Arbitration in the MENA

Deborah Ruff and Charles Golsong of Pillsbury Winthrop Shaw Pittman LLP explore arbitration as a form of dispute resolution in the region, with insight on key aspects such as choice of seat, drafting agreements and enforcement.

Are you negotiating a contract and in the process of deciding how and where disputes arising in connection with it should be heard? Are you uncertain whether arbitration in the MENA region is for you? The below should answer at least some of your questions.

WHY ARBITRATE?

Whilst arbitration is not the magic formula for resolving all disputes, it has some significant advantages. For example, arbitration makes it easier to enforce an award thanks to the New York Convention (the NYC), and it keeps you out of the court process, which can be lengthy due to mandatory rights to appeal and the potential to re-file cases, and sometimes unpredictable.

Additionally, arbitration permits the parties a say in who hears their case and to nominate a tribunal which has legal and, where necessary, technical and/or industry expertise relevant to the dispute, rather than having a judge randomly allocated – particularly if you have a complex construction or energy dispute. Parties can also tailor procedures to the needs of a particular dispute, and the process can therefore be more flexible and informal. Finally, arbitration generally affords more

confidentiality to parties than the courts and typically permits you to recover much of your costs, provided you win.

WHAT INSTITUTION AND WHICH SEAT?

The next step is to select which arbitration institution will administer the dispute. Two of the most well-known institutions are the International Chamber of Commerce (ICC), based in Paris, France, and the London Court of International Arbitration (LCIA). Both can administer disputes seated anywhere in the world – there is no need to incur the expense of hearings in London or Paris.

However, it is important to be aware that the "seat" of the arbitration is not only (or necessarily) a physical one. The arbitration will be subject to the arbitration laws of the jurisdiction where it is seated, which will affect matters such as the rights of challenge to the award, the level of confidentiality provided, and the availability of court assistance when seeking interim relief. Parties should, therefore, take legal advice on where to seat an arbitration.

In the MENA region, probably the best-known arbitration institutions are the Dubai International Arbitration Centre (DIAC) and the Cairo Regional Centre for International Commercial Arbitration (CRCICA). There are also other arbitration institutions in the MENA region, including in Saudi Arabia, Abu Dhabi, Bahrain and Qatar.

Another institution, the DIFC-LCIA, ceased to exist following a September 2021 Decree enacted by Dubai, with all agreements providing for DIFC-LCIA arbitration instead going to DIAC.

More important than the choice of arbitral institution, however, is the choice of international arbitrators and the enforcement process. Ad hoc arbitration – arbitration without an arbitral institution – can sometimes be a good idea, such as if the parties want to specify a particular process, perhaps a short one with no hearing. However, if you do choose to operate without the "safety net" of institutional rules, it is important to obtain legal advice on drafting appropriate clauses.

It is impossible in an article such as this to cover everything. However, there are some key points to be aware of before choosing to arbitrate in the MENA region. For example, some MENA jurisdictions require any potential signatory to an arbitration agreement to have a "special power of attorney" for this purpose, failing which the award may be annulled. Additionally, many MENA jurisdictions are very formalistic, and all formalities must be complied with in order to obtain an enforceable award.

Under UAE law, for example, both the dispositive and reasoning sections of an award must be signed by the arbitrator(s), or the award will be deemed invalid in the UAE. We recommend that the arbitrator(s) sign every page of the award. Overall, if the award is to be enforced in the MENA region, it is preferable for witnesses to swear an oath and not an affirmation, preferably on a holy book.

Crucially, if the award does not contain a clear-cut obligation on the losing party to pay damages/costs to the winning party and merely entitles the winner to payment, enforcement may fail because any payment is considered optional.

For Saudi-seated arbitrations, it is important to ensure that findings in the award are compliant with Sharia principles, failing which the award may be annulled in part or in full. For example, arbitrators in Saudi-seated arbitrations may not award interest. However, unlike Saudi Arabia, recent Qatari case law suggests that the Qatari courts do not consider the award of interest to contravene Sharia principles.

If you are a foreign investor contracting with a MENA governmental body or state-owned company, their domestic law may specify which law must govern the contract and/or where disputes must be resolved.

WHAT ARE THE DO'S AND DON'TS WHEN DRAFTING THE ARBITRATION AGREEMENT?

We all too often find that contractual counterparties leave the negotiation of this most crucial of clauses until very late. All major arbitration institutions provide model arbitration agreements which are often a good starting point.

The focus when drafting an arbitration agreement/amending a model agreement should be on ensuring that any arbitration award will be confidential and enforceable worldwide, that the arbitration will be heard in a neutral setting and that the parties will have autonomy (for example to choose the number of arbitrators, the scope of disclosure). The latter is a concept not always familiar to MENA parties – an advantage of arbitration is that the

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obligation to disclose adverse documents is usually less extensive than in litigation in, say, the US or England and Wales, but not non-existent.

Whilst it is possible to limit arbitration to certain categories of dispute, doing so can create the risk of litigation over the boundary between litigation and arbitration or of "split proceedings", with some issues heard in arbitration and others in parallel arbitration.

Arbitrator selection is another key component which requires advance strategic thinking. There are some common drafting errors which we have seen, such as providing for arbitrators with such a specific skillset that it will be nearly impossible to identify a suitable individual. In such cases, even if such an individual exists, they may well be otherwise occupied, which could potentially lead to proceedings being delayed.

Another common pitfall is failure to specify the number of arbitrators (i.e., one or three) who will make up the tribunal, which can cause issues. For example, the DIAC Rules 2022 provide that where the parties have not agreed on the number of arbitrators, the tribunal will consist of a sole arbitrator, except where "taking into account the relevant circumstances" a tribunal composed of three individuals is appropriate.

Failing to provide for a situation where one or more of the parties fails to nominate arbitrators, and failing to tailor the selection method to the contract in question are other commonly seen mistakes. If there are three parties to a contract, the tribunal selection mechanism should reflect this.

WHAT ABOUT ENFORCEMENT?

Most countries are signatories to the NYC, which sets up a global system for enforcement of arbitration awards. This can prove a significant advantage over litigation because enforcement of foreign court judgments is heavily dependent on the existence of bilateral agreements or the ability to determine consistent reciprocity.

In addition, the NYC limits the grounds for refusing enforcement. However, interpretation can vary substantially from one jurisdiction to another, particularly the "public policy" ground, as can the process of registration of the award for enforcement. When seeking to enforce an arbitration award in the MENA region, you will usually have to go through an "exequatur" process of submitting it to the local courts, which may take between 1-2 years. If the losing party has assets in other jurisdictions, you may want to try there first.

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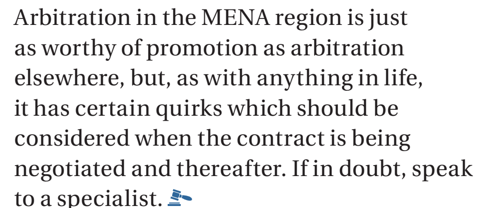
Additionally, it is important to consider whether any grounds of resistance to enforcement (for example, the aforementioned "public policy" ground) exist, and how these might be interpreted by the courts where enforcement is likely to be sought.

Whether there is a system of mandatory review of the substance of the foreign award in the country where enforcement will be sought is another important point to establish. If there is, this could lead effectively to re-litigating the dispute.

Finally, what types of orders are available to assist in enforcement in the jurisdictions where the assets are located. For example, are "freezing orders" available? How complicated is the process for the sale of real estate to meet the award? Can bank accounts be accessed?

Whilst these are important initial points to consider, this list is not exhaustive.



Arbitration in the MENA region is just as worthy of promotion as arbitration elsewhere, but, as with anything in life, it has certain quirks which should be considered when the contract is being negotiated and thereafter. If in doubt, speak to a specialist.

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