Arabia, Turkey, the United Arab Emirates and Tanzania.

Internal legal sources of arbitration: multiple, general and sectoral legislation on arbitration

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

The Mozambican Arbitration Law

The central piece of the Mozambican arbitration legal framework is the Mozambican Arbitration Law, which allows for the possibility of choosing arbitration as a dispute resolution mechanism and sets forth the main general rules applicable to arbitrations located in Mozambique (article 68).

The Mozambican Arbitration Law is mostly in line with the UNCITRAL Model Law on International Commercial Arbitration (the Model Law) 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 to 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 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 sets out 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 upon 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 of 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 to 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 an 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 as 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 of specific grounds laid down in the law, particularly in the case of manifest disregard of procedures with an impact on the exercise of the rights of defence and due process and on the basis of 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 No. 7/2014 of 28 February, 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 administrative contracts, and contractual liability and torts of the public administration.

The rules established in Law No. 7/2014 are similar to those 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, regulated by Decree-Law No. 43/2009 of 21 August and as amended by Decree-Law No. 20/2021 of 13 April) 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.

The Investment Law expressly does not apply to the 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 former 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 Mega-Projects Law

Law No. 15/2011 of 10 August (regulated by Decree No. 16/2012 of 4 June) establishes the guidelines for the process of contracting, implementing and monitoring undertakings of public-private partnerships (PPPs), large-scale projects (LSPs) and business concessions (BCs). Article 39 expressly recognises the possibility of arbitration in PPPs, LSPs and BCs. 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) 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 of 10 August are applicable.

Furthermore, Decree No. 88/2017 of 29 December approved the Regulation of Radioactive Minerals, Resolution No. 5/2016 of 20 June and the Organic Statute of the National Institute of Minas Gerais, and Decree No. 22/2015 of 17 September defined the responsibilities, competence and organsiational structure of the National Institute of Mines.

The Petroleum Law

The Petroleum Law (Law No. 21/2014 of 18 August) confirms the possibility of entering into 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 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 method of appointing the arbitrators and the deadline for issuing an award.

As these rules set forth in the Petroleum Law are special in relation to the rules foreseen in Law No. 15/2011 of 10 August, the former should prevail over the latter.

The Rovuma Basin project framework

In the specific case of the Rovuma Basin project, Law No. 25/2014 of 23 September authorised the government to approve a specific legal and contractual framework for the Rovuma Basin project, 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, 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 Law No. 25/2014 and article 25 of Decree-Law No. 2/2014).

Finally, by Resolution No. 25/2016 of 3 October, 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 resolved by negotiation of the parties. Should the parties not resolve 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 same nationality as 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 the ICSID Convention. Like the Model Concession Agreement, the seat of arbitration is Geneva, the applicable substantive law is Mozambican law and the language of the arbitration is English.

Conclusion

Mozambique has developed arbitration as the preferred dispute resolution mechanism, following other modern arbitral legislation and opening the possibility of choosing this alternative dispute resolution mechanism.

A notable sign of this openness by Mozambique towards arbitration was the ratification of the most significant international conventions regarding arbitration, the 1958 New York Convention and the 1965 ICSID Convention, and the adoption of specific domestic regimes favourable to arbitration.

As demonstrated above, Mozambique's legal environment and framework is largely favourable to arbitration. The Mozambican state has opened the option to investors of mitigating legal risks by choosing arbitration as the 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 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, sectoral 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, the CACM has administered mainly domestic arbitrations. In April 2018, the CACM organised its first congress with the presence of Mozambican and Portuguese speakers. More recently, there have been some calls for a modernisation of the Mozambican Arbitration Law and there are reports that this reform may occur in the near future, strengthening Mozambique's pro-arbitration attitude.

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Filipe Vaz Pinto has been a partner of Morais Leitão since 2014. He co-heads the 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 the Executive Commission of the Portuguese Committee of ICC.

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

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

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Joana Galvão Teles is a managing associate and a member of the dispute resolution team, working in litigation and, essentially, in arbitration, including international arbitration, and acting in a variety of industry sectors, including banking, construction, energy, infrastructures, insurance, public-private partnerships, transfers of technology, among others. Joana is also attending the PHD programme at Nova School of Law.

Joana also acts as arbitrator. She participates as counsel and as co-counsel with other foreign teams in several international and national, institutional 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.

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Paula is highly experienced in the Mozambican market, having intervened in all areas of practice, advising both national and foreign investors, as well as national and foreign private companies.

Paula is a registered arbitrator with the Mozambican Centre for Arbitration, Conciliation and Mediation (since 2002) with relevant experience in commercial arbitration, as an arbitrator nominated by the parties and as chair of the arbitral tribunal, and she 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).

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Morais Leitão, Galvão Teles, Soares da Silva & Associados (Morais Leitão) is a leading full-service law firm in Portugal, with a solid back-ground 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, Mo-rais Leitão is headquartered in Lisbon, with additional offices in Porto and Funchal. Due to its network of associations and alliances with local firms and the creation of the Morais Leitão Legal Circle in 2010, the firm can also offer support through offices in Angola (ALC Advogados), Hong Kong and Macau (MdME Lawyers) and Mozambique (MDR Advogados).

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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 countries. 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.

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IN SUMMARY

Recent decisions of Nigerian courts have continued to demonstrate that Nigerian courts are arbitration friendly and would not set aside arbitration awards except in truly deserving circumstances. In one recent decision, Nigeria's highest court, the Supreme Court, deprecated the unfortunate trend whereby award debtors mount all kinds of, mostly frivolous and unsubstantiated, challenges to arbitral awards. In that case, the Supreme Court not only emphasised the need for parties to arbitration agreements to abide by the awards resulting from such agreements, but also highlighted the correlation between respect for and enforcement of international arbitration agreements and building and sustaining a globally respected dispute resolution system on the one hand and the attractiveness and competitiveness of Nigeria as an investment destination on the other. Although the statement of the Supreme Court in that case was an obiter dictum since the appeal was dismissed on technical grounds, the statement is nonetheless significant because an obiter dictum of the Supreme court carries a lot of weight and would likely influence the decision of the lower courts. Also, the fact that the Supreme Court made such an important policy statement in relation to arbitration is an indication of the Court's exasperation with the trend of frivolous challenges to arbitral awards.

DISCUSSION POINTS

- Supreme Court pronouncement on the need for litigants to respect arbitral awards
- Existence of an arbitration clause does not oust the jurisdiction of the court

REFERENCED IN THIS ARTICLE

- *Metroline (Nig.) Ltd. v Dikko*
- *Optimum C. &. P. Dev. Ltd. v Ake Shareholding Ltd.*
- *Bill & Brothers Ltd. v Dantata & Sawoe C.C. Ltd.*

Notable pronouncement of the Supreme Court of Nigeria on the need for litigants to respect arbitral awards

Metroline (Nig.) Ltd. v Dikko[1]

In this case, the appellants, Metroline Nigeria Limited, Sheba International Limited, Axis Consulting, Design Matrix Associates and Inter Arc Concept Limited entered a joint venture agreement referred to as JVA 2004 (JVA). Clause 8 of the JVA provided that 'any dispute or question in connection with the Joint Venture or this deed shall be referred to a single arbitrator to be appointed by the Chief Judge of the [Federal Capital Territory, Abuja] in accordance with the Arbitration Act/Law for the time being in force.' Disputes arose among the joint venture partners which caused the respondent, Alhaji Mukhtar Mohammed Dikko, to apply to the Chief Judge of the Federal Capital Territory, Abuja (FCT) to appoint a sole arbitrator pursuant to the JVA. The sole arbitrator that was initially appointed by the Chief Judge of the FCT for the reference recused himself because of some issues around bias, and the Chief Judge had to appoint another sole arbitrator who thereafter conducted the arbitration and published the final award dated 3 April 2017.

The appellants were unhappy with the award and applied to the High Court of the FCT to have the award set aside, while the respondent simultaneously applied to the same court to have the award recognised and enforced as a judgment of the court. The High Court delivered a consolidated judgment wherein it refused to set aside the award but recognised the award for enforcement in the same manner as its judgment. The appellants were also dissatisfied with the judgment of the High Court and appealed to the Court of Appeal. The Court of Appeal, in a unanimous decision, dismissed the appeal. The appellants further appealed to the Supreme Court.

The Supreme Court dismissed the appeal on technical grounds because the appellants' grounds of appeal were grounds of mixed law and facts for which the appellants were required to obtain leave of the Supreme Court pursuant to section 233(3) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) (the Constitution), but which leave was not sought and obtained. Given the failure of the appellants to seek and obtain the required leave of the Supreme Court, the respondent contended that the appeal was incompetent and urged the Supreme Court to dismiss it. The Supreme Court agreed with the respondent and dismissed the appeal.

1 (2021) 2 NWLR (Pt. 1761) 422.

Although the appeal was not decided on the merits, one of the justices that heard the appeal, Justice Rhodes-Vivour JSC (now retired), took the opportunity to restate the supportive attitude of the Nigerian courts towards arbitration and deprecated the disturbing trend of filing all manner of unsubstantiated and spurious challenges to arbitral awards in Nigeria. Rhodes-Vivour, JSC in his supporting judgment stated:

> *I intend to comment on the disturbing trend where all manner of appeals are filed against awards. It is time litigants fully understand, respect and appreciate the nature of arbitration agreements they freely enter into. It is the duty of counsel to explain the nature of these agreements and not encourage their clients to disregard them when they get unfavorable awards. Arbitration agreements ought to be respected and the resultant awards complied with. We should always bear in mind the importance of respecting arbitration agreements, more so those that have international connotations. Building up and sustaining a globally respected dispute resolution system are major steps for the growth of our Nation into a preferred investment destination.*
>
> *The Nigerian Legal System, following international standards, has legislated on the nature of arbitration awards to be final and binding and only to be interfered with by the courts in the exceptional circumstances enunciated in the relevant arbitration statutes. Arbitration is widely acknowledged as an alternative to litigation which enables expeditious dispute resolution. Commendably, the legal framework provides for court interference in specified circumstances only. However, the unfortunate trend in which litigants with the assistance of counsel who fail to appreciate their duties as officers of the court, all in a bid to win their clients' case by all means, bring unsubstantiated and spurious challenges against otherwise good arbitration awards and the arbitration tribunal, ought to be frowned upon and discouraged. The courts should not allow itself to be used as a tool to set side otherwise good awards or frustrate legitimate arbitration awards.*

Comments

As already noted, the appeal was dismissed on technical grounds. However, the fact that Justice Rhodes-Vivour deemed it necessary to deprecate the unfortunate trend whereby parties to arbitration agreements mount all kinds of frivolous challenges to unfavourable awards underscores the Supreme Court's attitude to arbitration and frivolous challenges to arbitral awards. Although the Justice's statement in this respect is an obiter dictum given that the appeal was not decided on the merits, an obiter dictum of the Supreme Court, being the highest court in the country, carries a lot of weight and would usually influence the decisions of the lower courts in appropriate cases.

Available statistics indicate that Nigerian courts are arbitration friendly and would, in most cases, enforce arbitral awards or deny challenges to enforcement of arbitral awards. A recent study[2] of arbitration-related court decisions by Nigerian courts that analysed 49 cases in which the arbitral awards were directly challenged ('challenge cases') (as opposed to cases where enforcement was resisted or opposed by the award debtors) revealed that 47 concerned domestic awards (constituting 96 per cent of the cases reviewed), while two cases concerned international awards (4 per cent of the cases reviewed). Out of the 47 domestic cases, 12 awards were successfully challenged (26 per cent), while the challenge was unsuccessful in 35 cases (74 per cent). The challenge in international arbitration was unsuccessful. In relation to enforcement proceedings, the report analysed 41 cases under this category. Thirty-three of these cases related to domestic awards (80 per cent), while eight cases concerned international awards (20 per cent). Out of the 33 domestic awards, 26 were enforced (79 per cent), while seven were unenforced (21 per cent). Of the eight international awards, seven were enforced (88 per cent), while one was unenforced (12 per cent).

While the report confirmed hitherto anecdotal evidence that Nigerian courts are arbitration friendly in terms of their ultimate determination of awards challenges, the trend whereby award debtors mount frivolous and unsubstantiated challenges to arbitral awards coupled with the protracted litigation that such challenges would usually involve tends to give a wrong impression about the efficacy of arbitration as a viable alternative to litigation. Given this backdrop, the Supreme Court's statement is very timely, and it is hoped that it will cascade down the judicial hierarchy and help to stem the ugly tide of frivolous challenges to arbitral awards.

A decision of an arbitral tribunal awarding a relief that is contingent upon the fulfilment, on a future date, of a condition does not affect the finality or validity of the award.

Optimum C. &. P. Dev. Ltd. v Ake Shareholding Ltd.[3]

In this case, Optimum Construction & Property Development Limited (Optimum, the applicant) and Ake Shareholdings Limited (AKL, the respondent) entered into a sublease agreement and agreed to submit all disputes arising from the sublease agreement to arbitration. A dispute arose between the parties concerning Optimum's

2 See the report by the law firm Broderic Bozimo & Company entitled 'Analysis of Arbitration Related Court decisions in Nigeria', published on 4 October 2021, and available at: https://broderickbozimo.com/analysis-of-arbitration-related-decision-in-nigeria/.

3 (2021) 18 N.W.L.R. (Part 1807) 148.

performance of its obligations under the sublease agreement and the dispute was submitted to arbitration. Following the conclusion of the arbitral proceedings, the sole arbitrator rendered an arbitral award dated 19 August 2011 in favour of AKL granting some of AKL's claims. Among other reliefs, the sole arbitrator directed Optimum to, within six months of the date of the award, hand over a copy of the fire and general insurance of the property to AKL and carry out the necessary repair works on the property as identified in the minutes of a joint inspection meeting held on 26 August 2010 and the reports dated 10 December 2008 and February 2011, respectively. Furthermore, Optimum was allowed relief from forfeiture of the lease on the fulfilment of two conditions: namely, that it should hand over a copy of the fire and general insurance over of the property to AKL and carry out the necessary repair works as identified in the reports within six months.

Optimum failed to either hand over a copy of the fire and general insurance of the property to AKL or carry out the necessary repair works within the six-month period as directed in the award. Consequently, AKL filed an application in the High Court of Lagos State seeking an order of forfeiture of the lease in view of Optimum's failure to comply with the conditions stipulated in the award, the fulfilment of which would entitle it to relief from forfeiture of the lease. The High Court ruled on AKL's application and held that the arbitral award was inconclusive and, therefore, unenforceable. AKL's application was consequently struck out for being incompetent.

Dissatisfied with the ruling of the High Court, AKL appealed to the Court of Appeal. The Court of Appeal disagreed with the High Court's decision that the award was inconclusive and, therefore, unenforceable. Specifically, the Court of Appeal held that: (1) the award was clear, unequivocal, and unambiguous; (2) the award was final and conclusive; and (3) the award was not doubtful on its face and was valid, enforceable and should have been enforced summarily because the award had granted Optimum relief from forfeiture of the lease only on the conditions that Optimum handed over to AKL a copy of the fire and general insurance of the property and carried out the necessary repair works, a condition that Optimum had breached. The court further held that having flouted the terms of the award, Optimum lost the protection of the relief from forfeiture of the lease and an order of court was required to formally terminate the lease by ordering the forfeiture of the lease due to Optimum's failure to comply with the terms of the award. The appeal against the decision of the High Court was consequently allowed and the decision of the High Court was set aside. The Court of Appeal went further to enforce the award by revoking the award of relief from forfeiture, which was made conditional and which condition Optimum had failed to fulfil.

Dissatisfied with the decision of the Court of Appeal, Optimum appealed to the Supreme Court. Optimum did not, however, seek the leave of the Supreme Court to file the appeal, the grounds of which were of mixed law and facts. The appeal was, as a result, dismissed for being incompetent. Subsequently, Optimum filed an application at the Supreme Court seeking an order of the Supreme Court increasing the time within which it could seek leave to appeal on grounds of facts or mixed law and facts, an order granting leave to appeal on grounds of facts or mixed law and facts, and an order increasing the time to appeal on grounds of facts or mixed law and facts. In considering whether to grant Optimum's application, the Supreme Court had to consider whether Optimum's proposed grounds of were arguable and had reasonable prospect of success.

Ruling on Optimum's application, the Supreme Court held that from the express terms of the award, the arbitrator intended it to be a final and conclusive resolution of the dispute between the parties and did not leave any factual issue for further determination by the arbitrator. The Court further held that the prescription of a period of six months within which the directives in the award should be carried out did not render the award inconclusive and that the award became enforceable upon the expiry of the said period of six months. Based on the foregoing, Optimum was refused leave to appeal against the decision of the Court of Appeal.

Comments

We agree with the decision of the Court of Appeal as affirmed by the Supreme Court that the part of the award directing or requiring Optimum to hand over a copy of the fire and general insurance of the property to AKL and carry out the necessary repair works as identified within six months as conditions for enjoying relief from forfeiture of the lease did not make the award inconclusive and unenforceable. It is not unusual for awards to require acts or payments to be performed or paid on future dates. That an act or payment is to be performed or made on a clearly specified future date does not make such award inconclusive or unenforceable. What is more, the award was clearly expressed to be final, and the arbitrator did not retain jurisdiction to deal with any matters or to issue a supplemental award in the event that the respondent did not comply with the directions in the award.

While the Court was only required to examine the proposed grounds of appeal for which leave to appeal was required to determine whether the grounds were, prima facie, arguable or disclosed good cause for why leave should be granted, the Court recognised that it was not required at the stage of considering the application to decide whether the appeal would succeed or fail on the proposed grounds and should

only decide whether the grounds were substantial, arguable and triable, yet the Court decided the issues raised in the appeal even though it was not considering the merits of the appeal at that stage. The Court's decision reflects its increasing impatience or disapproval of what it described in the case of *Metroline v Dikko* as the trend of filing frivolous and substantiated appeals against arbitral awards. This is because the Court also held that 'This protracted litigation over the summary enforcement of an unchallenged arbitral award defeats the purpose of the arbitration clause in the sub-lease agreement. The parties to an agreement include an arbitration clause to avoid litigation and resolve their dispute through arbitration, to obtain a fair, consensual and non-hostile resolution of the disputes by an impartial third party without unnecessary expense and delay.'

The existence of an arbitration clause in a contract does not oust the jurisdiction of the court

Bill & Brothers Ltd. v Dantata & Sawoe C.C. Ltd.[4]

In this case, Dantata and Sawoe Construction Co. (Nig.) Ltd. (DSC, the first respondent) made an application for a statutory right of occupancy over a plot of land to the Federal Capital Development Authority of the Federal Capital Territory (FCT), Abuja (FCDA, the third respondent) for the purpose of erecting a high-rise building. Based on DSC's application, a development lease agreement that contained an arbitration clause was executed between DSC and the FCDA and a plot of land for the construction of the high-rise building was allocated to DSC. DSC took possession of the land and began construction thereon. Subsequently, the Honourable Minister of the Federal Capital Territory (the Minister of the FCT, the second respondent) and the FCDA revoked the licence issued to DSC thereby withdrawing the grant of the plot upon which DSC had already commenced the construction of a high-rise building. The Minister of the FCT and the FCDA also issued a stop-work order to DSC and issued a certificate of occupancy over the same plot of land to Bill & Brothers Ltd, Sa'Adah Global Enterprises and Mapit Consultants Ltd (the appellants). Also, the Minister of the FCT and the FCDA respondents demolished the fence that DSC had already erected around the land.

Aggrieved by the actions of the Minister of the FCT and the FCDA, DSC commenced an action against the Minister of the FCT, the FCDA and the appellants at the High Court of the FCT challenging the actions of the Minister of the FCT

4 (2021) 12 N.W.L.R (Part 1789) 50.

and the FCDA. In its judgment, the High Court found for and entered judgment in favour of DSC. Specifically, the High Court declared the actions of the Minister of the FCT illegal, null and void, set aside the revocation of the licence as well as the stop-work order and eviction of DSC from the land and restored DSC's possession and right of occupancy over the land. The High Court also granted injunctive reliefs and awarded monetary damages against the Minister of the FCT and the FCDA in favour of DSC.

Dissatisfied with the decision of the High Court, the appellants appealed to the Court of Appeal. On appeal, one of the issues submitted for determination by the appellants was whether in view of the arbitration agreement contained in the development lease agreement between DSC and the Minister of the FCT and the FCDA, the High Court was deprived the jurisdiction to hear and determine the suit thereby rendering the judgment a nullity. The appellants argued that the existence of an arbitration agreement in the development lease agreement between DSC and the Minister of the FCT and the FCDA meant that the High Court lacked the jurisdiction to hear and determine the suit and therefore, the entire judgment of the High Court was a nullity. In response, it was submitted on behalf of DSC that the jurisdiction of the court is not ousted even where a matter deserves reference to arbitration. Rather, the court can stay proceedings pending arbitration. It was further submitted on behalf of DSC that since the appellants were not parties to the agreement, they could not invoke the arbitration clause therein and that the Minister of the FCT and the FCDA, who were parties to the agreement, having waived the right to insist on the matter being referred to arbitration, it was not for the appellants to raise the issue of arbitration.

The Court of Appeal rejected the argument of the appellant and held that an arbitration agreement does not oust the court's jurisdiction because the jurisdiction of a court is granted to it by the Constitution and the statute establishing the court. Thus, parties cannot by their agreement seek to oust the jurisdiction so determined. The Court of Appeal further held that an arbitration clause only postpones the right of either of the parties to the agreement to resort to litigation in court and when a party to the arbitration agreement promptly and properly raises the same issue, the court seized of the matter will lean towards enforcing the clause, not by striking out the case for want of jurisdiction but by staying proceedings pending arbitration. The Court of Appeal agreed with DSC's submission that since the appellants were not parties to the agreement, they could not seek to enforce the benefit of the arbitration clause therein.

Comments

As rightly noted by the Court of Appeal, an arbitration agreement does not oust the jurisdiction of the Court. Jurisdiction of courts is granted to them by the Constitution and statutes establishing such courts and parties cannot, by their agreement, oust the jurisdiction of the courts. What the Arbitration and Conciliation Act (ACA)[5] provides for is a stay of proceedings pending reference to arbitration whenever a party, in breach of an arbitration clause commences an action in court. However, it is only the parties to an agreement containing an arbitration clause that can enforce said clause. The appellants argued that under section 4(1) of the ACA, a non-party to an arbitration agreement can apply to stay proceedings pending arbitration. Section 4(1) of the ACA provides that 'A court before which an action which is the subject of an arbitration agreement is brought shall, if any party so request not later than when submitting his first statement on the substance of the dispute, order a stay of proceedings and refer the parties to arbitration.' The Court of Appeal, however, rejected this submission and held that it amounted to reading said section 4(1) in isolation from the related section 5(1), which provides that 'If any party to an arbitration agreement commences any action in any court with respect to any matter which is the subject of an arbitration agreement any party to the arbitration agreement may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings.' The view canvassed by the appellants to the effect that a non-party to an arbitration agreement can, pursuant to section 4(1) of the ACA, apply for stay of proceedings pending reference of the dispute to arbitration is erroneous. Although section 4(1) does not contain the words 'any party to an arbitration agreement', it stands to reason that since only a party to a contract can enforce it, a non-party to an arbitration agreement cannot apply for stay of proceedings and referral of a dispute to arbitration, particularly where, as in this case, the parties to the arbitration agreement have submitted to the court's jurisdiction and decided not to invoke the arbitration clause contained in their development lease agreement.

5 Cap A18, Laws of the Federation of Nigeria (LFN) 2004.

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Uzoma Azikiwe is a partner and the head of Udo Udoma & Belo-Osagie's litigation, arbitration and alternative dispute resolution team. He was elevated to the rank of senior advocate of Nigeria in 2020. He provides advice in maritime, aviation, employment and energy matters, and his specialisations include advising multinationals on oil and gas law, environmental matters, the provision, manning and maintenance of vessels, cabotage issues, telecommunications, construction and infrastructure, and administrative and constitutional law.

He trained as an international commercial arbitrator with several Nigerian and international arbitration organisations, including the International Chamber of Commerce Institute of World Business Law, the Chartered Institute of Arbitrators in the UK, the Chartered Institute of Arbitration (Nigeria), and the Chartered Institute of Mediation and Conciliation. He obtained a diploma in international commercial arbitration at St Anne's College, Oxford, United Kingdom, and has benefited from PIDA training in international commercial arbitration, PIDA training in international commercial contracts and training by the Chartered Institute of Taxation of Nigeria.

Uzoma gives presentations, presents depositions and gives evidence as a legal expert on Nigerian law before various foreign courts. Most recently, he appeared in this capacity before the High Court of Justice in England (in the 2009 case of *Dornoch Limited & Others v Westminster International BV & Others*).

He has published articles on commercial law including 'The Doctrine of Undisclosed Agency Revisited', as well as articles on environmental law and arbitration. His articles have been published in reputable international journals, such as *The European, Middle Eastern and African Arbitration Review*, *The Middle Eastern and African Arbitration Review*, *International Financial Law Review Dispute Resolution Guide* and *Chambers International Arbitration Country Practice Guide*. He presents papers at and conducts seminars for various major service companies in the oil industry in Nigeria on employment and labour matters.

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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 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 Chartered Institute of Arbitrators (UK) and also a Fellow of the Nigerian Institute of Chartered Arbitrators.

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Founded in 1983, Udo Udoma & Belo-Osagie is a full-service corporate and commercial law firm with offices in Nigeria's key commercial centres and an affiliate in Ghana. Our 15 partners and 69 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.

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Seat of arbitration: Doha or the QFC

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IN SUMMARY

This article considers the QFC as a seat of arbitration, with particular focus on the QFC Court as the supervisory court; the applicable curial law in a QFC-seated arbitration; and the advantages and disadvantages of choosing the QFC as the seat, rather than Doha, from the perspective of interim measures and the enforcement of arbitral awards.

DISCUSSION POINTS

- The QFC Court
- QFC-seated arbitration
- The QFC Court as the Competent Court in a Doha-seated arbitration
- Seat: the QFC or Doha?
- Interim relief and the enforcement of arbitral awards

REFERENCED IN THIS ARTICLE

- Law No. 7 of 2005 (the QFC Law)
- The Arbitration Regulations 2005 (the QFC Arbitration Regulations)
- *C v D* [2021] QIC (F) 8
- Law No. 2 of 2017 (the Qatari Arbitration Law)
- The UNCITRAL Model Law on International Commercial Arbitration
- *American Cyanamid v Ethicon* [1975] AC 396
- *Chedid & Associates Qatar LLC v Said Bou Ayash* [2015] QIC (A) 2
- *Leonardo SpA v Doha Bank Assurance Company LLC* [2020] QIC (A) 1

Introduction

For arbitration practitioners in Qatar, Doha-seated arbitrations will be commonplace. However, there is another (and lesser-known) jurisdiction in Qatar: the Qatar Financial Centre (QFC), which can also serve as an arbitral seat.

The QFC was established by Law No. 7 of 2005 (the QFC Law) as an offshore business and financial centre in Doha, with a separate legal, regulatory and commercial framework. Its legal system is based on English common law. The QFC has its own arbitration law, called the Arbitration Regulations 2005 (the QFC Arbitration Regulations), and its own court, known as the Qatar International Court (the QFC Court).

This article considers the QFC as a seat of arbitration, with particular focus on the QFC Court as the supervisory court; the applicable curial law in a QFC-seated arbitration; and the advantages and disadvantages of choosing the QFC as the seat, rather than Doha, from the perspective of interim measures and the enforcement of arbitral awards.

The QFC Court

Somewhat surprisingly, the QFC Arbitration Regulations do not prescribe the QFC Court as the supervisory court in QFC-seated arbitrations. However, the QFC Court has decided the matter: in *C v D* [2021] QIC (F) 8, it held that, when an arbitration is seated in the QFC, the QFC Court is the supervisory court.

If parties wish to bring proceedings before the QFC Court in its original jurisdiction, article 8(3) of the QFC Law and article 9 of the QFC Court's Regulations and Procedural Rules provide that at least one of them must be a QFC-registered entity. This was also considered to be the position in respect of the QFC Court's supervisory jurisdiction in a QFC-seated arbitration. In other words, if neither party was registered in the QFC, it was thought that they could not validly agree to designate the QFC as the arbitral seat. However, in *C v D*, where neither entity was so registered but the QFC was designated as the arbitral seat, the QFC Court decided that the QFC Court is the supervisory court in a QFC-seated arbitration, irrespective of whether the parties to the dispute (or either of them) are entities established within the QFC.

C v D demonstrates that the QFC Court has an arbitration-friendly approach. And this would potentially attract entities based in mainland Qatar, primarily foreign entities operating there, to opt for the QFC as the seat of arbitration.

The curial law

QFC-seated arbitration

The QFC Court assumed jurisdiction over the underlying proceedings in *C v D*. It did so both as the supervisory court in a QFC-seated arbitration, and for the purposes of the relevant mainland statute, Law No. 2 of 2017 (the Qatari Arbitration Law), which invokes the notion of supervisory court by its reference in article 1 to 'Competent Court'. While the QFC Court's ruling is unambiguous to the extent of deciding that the QFC Court is the supervisory court for QFC-seated arbitrations, paragraph 6 of the decision has left some room for debate as to the applicable curial law – the QFC Arbitration Regulations or the Qatari Arbitration Law – in a QFC-seated arbitration.

In paragraph 6, the Court held as follows:

> *As the court of the seat of the arbitration, and the Competent Court under Law No. 2 of 2017 issuing the Law of Arbitration in Civil and Commercial Matters, the Court was satisfied that it had jurisdiction to deal with the application, in circumstances in which an arbitral tribunal could not yet act, or act effectively.*

In a recent QFC-seated ICC arbitration, the question of the applicable curial law of a QFC-seated arbitration was discussed. One party contended for the application of the QFC Arbitration Regulations, while the other submitted that the Qatari Arbitration Law was the applicable curial law. The second party relied on paragraph 6 of *C v D* and article 1 of the Qatari Arbitration Law to argue as follows: (1) article 1 of the Qatari Arbitration Law defines the QFC Court as a Competent Court; therefore, (2) as the Competent Court, the QFC Court should apply the Qatari Arbitration Law in a QFC-seated arbitration; and (3) paragraph 6 of *C v D* implies that the QFC Court applied the Qatari Arbitration Law in that case, and accordingly, the same principle should apply to a QFC-seated arbitration. (The tribunal in that case has not yet rendered its ruling on the applicable curial law, which is expected to be included in the final award.)

In the authors' view, this interpretation is misconceived. Further to article 1 of the Qatari Arbitration Law, the Competent Court can be 'the Civil and Commercial Arbitral Disputes Circuit in the Court of Appeals [in mainland Qatar]' or the QFC Court 'pursuant to the agreement of the Parties'. Therefore, parties can nominate the QFC Court as the Competent Court in a Doha-seated arbitration. If, in a Doha-seated arbitration, the parties designate the QFC Court as the Competent Court, the QFC Court must apply the Qatari Arbitration Law. However, in a QFC-seated arbitration, the QFC Arbitration Regulations would be the applicable curial law, not

least because article 6 of the QFC Arbitration Regulations provides that 'Parts 1 to 4 of these Regulations', which contain all the operative provisions, 'apply where the QFC is the Seat of an Arbitration'.

This view is consistent with paragraph 6 of the decision in *C v D*: the QFC Court accepted jurisdiction in that case because (1) it is the supervisory court in a QFC-seated arbitration; and in any event (2) even if it is considered that non-QFC registered entities could not opt for the QFC as the seat, and therefore the arbitration would be deemed to be seated in Doha, the QFC Court could accept jurisdiction as it is the Competent Court under the Qatari Arbitration Law.

The QFC Court as the Competent Court in a Doha-seated arbitration

Article 6(2) of the QFC Arbitration Regulations provides that articles 11, 12 and 23 and Part 4 of the QFC Arbitration Regulations apply where the seat is outside the QFC, regardless of the law of the seat. Accordingly, in a Doha-seated arbitration, the QFC Court would not only apply the Qatari Arbitration Law as the law of the seat, but also the specific provisions set out in article 6(2) of the QFC Arbitration Regulations. This might, at first blush, give the impression that the QFC Court would have to consider potentially conflicting curial laws when acting as the Competent Court in a Doha-seated arbitration.

However, a review of these provisions shows that there would be no such conflict.

Article 11 of the QFC Arbitration Regulations is materially identical to article 8 of the Qatari Arbitration Law: if an action is brought before the QFC Court in a matter which is the subject of an arbitration agreement, and a party challenges the QFC Court's jurisdiction on that basis before filing its first statement on the substance of the dispute, then the QFC Court must refer the parties to arbitration.

Article 12 of the QFC Arbitration Regulations contains the same principle as article 9 of the Qatari Arbitration Law: parties can seek interim relief from the QFC Court. However, unlike article 9 of the Qatari Arbitration Law, article 12 of the QFC Arbitration Regulations does not limit the circumstances in which the QFC Court can grant such interim measures, namely that the arbitral tribunal does not have jurisdiction or is incapable of acting effectively at the time.

Article 23 of the QFC Arbitration Regulations provides that interim measures granted by an arbitral tribunal are enforceable upon application to the QFC Court. This principle is also enshrined in article 17(3) of the Qatari Arbitration Law. The grounds for challenging the enforcement of an interim measure are more extensive in article 23, which is addressed later in this article.

Part 4 (articles 42 and 43) of the QFC Arbitration Regulations is materially identical to Chapter 7 (articles 34 and 35) of the Qatari Arbitration Law.

Seat: the QFC or Doha?

The QFC Arbitration Regulations and the Qatari Arbitration Law are modelled on the UNCITRAL Model Law on International Commercial Arbitration (the UNCITRAL Model Law). The two statutes are, therefore, materially identical. However, one crucial area of difference is in relation to the grant of interim relief by arbitral tribunals.

The test for interim measures

To begin with, article 17(1) of the Qatari Arbitration Law and article 22(2) of the QFC Arbitration Regulations are materially the same in respect of the type of interim measures or relief that an arbitral tribunal can grant, as they replicate article 17 of the UNCITRAL Model Law. Those measures are: to maintain or restore the status quo pending determination of the dispute; to take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm, or to prejudice the arbitral process; to preserve assets out of which a subsequent award may be satisfied; or to preserve evidence that may be relevant and material to the resolution of the dispute.

However, the QFC Arbitration Regulations go one step further by adopting article 17A of the UNCITRAL Model Law, to provide a stringent legal test that must be satisfied by the party requesting interim relief, as follows:

> *(A) harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and*
>
> *(B) there is a reasonable possibility that the requesting party will succeed on the merits, provided that any determination on this possibility shall not affect the discretion of the Arbitral Panel in making any subsequent determination.*

Therefore, in a QFC-seated arbitration, an arbitral tribunal must apply a two-stage test when deciding applications for interim relief. First, the arbitral tribunal has to determine whether damages are an adequate remedy. If the risk to the applicant is not reparable by damages, then the arbitral tribunal must look at the balance of convenience: in other words, does the harm likely to be caused to the applicant if the relief were not granted substantially outweigh the harm that the respondent would likely suffer if the relief were not ordered? Next, the arbitral tribunal must consider

if there is a reasonable prospect of success on the merits. This mirrors the test for injunctive relief under English law, as laid down by the House of Lords in *American Cyanamid v Ethicon* [1975] AC 396, and therefore will be familiar to common law practitioners in Qatar.

On the other hand, the test under the Qatari Arbitration Law (set out in the operative part of article 17) is that the interim measure is either 'dictated by the nature of the dispute', or it is intended for the prevention of 'irreparable harm'.

While both statutes prescribe a legal test for interim measures, it will be seen that these tests differ greatly. The test under the QFC Arbitration Regulations is stricter than that prescribed by the Qatari Arbitration Law. The notion of relief 'dictated by the nature of the dispute' is plainly a broad one, enabling counsel to present a variety of arguments to justify interim relief in light of the underlying dispute between the parties. The alternative test of prevention of irreparable harm is equally wide. While it can be argued that 'irreparable harm' ought to mean harm that is not compensable by damages, in the absence of any learning or authority on this issue, it is likely to be a matter that arbitral tribunals will consider on a case-by-case basis. Furthermore, the absence of the need to satisfy the balance of convenience test removes a significant hurdle for granting interim relief.

Enforcement of interim measures

Article 17(3) of the Qatari Arbitration Law provides as follows: 'The Party in whose favour the order for provisional measures or an interim award is issued may, after it obtains written permission from the Arbitral Tribunal, request the Competent Judge to order the enforcement of the order or award issued by the Arbitral Tribunal, or any part of it . . .'.

Therefore, in a Doha-seated arbitration, if a party succeeds in obtaining an interim measure from an arbitral tribunal, whether by way of a procedural order or an award, it is enforceable, subject to the arbitral tribunal's written permission. In practice, however, such permission tends to form part of the relevant order or award, thus avoiding the need to obtain permission separately after the event.

On the other hand, article 23 of the QFC Arbitration Regulations sets out a more comprehensive scheme for the enforcement of interim measures. First, article 23(1) provides that an interim measure is automatically binding, unless otherwise stated by the arbitral tribunal, and that it is enforceable upon an application to the QFC Court. Notably, the last sentence of article 23(1) recognises the enforcement of interim measures issued outside Qatar, prescribing that such a measure can be enforced 'irrespective of the country in which it was issued'.

That said, article 23(2) sets out various grounds on which the QFC Court can refuse to enforce an interim measure granted by an arbitral tribunal. These grounds are divided into two categories: (1) where the application to refuse enforcement is made by a party; and (2) grounds that the QFC Court can consider on its own initiative. Of particular interest is the following ground for refusal: 'the interim measure is incompatible with the powers conferred upon the [QFC Court], unless the [QFC Court] decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance.' There is no guidance by way of authority or otherwise as to which matters are considered 'incompatible' with the QFC Court's powers. Likewise, the power to reformulate (or amend) an interim measure is wide-ranging. Unless there is clarity provided on this issue by the QFC Court, whether through case law or practice direction, it is difficult to gauge the extent to which the QFC Court can exercise the power to reformulate interim measures granted by arbitral tribunals.

Enforcement of arbitral awards

The QFC Arbitration Regulations and the Qatari Arbitration Law are founded on the UNCITRAL Model Law. For this reason, the grounds for challenging or setting aside an arbitral award are materially identical in each. However, they prescribe different time limits for making such an application: under the Qatari Arbitration Law, it is one month from the date of receipt of the award (or the corrected award), whereas the QFC Arbitration Regulations set a three-month period.

Furthermore, under article 41(2)(B)(ii) of the QFC Arbitration Regulations, an award can be set aside if it is against the 'interest of the QFC'. On the face of it, this appears to be more limited than the general ground of 'public policy', which is the term used in article 33(3) of the Qatari Arbitration Law. However, this matter has yet to be decided by the QFC Court.

Other factors

As the QFC Court can be designated as the Competent Court in a Doha-seated arbitration, if parties wish to avail themselves of the QFC Court, they do not need to prescribe the QFC as the seat. Therefore, the question arises if there is any advantage in choosing the QFC Court as the supervisory court, whether by way of a QFC-seated arbitration or by designating the QFC Court as the Competent Court in an arbitration seated in Doha.

It might be thought that the QFC Court is more expeditious than mainland courts, not least because the volume of litigation in the mainland Qatari courts is higher. Further, the QFC Court provides a more diverse and international pool of judges, including those with significant experience of international arbitration – such as the current President of the QFC Court, Lord Thomas of Cwmgiedd, who is the former Lord Chief Justice of England and Wales – and a very efficient registry in charge of the administration of cases.

Unlike in the mainland Qatari courts, there is no obligation on parties before the QFC Court to instruct local counsel. This is because any practitioner who has rights of audience before the higher courts of their home jurisdiction is permitted to appear before the QFC Court. In consequence, there is an obvious cost saving.

Furthermore, where the QFC is the seat, parties can rely on English law principles if an issue is not addressed in the QFC Arbitration Regulations: see *Chedid & Associates Qatar LLC v Said Bou Ayash* [2015] QIC (A) 2 at paragraph 18 and *Leonardo SpA v Doha Bank Assurance Company LLC* [2020] QIC (A) 1 at paragraphs 42–45.

Conclusion

While Doha and the QFC have materially identical arbitration laws, the QFC is still in its infancy as an arbitral seat. Doha-seated arbitrations are certainly more commonplace, and it is rare to see parties choosing the QFC Court as the Competent Court. This is because local entities and businesses who wish to arbitrate under the Qatari Arbitration Law tend to be more familiar with the mainland Qatari courts and their supervisory regime. For the same reason, where a party wishes to have the QFC Court as the supervisory court, it would likely opt for the QFC as the seat. Indeed, in the authors' view, there is much to commend the QFC as an arbitral seat, including the high quality of the judiciary.

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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, he 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. Thomas also has significant experience of litigation in the Qatar Financial Centre. He has presented many cases as advocate before the Qatar International Court (at first instance and on appeal) and the Regulatory Tribunal.

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. Thomas sits as an arbitrator and is on the panel of arbitrators of several arbitral institutions. He has also conducted an expert determination.

Thomas is recognised in *Chambers and Partners* and *The Legal 500* for his international arbitration practice. He has been described as 'first class', 'a fantastic lawyer', and 'a warm and dynamic character'.

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سلطان العبدالله ومشاركوه
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Sultan Al-Abdulla & Partners (SAP) is a full-service Qatari 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*. SAP was named Qatar Law Firm of the Year in 2017, 2020 and 2021 by Qatar Business Law Forum. It also won the Technology, Media and Telecommunications Team of the Year 2019 by the same, and was named the Qatar Domestic Law Firm of the Year in the Chambers Middle East Virtual Awards 2021.

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, India, Pakistan, Qatar and Egypt. 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.

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A progress report on Saudi Arabia's arbitration-friendliness

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IN SUMMARY

Saudi Arabia has undergone a transformation in recent years on its path towards becoming a globally recognised arbitration seat. With strong judicial and governmental support, the jurisdiction is measuring itself against international standards, attracting expertise from within the country and beyond and attracting an increasing number of international arbitration filings.

DISCUSSION POINTS

- Benchmarking Saudi Arabia as an effective, efficient and safe international arbitration seat
- Recent SCCA business-focused initiatives
- SCCA board and committee appointments increasing diversity and expertise
- SCCA caseload and judicial enforcement record

REFERENCED IN THIS ARTICLE

- Chartered Institute of Arbitrators, London Centenary Principles 2015
- Saudi Arbitration Law enacted by Royal Decree No. M/34 dated 16 April 2012G and its Implementing Regulations issued by Cabinet Decree No. 541 dated 22 May 2017G.
- Cabinet Resolution No. 541/1438 issuing the Executive Regulations implementing the Arbitration Law
- World Economic Forum's Competitiveness Report (2019)
- SCCA Arabic Moot
- SCCA Arbitration Rules 2016
- SCCA Code of Ethics

Introduction

Arbitration in Saudi Arabia is continuing its transformation in a concerted effort by the jurisdiction to restructure the economy as part of the kingdom's Vision 2030. The following article looks at how the jurisdiction measures up against internationally recognised factors for safe arbitral seats, considers recent initiatives to assist parties to arbitration, the appointment of expert international professionals to the main arbitration centre's committees and some statistics revealing how the judiciary is supporting arbitration in the kingdom.

Benchmarking Saudi Arabia as an arbitral seat

In 2015 an eminent working group of the Chartered Institute of Arbitrators (CIArb) developed a set of ten principles constituting the required elements for a safe arbitral seat, creating a framework for their evaluation.[1] The following section measures recent initiatives in the kingdom to promote the country as an arbitral centre against the London Centenary Principles of the Chartered Institute of Arbitrators (CIArb), considering each principle in turn in the Saudi Arabian context.

Law

According to the London Centenary Principles, good seats require an arbitration law that sets out a procedural framework, limits judicial intervention and strikes a balance between transparency and confidentiality. The Saudi Arabia Arbitration Law, Royal Decree No. M/34, (the Saudi Arbitration Law) is broadly modelled on the UNCITRAL Model Law on International Commercial Arbitration and has paved the way for a more arbitration-friendly era. It provides for, among other things, party autonomy in the key areas of the applicable law, the rules governing the dispute, the place and language of arbitration, party representation, and the appointment of the arbitral tribunal. Under the Saudi Arbitration Law, parties may appoint any arbitrator, mediator, lawyer, expert or other representative regardless of gender, nationality or religion. The law also grants protection to arbitral awards and confines any challenges to a limited number of grounds (including sharia principles) and without review of the merits.

1 https://www.ciarb.org/resources/features/a-framework-for-evaluating-the-best-arbitral-seats/.

Independent commentators believe that the Saudi Arbitration Law includes several arbitration-friendly principles with 'provisions of the new law that . . . will provide litigants with a viable arbitration alternative for their disputes in the Kingdom'.[2]

Judiciary

The London Centenary principles require a judiciary that is independent, competent and efficient, with expertise in international commercial arbitration and respectful of the parties' choice of arbitration as their method for settlement of their disputes. According to the World Economic Forum's Global Competitiveness Report (2019), Saudi Arabia achieved a global ranking of 16th in 'judicial independence', 17th in 'efficiency of legal framework in settling disputes' and 11th in 'legal framework's adaptability to digital business models'.[3]

Article 8 of the Saudi Arbitration Law and article 2 of the accompanying Executive Regulations[4] stipulate that the competent court for the purposes of the Arbitration is the Court of Appeal. Furthermore, article 17 of the Executive Regulations ensures that the Supreme Court hears appeals regarding validity of arbitral awards.

Critically, the Saudi judiciary, including its ongoing strategic engagement with the Saudi Centre for Commercial Arbitration (SCCA), continues to meaningfully invest in enhancing and broadening the judiciary's considerable expertise in international arbitration. Further, the performance of the judiciary has garnered considerable recognition and praise from local and international law firms.[5]

Legal expertise

The professional legal community in Saudi Arabia includes a network of highly experienced, sophisticated and independent local and international lawyers providing expertise to those doing business, litigating and arbitrating in Saudi Arabia and beyond. The Saudi Bar Association in 2019 launched the Saudi Accreditation

2 https://www.jonesday.com/en/insights/2012/09/the-new-saudi-arbitration-law.

3 World Economic Forum, The Global Competitiveness Report 2019, available at https://www.weforum.org/reports/how-to-end-a-decade-of-lost-productivity-growth.

4 Executive Regulations of the Arbitration Law, dated 22 May 2017.

5 See, for example, Scott Hutton et al, 'Saudi Arabia', The Construction Disputes Law Review: 'The Saudi court system is also supporting the growth of arbitration by recognising arbitration agreements and enforcing arbitral awards. Arbitration is currently the preferred choice for many in the construction industry and it is anticipated that this will be a substantial growth area in Saudi Arabia.' available at https://thelawreviews.co.uk/title/the-construction-disputes-law-review/saudi-arabia.

Standards for Lawyers, describing it as a 'set of processes endeavouring to set national legal profession standards meeting international best practices and maintaining a high level of professionalism'. Initiatives such as this are ensuring that Saudi lawyers will be competitive domestically and internationally – and will be effective as counsel in mediation and arbitration.

The SCCA and its UK partner, CIArb, have been committed to ongoing professional development and deepening of expertise in international arbitration through years of workshops, training and accreditation of arbitration specialists.

Education

Saudi Arabia and the SCCA have redoubled their commitments and investments in ADR education across the spectrum of stakeholders and practitioners: from counsel, arbitrators and mediators to experts, users and students.

To provide practitioners with an opportunity to enhance their skills and have a locally and internationally recognised accreditation designation, the SCCA partnered with CIArb to create a fully Arabic programme for arbitrator and mediator accreditation (along with offering an English version) for all those wishing to avail themselves of the SCCA-CIArb Pathways to Fellowship.

The SCCA Arab Moot Competition is a particularly impactful education initiative attracting Arabic speaking university students from across the Arab world and beyond. Now, in its third edition, there are 84 teams with 586 students and academics from 14 countries. With its focus on SCCA international standard clauses, rules, procedures and guides, this international competition is cultivating the next generation of international commercial arbitration experts. The Arab Moot Competition case drafting committee was chaired by Emirati arbitrator and mediator Fatima Balfaqeeh.

Rights of representation

The concept of party autonomy is paramount. Both the Saudi Arbitration Law and the institutional arbitration rules of the SCCA allow parties to be represented by any legal representative they wish, both local and foreign. Registration is not required. Further, and contrary to some misconceptions, under the Saudi Arbitration Law, parties can appoint any arbitrator, mediator, lawyer, expert or other representative regardless of gender, nationality or religion. Under article 14 of the Saudi Arbitration Law, however, sole arbitrators and panel chairs must hold a degree in sharia or law.

Accessibility and safety

Parties, counsel, experts and arbitrators have generally had easy accessibility to the Saudi seat, including being 'free from unreasonable constraints on entry, work and exit' as required by the London Centenary Principles. Adequate safety and protection of the participants, their documentation and information are also generally assured. Arbitrators have access to everything related to the case and ensure confidentiality and non-disclosure of information and documents.

Facilities

The SCCA has its own purpose-built, state-of-the-art facilities across several locations in Jeddah and Riyadh, among others, and offers, inter alia, transcription services, hearing rooms, document handling and management services, and translation services.

Ethics

The SCCA has adopted and implemented codes of ethics for arbitrators, mediators, parties and their representatives, board members and staff. The code of ethics for arbitrators sets out a number of standards intrinsic to their functions. The code of ethics for parties sets out 12 standards of conduct by which they and their representatives should abide.

All the SCCA Codes of Ethics – for arbitrators, mediators, parties and representatives, board members and staff – are reviewable and downloadable in Arabic and English.[6]

Enforceability

Arbitral awards are enforced in accordance with simple, prompt and effective procedures. Under the Enforcement Law, an arbitral award, to which an enforcement order is appended, is considered a writ of enforcement for which compulsory enforcement is permitted. In addition, Saudi Arabia is a signatory to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards; Saudi courts are therefore required to give effect to private arbitration agreements and the recognition and enforcement of arbitral awards made in other contracting states.

6 https://www.sadr.org/arbitrators-code-of-conduct?lang=en.

Recent business-focused initiatives at the SCCA

An independent, not-for-profit arbitral institution, the SCCA is recognised as a full and complete administrative ADR service provider with tested rules and procedures that follow international best practices and standards.

Since its launch in October 2016, the SCCA has registered 211 filings totalling US$1.01 billion involving domestic and international parties.

Regarding appointments, parties can authorise the SCCA to perform one of three services to select and appoint one or more arbitrators. First, parties can request the SCCA to provide a list of experienced and qualified candidates from which to choose their arbitrator (list-only service). Second, parties can authorise the SCCA to appoint one or more arbitrators using its list method (list-and-appointment service). Finally, parties can authorise the SCCA to directly appoint one or more arbitrators without any further intermediary steps (administrative appointment service).

To support the business sector and promote investment, the SCCA introduced measures to make its range of services more accessible and cheaper, including a reduction in arbitrator fees of up to 30 per cent, halving the initial costs for initiating proceedings and allowing parties to agree to alternative fee arrangements based on arbitrators' hourly rates.

The SCCA board of directors' approved several amendments to Appendix I of the SCCA Arbitration Rules[7] to broaden its institutional arbitration offering across diverse sectors and with parties of any size and nationality.

From 1 September 2021, the amendments to Appendix 1 of the SCCA Arbitration Rules streamline the process and make it more affordable. For example, the SCCA has eliminated its filing fee. A filing party now need only advance a flat rate registration fee of US$1,350 that will later be credited towards administrative fees. This also reduces the initial cost in starting the arbitration proceeding by 50 per cent for claims above US$107,000. In addition, the administrative fees start at a flat rate of US$540 for proceedings under the Online Dispute Resolution (ODR) Protocol and are capped at a maximum of US$80,000 for any other arbitration proceedings.

Further review of arbitrator fees resulted in and reduced them by up to 30 per cent. To provide more transparency, the SCCA has also introduced three pricing levels: minimum, maximum and average. The SCCA fixes the arbitrator fees case by case

7 SCCA Arbitration and Mediation Rules, October 2018, as amended, available at https://sadr.org/awareness-publications?lang=en.

depending on the complexity of the matter and the time and effort required to determine the case. Instituting minimum and maximum fees enables the parties to project the costs of arbitration before proceedings commence.

The SCCA also introduced the option for parties to agree to alternative fee arrangements based on hourly arbitrator rates. This method is available alongside the SCCA's existing ad valorem method, which will remain the default mechanism in case the parties cannot agree on an hourly rate.

The SCCA reduced the cost of its ODR service by 40 per cent to make it more accessible to all businesses, especially innovators, entrepreneurs and those operating small and medium-sized enterprises.

Additional flexibility for parties now includes options to facilitate the advancement of deposits for SCCA and arbitrator fees, including instalment plans and bank guarantees for larger amounts (as outlined in the amendments to Appendix I of the SCCA Arbitration Rules).

Clients can also estimate the costs of their arbitration by accessing SCCA's online interactive calculator,[8] which provides a preliminary assessment of the arbitration costs while comparing the various SCCA arbitration services. Based on the service selected and the number of arbitrators, the costs may range between by 25 to 200 per cent.

The amendments to Appendix I ensure the utility of innovative arbitration services SCCA offers alongside standard arbitration, such as expedited arbitration,[9] which provides a quick path to dispute resolution at a cost 20 per cent lower than standard arbitration, and online arbitration, which enables the parties to settle their dispute remotely within 30 days of the arbitrator's appointment.

Recent appointments of international experts

In 2021, the SCCA added high-profile ADR experts to its board of directors, rules advisory committee and committee for administrative decisions as part of its objective to provide first-class rules and services that are responsive to industry needs while being transparent and consistent, and that adhere to international best practices.

8 SCCA Fee Calculator, available at https://sadr.org/ADRService-Arbitration-Fee_Calculator?lang=en.

9 See https://sadr.org/ADRService-Expedited_Procedures?lang=en.

A Royal Decree was issued on 23 March 2021 appointing the third independent board of directors of the SCCA chaired by Walid Abanumay with Toby Landau appointed the vice-chair. The diverse board includes eminent international arbitration experts from Saudi Arabia, Egypt, France, the United Kingdom and the United States, including experts in law and sharia as well as business sector leaders.

Half of the incoming board members are leading international arbitration experts, and all are leaders from the business, legal and finance and banking sectors. The new board now reflects more diversity in terms of specialisations, gender and nationalities – with foreign experts comprising 40 per cent of the board, and a foreign vice-chair. This diversity enhances and promotes international best practices of the SCCA while also reinforcing SCCA neutrality and independence from the public sector.

This decree further implements the SCCA's Statute[10] stipulating that the SCCA must have an independent board of directors serving for a term of three years and is renewable once.

To ensure the independence of the SCCA committees, three new members, (James Hosking, Matthew Secomb and Mohamed Abdel Wahab) with long-standing experience in institutional arbitration and who are not Saudi nationals joined the SCCA rules advisory committee, which now has 15 members.

Three new members (Ziad Bin Abdulrahman Al-Sudairy, Annette Magnusson and Sarah Lancaster) who have held senior positions in some of the most preeminent arbitral institutions in the world joined the committee for administrative decisions. The committee was established in September 2020 to provide parties access to a neutral and specialised decision-making authority that makes consistent, transparent and expedited decisions to keep the arbitration on track. Its decision-making authority encompasses the determination of arbitrator challenges, disputes concerning the place of arbitration and disputes concerning the number of arbitrators in both SCCA-administered and ad hoc arbitration proceedings.

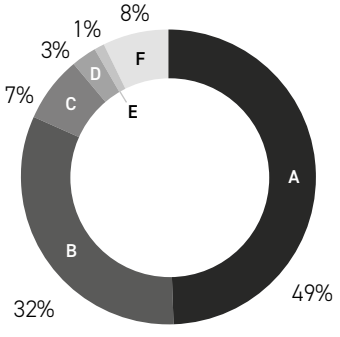
Caseload and judicial enforcement

In 2021, courts in Saudi Arabia enforced 204 domestic and foreign awards representing an aggregate value of US$2.1 billion, with enforcement proceedings being resolved on average within two weeks. Since the Saudi Arbitration Act in 2012 there have been approximately 35,000 applications for enforcement with an aggregate value

10 Statute of the Saudi Centre for Commercial Arbitration, Council of Ministers Resolution No. 488, 30 April 2019, available at https://www.sadr.org/about-ADR.in.sa-laws-and-regulations?lang=en.

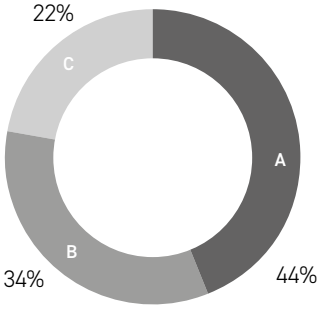
of enforced arbitral awards coming in at just over US$6.16 billion. In 2019, more applications for enforcement were filed than had been filed between 2013 and 2018. An SCCA study of Saudi case law related to arbitration published between 2017 and 2021 indicated that 540 judgments were issued and 603 motions registered with the appellate courts, nearly a third of these related to enforcement or nullification of arbitral awards. Only 6 per cent of motions to annul an award were granted and half of the successful applications for annulment were granted on sharia and public policy grounds.[11]

Grounds for motions



A Arbitral tribunals
B Arbitral awards
C Arbitration agreements
D Statutory time periods
E Judicial support in aid of arbitration
F Other grounds of interest

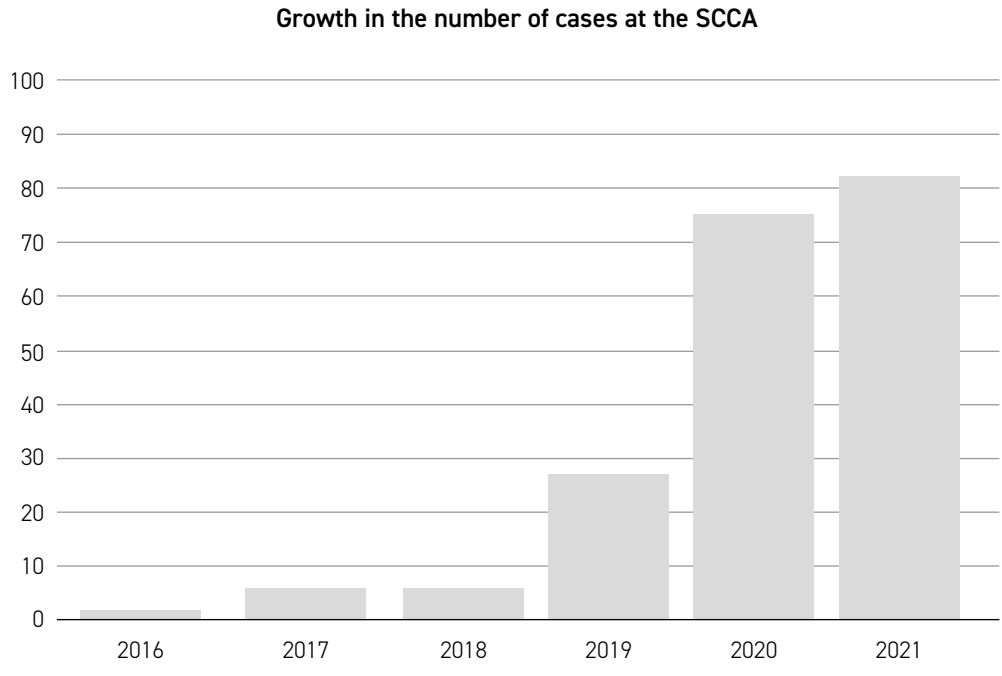
Types of action



A Enforcement/recognition
B Nullification
C Enforcement/recognition and nullification in same parties

The SCCA has registered 198 filings totalling over US$897 million involving domestic and international parties from sectors including banking and finance, capital markets and investment, construction and engineering, and arts and entertainment.

11 Royal Decree No. 44682 of 28 August 2021 limits the definition of public policy to general rules of Islamic law based on the *Quran* and the *Sunnah*.



Conclusion

The decade-long transformation of all aspects of the Saudi ADR practice, profession and industry outlined in this article has been profound, comprehensive and likely to endure. Importantly the Saudi judiciary has a solid record of skilfully and consistently adjudicating matters related to arbitration; and providing the judicial support required for a consistent record of successful enforcement of local and foreign arbitral awards. With its now well established local, regional and international reputation as a first-rate ADR institution, the SCCA benefits from operating in an arbitration-friendly jurisdiction – reflected in its rapidly increasing caseloads.

JAMES MACPHERSON
Saudi Center for Commercial Arbitration

James MacPherson is a leading international ADR specialist with over 20 years' experience within public and private sectors as a neutral (mediator, facilitator and arbitrator), ADR trainer, adviser and systems designer.

In 2014, James was retained as special counsel and project leader establishing the first international Saudi ADR centre (SCCA). He is affiliated with and active on domestic and international rosters of ADR providers around the world and also serves on the inaugural board of the Oman Arbitration Centre (OAC).

He was co-founder and inaugural CEO of the Bahrain Chamber for Dispute Resolution (BCDR-AAA) and has served as board member of the International Mediation Institute (The Hague).

He specialises in conflict management and resolution for corporate and government organisations, including designing and directing international, multilingual arbitration and mediation programmes.

He advises businesses and government agencies in Africa, Asia, Europe, the Middle East and North America on ADR systems design and training as well as legislative policy.

He has enjoyed designing and delivering ADR training in Bahrain, Canada, Germany, Hong Kong, Jordan, Kuwait, the Maldives, Morocco, Oman, Qatar, Saudi Arabia, Sri Lanka, Syria, Turkey, the UAE, the UK and the USA.

A successful bilingual (English and French), dual national (Canada and US) mediator, James works to resolve matters ranging from commercial, insurance, construction, employment, financial and IP/tech, to indigenous disputes and organisational conflict.

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Saudi Center for Commercial Arbitration

The Saudi Center for Commercial Arbitration (SCCA) is a not-for-profit organisation established by a Saudi minister council decision in 2014 to administer alternative dispute resolution (ADR) procedures in commercial disputes where parties agree to refer their disputes to SCCA arbitration and mediation, all in accordance with regulations in force and judicial principles of civil and commercial procedure.

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The SCCA also provides customers with professional institutional services by a staff trained to international best practice standards and the latest ADR technology methods and facilities – all contributing to the rapid and effective settlement of domestic and international commercial disputes.

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IN SUMMARY

The year 2021 marked the 50th year since the foundation of the United Arab Emirates. The year saw the continued promotion of arbitration and other forms of alternative dispute resolution within the jurisdiction – including in the financial free zones of the Abu Dhabi Global Market (ADGM) and Dubai International Financial Centre (DIFC). (The ADGM and DIFC have their own courts and arbitration laws and are arbitration seats, separate from the UAE itself.) Notable developments during the past year have included the consolidation of arbitration centres in Dubai, amendments to arbitration legislation in the ADGM and the adoption of a Monday-to-Friday working week (from January 2022). 2021 also saw further consideration of the 2018 UAE Arbitration Law by the UAE courts, with mixed results for parties seeking to enforce arbitral agreements and awards.

DISCUSSION POINTS

- Key developments in the UAE (onshore), the DIFC and the ADGM

REFERENCED IN THIS ARTICLE

- Federal Law No. 6 of 2018 on Arbitration
- Dubai Decree No. 34 of 2021
- ADGM Arbitration Regulations 2015
- ADGM Arbitration Regulations 2015 – Amendment No. 1 of 2020
- Dubai Court of Cassation Case No. 290/2021
- Dubai Court of Cassation Case No. 1308/2020
- Abu Dhabi Court of Cassation Case No. 922/2020
- *(1) NMC Healthcare Ltd (in administration) and associated companies (2) Richard Fleming (3) Benjamin Cairns v Dubai Islamic Bank PJSC & Others* [2021] ADGM CFI 0006

Key developments in the UAE (onshore)[1]

The year 2021 continued to see the promotion of the UAE as a forum for arbitration proceedings, with steps taken – in Dubai, in particular – intended to enhance the appeal of the UAE as an arbitral seat. The ADGM and DIFC likewise continued to demonstrate a commitment to promoting and supporting arbitral proceedings, as discussed briefly below.

Perhaps the most significant change came in Dubai, which passed legislation (Dubai Decree No. 34 of 2021 (Decree 34)) abolishing the DIFC Arbitration Institute (DAI) and the Emirates Maritime Arbitration Centre (EMAC), leaving the Dubai International Arbitration Centre (DIAC) as the sole arbitration centre within the emirate.

In parallel with abolishing the DAI and EMAC, Decree 34 also introduced a new statute for DIAC, which made material changes to the institution's structure (including the introduction of a new DIAC board and arbitration court) and foreshadowed the introduction of new DIAC Rules, which have since been released. These changes are aimed at enhancing the position of DIAC through the adoption of international best practices.

The year also saw further development of the body of case law considering the recently enacted UAE Arbitration Law (Federal Law No. 6 of 2018) (although it should be noted that the UAE has no doctrine of binding precedent). Not all decisions demonstrated an overwhelming support for arbitration in all circumstances. Several decisions of the onshore courts reflected a perception of arbitration as an exception to the 'default' position of referring disputes to the courts, with the courts choosing to exercise jurisdiction on a number of occasions, despite parties' apparent choice of arbitration.

The consolidation of arbitration centres in Dubai

A key development in the arbitration sphere in Dubai has been the consolidation of arbitration centres following the issuance of Decree 34, which became effective on 20 September 2021. Decree 34 abolished the DAI and EMAC, which were consolidated into DIAC (articles 4 and 5 of Decree 34).

1 There is no formal system of court reporting in the onshore UAE courts. References made in this article to cases are based on published reports, summarising the relevant judgments; the authors have not sighted the underlying judgments.

EMAC, a specialised maritime arbitration centre, was established as recently as 2016, so is perhaps less well known to international parties operating in the UAE and wider Middle East region.

By contrast, the DAI was responsible, in collaboration with the London Court of International Arbitration (LCIA), for the administration of arbitrations under the auspices of the DIFC-LCIA, a well-known arbitration centre located in the DIFC and popular with international parties, in particular.

Although not explicitly stated, the abolition of the DAI seems to have also caused the effective abolition of the DIFC-LCIA. To that end, a press release from the DIFC on 7 October 2021 stated that:

> *From the date of the enactment of the Decree, parties to contracts should not include arbitration agreements which provide for the resolution of disputes in accordance with the DIFC-LCIA Rules or for the DIFC-LCIA to administer, or to act as appointing authority in arbitrations, mediations or other ADR proceedings, pursuant to other, ad hoc, rules or procedures.*[2]

Prior to its enactment, Decree 34 had not been the subject of widespread discussion or consultation – with the LCIA itself stating that it 'came as a surprise' in a statement issued on 7 October 2021.[3] Practitioners in Dubai and the wider UAE and Middle East region were, for the most part, also unaware of Decree 34 before its publication.

The introduction of Decree 34 has therefore given rise to some uncertainty, at least in the short term, as to (1) the impact on proceedings ongoing at the date Decree 34 came into force, and (2) the validity of pre-existing arbitration agreements, providing for disputes to be referred to arbitration under the rules of the DIFC-LCIA or EMAC.

In this respect, Decree 34 states that pre-existing arbitration agreements providing for arbitration under the rules of the abolished centres would remain valid and effective and that the relevant rules would remain in full force and effect to the extent they do not contradict Decree 34, until new DIAC Rules are approved. DIAC published new rules on 2 March 2022 (DIAC Arbitration Rules 2022), which came into effect on 21 March 2022.[4] It remains to be seen what effect this will have on pre-existing agreements to arbitrate under the DIFC-LCIA or EMAC Rules. Decree 34 also provides

2 See https://www.difc.ae/newsroom/news/dubais-position-global-hub-alternative-dispute-resolution-reconfirmed-through-unifying-arbitration-centres/.

3 See https://www.lcia.org/News/update-difc-lcia.aspx.

4 See http://www.diac.ae/idias/resource/Rules2022.pdf.

that arbitral tribunals already formed under the rules of the abolished centres as of the effective date of Decree 34 will continue to handle the cases in front of them pursuant to their applicable rules and procedures, but that DIAC will undertake the supervision of such cases (article 6). It was subsequently reported – in the above-mentioned statements from the DIFC and LCIA – that existing cases before the DIFC-LCIA would continue to be administered by the DIFC-LCIA casework team and the LCIA.

Even with these transitional procedures in place, it remains to be seen, in practice, how new matters will be dealt with and how parties will react, particularly now that the new DIAC Rules have been introduced.

Notwithstanding the above, and the uncertainty that is likely to continue in the short term, the rationale behind Decree 34 remains consistent with Dubai's aim of promoting itself as an arbitration destination and it is hoped that the changes to the structure of DIAC will, once implemented, strengthen DIAC as an arbitral institution.

It should also be noted that the new DIAC statute, introduced by Decree 34, provides (among other things) that where parties fail to agree on the place or seat of arbitration, the DIFC will be deemed to be the applicable seat. This is a move that is likely to be popular with international parties, given the support that the DIFC courts have demonstrated for arbitration.

New working week

Another development in the UAE that is likely to be viewed positively by parties based outside of the Middle East is the move to a Monday-to-Friday working week from January 2022 (a change from the previous Sunday-to-Thursday working week). Although this move is not one that was aimed specifically at arbitration, it is nevertheless likely to prove beneficial to the conduct of proceedings in the UAE by making it easier to arrange hearings (whether in-person, virtual, or hybrid) across the full working week in different jurisdictions (as opposed to the previous options of operating a four-day hearing week or requiring at least one party to work on their weekend, in circumstances where working weeks did not align).

Key onshore court decisions

As noted above, 2021 also saw the continued development of case law concerning arbitration in the UAE onshore courts, including concerning the interpretation of the 2018 UAE Arbitration Law. This has included a number of decisions that suggest that arbitration continues to be viewed as an exceptional measure in some quarters, requiring clear agreement by both parties.

Thus, it was reported that, in Judgment No. 1308/2020, the Dubai Court of Cassation ruled that it had jurisdiction over a dispute arising out of a contract, into which the parties had incorporated by reference the 1987 FIDIC Red Book General Conditions.[5] The Red Book General Conditions include an arbitration clause, but the Court of Cassation concluded (upholding the judgment of the Dubai Court of First Instance) that the incorporation of the Red Book General Conditions as a whole was not sufficient to incorporate the arbitration clause therein. To incorporate the arbitration clause would have required a specific reference, sufficient to establish the parties' knowledge of the clause's existence. This is an important decision to consider in the context of article 5(3) of the UAE Arbitration Law, which permits the incorporation of arbitration clauses by reference, provided that the reference is such as to make the clause part of the new contract.

In a similar vein, it was reported that, in Case No. 922/2020, the Abu Dhabi Court of Cassation ruled that a representative acting under a power of attorney is only authorised to enter into an arbitration agreement if their power of attorney permits them to do so in clear and unequivocal terms.[6] The requirement of explicit authority to bind a company or other principal to an agreement to arbitrate (as distinct from a general authority to bind the principal to contracts) is a long-standing issue that was incorporated into the new UAE Arbitration Law in 2018.[7] The decision by the Abu Dhabi Court of Cassation re-affirms previous decisions that the authority granted under a power of attorney will be narrowly construed and that, in the event of ambiguity as to a representative's authority to bind the principal to arbitration, there is a danger that the court will conclude that there is no valid and enforceable arbitration agreement.

By contrast, it was also reported that, in a separate case, the Abu Dhabi Court of Cassation acknowledged the possibility of verbal, implied or apparent authority to arbitrate being granted.[8]

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5 See https://www.lexismiddleeast.com/case/Dubai/DCC_2021_1308_2020/.

6 See https://www.wilmerhale.com/en/insights/publications/20210609-the-abu-dhabi-court-considers-special-authority-is-required-to-conclude-an-arbitration-agreement-by-power-of-attorney.

7 See https://www.wilmerhale.com/en/insights/publications/20210609-the-abu-dhabi-court-considers-special-authority-is-required-to-conclude-an-arbitration-agreement-by-power-of-attorney.

8 See https://waselandwasel.com/articles/abu-dhabi-cassation-court-acknowledges-verbal-implied-or-apparent-authority-to-bind-principal-to-arbitration-agreement/.

This decision is consistent with another line of cases (notably in the Dubai courts), in which the courts have accepted apparent authority as being sufficient to defeat a party's attempt to invalidate an arbitration agreement (often following the receipt of an adverse arbitral award).

However, there remains uncertainty as to which approach the UAE courts will take when faced with this issue (and the approach may differ, depending on the type of corporate entity being dealt with), such that parties contracting with UAE parties should continue to ensure that anyone signing on behalf of their counterparts has adequate authority to commit to arbitration.

The UAE courts also elected not to enforce an arbitration agreement in another decision reported this year, by the Dubai Court of Cassation in Case No. 290/2021.[9] The case concerned disputes arising out of a contract between a developer and its consultant (which contained an arbitration clause) and the related contract between the developer and its contractor (which did not). The Dubai Court of Cassation held that disputes arising out of multiple contracts (only one of which contained an arbitration agreement) relating to the same transaction were so closely connected that it was in the interests of justice, and necessary to avoid inconsistent judgments, that the disputes should be determined in one forum. As the arbitration agreement was not binding on all of the parties, it was not possible for the whole dispute to be determined by arbitration – and the disputes under the two contracts should therefore be determined by the Dubai courts.

Elsewhere, it was reported that the Dubai Court of Cassation upheld a challenge to the recognition and enforcement of an arbitral award issued by the China International Economic and Trade Commission on the basis that the award was not signed (or not properly signed) by the arbitrator.[10] The reports do not make clear whether the arbitrator had failed to sign the award entirely (which would perhaps provide greater justification for a refusal to enforce) or had failed to sign the reasoning or decision within the award (which was a requirement in the UAE prior to the enactment of the UAE Arbitration Law in 2018 and would seem still to be required, even

9 See https://www.klgates.com/Dubai-Court-of-Cassation-Finds-that-the-Interests-of-Justice-Can-Override-an-Agreement-to-Arbitrate-in-Circumstances-Where-a-Dependent-Contract-does-not-also-Provide-for-Arbitration-8-9-2021 and https://dwfgroup.com/en/news-and-insights/insights/2021/8/dubai-court-of-cassation-overrides-an-arbitration-agreement-in-the-interest-of-justice.

10 See https://waselandwasel.com/articles/dubai-cassation-court-rejects-enforcement-of-unsigned-arbitration-award/.

though not explicitly stated in the law). The Court of Cassation apparently concluded that enforcement of the award would be contrary to the public policy of the UAE,[11] seemingly in reliance on article 41(3) of the UAE Arbitration Law, which requires arbitral awards to be signed by the arbitrators (or a majority thereof).

Key developments in the DIFC

As discussed in more detail above, the key arbitration-related development in the DIFC was Decree 34, which effectively served to abolish the DIFC-LCIA. Prior to the introduction of Decree 34, the DIFC-LCIA had enacted new, updated rules and a new law, Dubai Law No. 5 of 2021, had introduced changes to the DAI. However, these changes were superseded by the subsequent introduction of Decree 34.

The DIFC courts have continued to be supportive of arbitration, most notably in an unpublished decision from November 2020, in which the DIFC Court of First Instance granted an anti-suit injunction in relation to proceedings commenced in the onshore Dubai courts, in breach of an agreement to arbitrate, with a seat in the DIFC.[12]

The case – *Multiplex Constructions LLC v Elemec* – was the first instance of the DIFC courts granting an injunction restraining a party from pursuing litigation in the onshore UAE courts. It arose when Elemec commenced proceedings in the onshore Dubai courts, in breach of the parties' agreement to arbitrate. In turn, Multiplex commenced DIFC-LCIA arbitration proceedings – as provided for in the parties' agreement – and sought an injunction against Elemec continuing proceedings in the onshore courts.

HE Justice Shamlan Al Sawalehi – who issued the injunction in the DIFC court – found in favour of the binding nature of the arbitration agreement and confirmed that the onshore court proceedings were in violation of the agreement to arbitrate. As such, Justice Al Sawalehi issued an anti-suit injunction that restrained the continuation of the onshore proceedings.

The decision confirms the DIFC courts' support of arbitration, and willingness to intervene to protect agreements to arbitrate in the DIFC – even in the face of competing proceedings in the onshore UAE courts.

11 See https://waselandwasel.com/articles/dubai-cassation-court-rejects-enforcement-of-unsigned-arbitration-award/.

12 See https://hsfnotes.com/arbitration/2020/12/16/difc-court-grants-first-ever-anti-suit-injunction-in-respect-of-on-shore-dubai-court-proceedings/.

Key developments in the ADGM

Throughout 2021, the ADGM and the ADGM courts continued to demonstrate their support of arbitration through legislative developments and court decisions. 2021 also saw the establishment of a case management office of the International Chamber of Commerce (ICC) in the free zone.

Legislative development

On 23 December 2020, a new ADGM law, Arbitration Regulations 2015 – Amendment No. 1 of 2020 (the Amendment Law), was enacted to amend and update the underlying arbitration law in the ADGM.[13]

The key changes made to the ADGM Arbitration Regulations include:

- Requirements for a valid arbitration agreement: section 14(2) of the Arbitration Regulations 2015 now provides that parties who do not record their agreements in writing may agree to be bound orally or by conduct.
- Unilateral and asymmetrical clauses permitted: the Amendment Law introduced a new provision, section 14(6), which clarifies that an arbitration agreement containing a unilateral or asymmetrical right to refer a dispute either to an arbitral tribunal or to a court is not inconsistent with the Arbitration Regulations 2015 and will therefore be enforceable.
- Opt-in jurisdiction: the Amendment Law confirmed the ADGM as an 'opt-in' jurisdiction for arbitration, meaning that parties can agree to arbitration seated in the ADGM, without any connection to the jurisdiction. Section 35(2) of the ADGM Arbitration Regulations now provides that 'if the parties have agreed that the seat of arbitration shall be the Abu Dhabi Global Market, no other connection with the Abu Dhabi Global Market is required for these Regulations to apply.'
- The ADGM is not a 'conduit' jurisdiction: the Amendment Law confirms that the ADGM cannot be used as a 'conduit route' for enforcement of non-ADGM judgments and awards rendered in other jurisdictions (save for judgments rendered by other courts in the emirate of Abu Dhabi).[14] In other words, parties wishing to enforce foreign arbitration awards in the onshore UAE cannot do so by first

13 ADGM Arbitration Regulations 2015 (https://www.adgmac.com/arbitration/arbitration-regulations/).

14 Section 61(5) of the Arbitration Regulations – Amendment No. 1 of 2020 (https://en.adgm.thomsonreuters.com/rulebook/arbitration-regulations-2015-amendment-no-1-2020).

having them ratified by the ADGM courts (and then using established processes for enforcing ADGM court judgments in the onshore Abu Dhabi courts and the wider UAE).

- Focus on technology: section 31(5) of the ADGM Regulations 2015 now provides that an arbitral tribunal should consider the use of technology in order to enhance the efficient and expeditious conduct of arbitration. A new section 43(2) also allows arbitral tribunals to decide whether a hearing is to be conducted, in whole or in part, by video conference, telephone or other communication technology,[15] unless parties have agreed otherwise. In addition, if a hearing is to be held in person, a party may apply to the arbitral tribunal for any of its fact or expert witnesses to attend by video conference, telephone or other communication technology. Section 55(4) also confirms the legal validity and enforceability of awards signed electronically by tribunals.
- Conduct of parties' representatives: section 44(1) of the ADGM Regulations 2015 now sets out required standards of conduct for party representatives and provides (at section 44(1)(a)) that representatives shall 'not engage in activities intended to obstruct or delay the arbitral proceedings, jeopardise the integrity of the proceedings or the finality of any award.' Potential sanctions will apply if a representative contravenes section 44(1).

Key decisions in the ADGM

Aside from the above legislative developments, 2021 also saw an important decision in the ADGM courts, which considered both the circumstances in which the ADGM courts would stay proceedings in favour of another UAE court and the circumstances in which a stay would be granted in favour of arbitration.

The case related to 'protective' claims by NMC Healthcare Ltd (NMCH) and other members of the NMC Group (all of which were in administration proceedings in the ADGM) against one of the group's creditors and concerned the question of whether the creditor had any security interest over certain insurance receivables.[16] What is important for current purposes is that the creditor challenged the commencement of proceedings in the ADGM courts on the following grounds (among others):

15 Section 43(3) of the Arbitration Regulations – Amendment No. 1 of 2020 (https://en.adgm.thomsonreuters.com/rulebook/arbitration-regulations-2015-amendment-no-1-2020).

16 *(1) NMC Healthcare LTD (in administration) and associated companies (2) Richard Fleming (3) Benjamin Cairns v Dubai Islamic Bank PJSC & Others* [2021] ADGM CFI 0006 (https://www.adgm.

- certain of the claims should be stayed in favour of an arbitration clause in relevant financing documents; and
- certain other of the claims should be stayed in favour of jurisdiction clauses in security documents, in favour of the onshore Dubai courts.

In relation to the first issue, the ADGM court granted a stay of the ADGM court proceedings, to the extent necessary to give effect to the creditor's right to have a specific claim determined in arbitration. In doing so, the ADGM court relied on article 16 of the ADGM Arbitration Regulations 2015.

Further, and different from the approach adopted by the Dubai Court of Cassation in the case discussed above – in which the court held that an arbitration agreement in one contract should not be enforced, so that disputes under two related contracts could be heard together in the same forum – the ADGM court noted expressly that 'it is widely recognised that fragmentation is a price to be paid for the policy of enforcing arbitration agreements.' It would therefore seem that the ADGM court is prepared to go to greater lengths – and to risk procedural efficiency – in order to uphold agreements to arbitrate.

In relation to the second issue, NMCH argued (among other things) that the ADGM court has no power to order a stay in favour of proceedings in another UAE court. This argument was founded primarily on the decision of the DIFC Court of Appeal in *IGPL v Standard Chartered Bank*,[17] in which it was held that, under the Constitution of the UAE, the power to determine conflicts between the decisions of different courts of the UAE is vested in the Union Supreme Court, which has exclusive jurisdiction to determine such matters. The DIFC Court of Appeal did not, therefore, consider that it had jurisdiction to consider arguments of forum non conveniens in the context of an application to stay the DIFC proceedings in favour of the Sharjah courts.

In distinguishing the decision of the DIFC Court of Appeal from the scenario before it, the ADGM court highlighted that, in the DIFC case, IGPL had conceded that the parties had not agreed to opt out of the jurisdiction of the DIFC court. By contrast, in the contracts relevant for the stay application in this case, the parties

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com/documents/courts/judgments/2021-may/adgmcfi2020020-and-adgmcfi2021042--nmch--dib-pjsc--judgment-of-justice-sir-andrew-smith-final-240520.pdf).

17 *Investment Group Private Ltd v Standard Chartered Bank* [2015] DIFC CA 004 (https://www.difccourts.ae/rules-decisions/judgments-orders/court-appeal/investment-group-private-limited-v-standard-chartered-bank-2015-difc-ca-004).

had expressly agreed to refer disputes to the onshore Dubai courts, as permitted by article 13(9) of the ADGM Founding Law.[18] The basis of the stay – which was granted – was not, therefore, avoiding inconsistent decisions (which the DIFC Court of Appeal had decided was a matter solely for the Union Supreme Court), but rather preventing a party from flouting an agreement not to bring proceedings in the ADGM courts.

Institutional changes and developments

Away from the ADGM courts and legislature, the ICC International Court of Arbitration opened a case management office in the ADGM (its fifth globally). As well as administering regional arbitrations under the ICC Rules, the office will also conduct training and collaborate with the ADGM on promotional activities. Other activities will include ICC court sessions and workshops for companies incorporated in the ADGM.

Another development saw the signing of a Cooperation Agreement between the ADGM Arbitration Centre and the Permanent Court of Arbitration (PCA) in September 2021.

As part of the Cooperation Agreement, the organisations will collaborate to raise awareness and promote more effective resolution of international disputes through arbitration and other means of dispute settlement. As part of this push for greater collaboration, the ADGM Arbitration Centre is also set to extend support to the PCA for hearings or meetings conducted in Abu Dhabi through the provision of facilities, services, and personnel. The two organisations will also collaborate to organise lectures and seminars on arbitration and other means of dispute resolution.

Looking ahead

Legislative developments in both the onshore UAE and the free zone jurisdictions in the ADGM and DIFC during 2021 have continued the pro-arbitration trend of recent years. Both the onshore UAE and the two free zones continue to seek to position themselves as arbitration-friendly jurisdictions.

While the courts in the ADGM and DIFC have generally adopted a consistent pro-arbitration approach, the onshore UAE courts have a slightly more varied track record. This trend was continued in 2021, which saw a number of decisions

18 Abu Dhabi Law No. 4 of 2013 (https://en.adgm.thomsonreuters.com/rulebook/abu-dhabi-law-no-4-2013).

that reflected the onshore courts' continued perception of arbitration as an exception to determination of disputes by the courts. It is hoped that the proportion of pro-arbitration decisions will increase in the coming years.

The most significant development in the UAE in 2021 is likely to prove to be the effective abolition of the DIFC-LCIA and EMAC arbitration institutions by Decree 34, in favour of a single, pre-eminent Dubai-based institution in DIAC. This was a move that caught some institutions and practitioners alike off-guard, and it remains to be seen what impact the changes will have on the conduct of arbitrations under the DIFC-LCIA and EMAC Rules, at least in the short term.

With new DIAC rules now published, and a new arbitration court established, it is to be hoped that, once the 'new' DIAC is fully up-and-running, the aim of establishing an internationally recognised arbitration centre is realised.

* *The authors are grateful for the contributions of Lana Ristic (associate), Rany Rifaat (associate) and Tosin Murana (trainee solicitor).*

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