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TALKINGPOINT: DISPUTE RESOLUTION IN THE MIDDLE EAST

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TalkingPoint: Dispute Resolution In The Middle East

BY PATRICK BOURKE, TIM PORTWOOD, AND SUNIL THACKER

FW moderates a discussion between George D. Martin at Faegre & Benson LLP, Jeffrey Harfenist at Navigant Consulting (PI) LLC, and James Walker and, Mr. Sunil Thacker, discuss on the implications for companies and individuals arising from FCPA violations.

FW: Have you seen an increase in commercial disputes across the Middle East over the last 12 months or so? What types of disputes seem to be most prevalent?

Portwood: Looking at the UAE, the number of commercial disputes has increased from 2009 to 2010, although the size of that increase does not seem to be as dramatic as in the previous year, 2008 to 2009. By way of example, I understand that the Dubai International Arbitration Centre (DIAC) has registered an increase of 18.5 percent in the number of cases in the first six months of this year as compared to the same period last year whereas in the previous year the number of cases almost doubled. This growth is due to at least two factors. The first is increased interest in the Arab world generally over the last five to 10 years in the use of arbitration crafted on Western principles and rules as an alternative means of dispute resolution to the state courts. The other reason for this precipitation in the use of arbitration is the unprecedented number of disputes arising out of the global economic crisis. The crisis hit the property and construction industries in the UAE in a particularly hard way. Many of the arbitrations that are presently underway concern issues such as non-performance, non-certification of milestones or payment, claims for extensions of time and increased costs in the construction industry. Defaults either in the construction of off-plan developments or in the payment of instalments are also giving rise to a large number of arbitrations.

Bourke: There has been an increase in disputes across the Middle East generally over the past 24 months, particularly in the real estate and construction sectors, but also in relation to disputes involving financial institutions. These disputes have arisen principally as a consequence of the global financial crisis (GFC), with many disputes having been caused by a lack of liquidity and access to finance. Dubai has seen the most significant increase in disputes, as a result of the impact of the GFC on construction and real estate in the Emirate.

Thacker: Disputes have risen significantly in the entire Middle East over the last two years. The most prevalent disputes relate to real property, commercial transactions and cases involving contentious shareholder disputes.

FW: To what extent are companies in the region embracing alternative dispute resolution methods?

Bourke: If ADR is taken to include arbitration, it is evident that international, and increasingly domestic, parties are including arbitration clauses in their contracts, and this trend is likely to continue. In relation to other ADR methods, informal negotiation or mediation has long been part of Middle Eastern tradition, and this is likely to continue. However, we are seeing an increase in the number of companies, both domestic and international, wishing to include more formal ADR steps in their contracts, though it will take time for formal mediation to be fully embraced within the region.

Thacker: Due in large part to the influence of Shariah-based local laws and complicated enforcement procedures, most foreign investors have chosen not to seat their arbitrations in the Middle East. Reinforcing this apprehension is the perception that, as a general rule, the practice of commercial arbitration in the Middle East is still in its infancy and that arbitration experience in practitioners, judges as well as arbitrators lags behind the rest of world. In an attempt to dispel these notions, many Middle East countries have now introduced reforms to modernise their arbitration laws, procedures as well as practice. To illustrate, Dubai International Arbitration Centre offers a world class infrastructure, and has some seasoned arbitrators who possess the requisite skill, knowledge, experience and qualifications in the subject matter they are entrusted with.

Portwood: The use of alternative dispute resolution methods depends upon a virtuous circle. Parties will only include, for example, an arbitration agreement in their construction contracts or off-plan property sale agreements if they have confidence in arbitration as a dispute mechanism. That confidence usually rests on some form of experience of arbitration in the first place and on a degree of comfort that resulting arbitral awards will be enforceable in the local courts. Rounding off the circle takes time, therefore, and, in the UAE for instance, the first decisions demonstrating a pro-arbitration outlook to the enforcement of arbitral awards have only just seen the light of day. The proposed new Federal law in the UAE on arbitration is currently on the hot plate and if enacted – as is expected by the end of this year – will follow the UNCITRAL Model Law, as is the case for the laws of many Western jurisdictions. This proposed law will follow in the same vein as the UAE's ratification of its accession to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards on 21 August 2006 and that was given the force of law on 19 November 2006. The number of disputes precipitated by the economic crisis that are being submitted to arbitration suggests that companies in the UAE at least have already begun embracing arbitration as an alternative to the local courts, and it is hoped that the work of institutions such as the DIAC and the Abu Dhabi Conciliation and Arbitration Centre (ADCCAC) the Sharjah International Arbitration Centre and the Ras Al-Khaimah Commercial Arbitration Centre will serve to increase confidence in arbitration in the region such that more and more local persons and foreign investors will include arbitration agreements in their contracts.

FW: How would you describe arbitration facilities and processes in the Middle East?

Thacker: Several countries in the Middle East have adopted United Nations Commission on International Trade Law Model Law on International Commercial Arbitration.

Bahrain, Iran, Jordan, Oman, Egypt and Tunisia have adopted the UNICITRAL Model to the adoption of Western arbitration models in Qatar and Lebanon. Whilst the facilities are common in most of these jurisdictions, the challenge lies in finding professional arbitrators in matters involving technical claims. The facilities at Dubai International Arbitration Centre (DIAC) and Dubai International Financial Centre (DIFC) are excellent, allowing flexibility to the parties in conducting the hearings.

Portwood: If there is one word that encompasses both the modern arbitration facilities and processes in the UAE it would be 'youthful'. Most of the arbitration centres, with the notable exception of the DIAC and the ADCCAC, have not yet celebrated their fifth birthday. The quality of the service depends largely of course on the quality of the people running the institutions and great efforts have been made recently by most of the institutions to recruit experienced personnel to lead their institutions through these pioneering days. The facilities are good, with a large number of different possibilities available for the hosting of hearings. It is commonplace however to look abroad for the services of translators/interpreters and court reporters. Regarding processes, the rules of the institutions have been inspired by those of existing bodies such as the ICC, the LCIA and so on to produce a body of rules that have been tried and trusted.

Bourke: In relation to processes, most, countries in the region are now party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) – Iraq and Yemen being the notable exceptions. Some countries, including Egypt and Bahrain (and the Dubai International Financial Centre (DIFC)), have also enacted slightly amended versions of the United Nations Commission on International Trade Law (UNCITRAL) Model Arbitration Law, which is now the accepted international template for national arbitration laws. The purpose of the Model Law is to set out a framework for arbitration which permits the national courts to provide assistance for the arbitral process and ensure that it works, but prevents judicial intervention in the process to the extent possible. In the UAE, arbitration has also received government and institutional backing: the Federal Government is in the process of considering a new UAE Federal Arbitration Law and it is hoped that this draft law will be enacted in due course. There are a significant number of arbitral institutions within the region, with some countries having a number of options from which to choose – for example, there are five institutions in the UAE alone. It remains to be seen whether it is viable for so many institutions to be successful in the region. The busiest institution has been Dubai International Arbitration Centre (DIAC), which received approximately 300 new arbitrations in 2009, and appears likely to receive even more in 2010. This will make the DIAC one of the largest international arbitral institutions in the world by volume (behind only the ICC and the Chinese centre, CIETAC). While there have understandably been some timing issues with the DIAC while it geared up to take this huge increase in volume of cases, they have recruited motivated and highly competent case handlers who are now addressing these issues. The DIFC-LCIA Arbitration Centre (DIFC-LCIA), a relative newcomer, has also been well-received and is likely to become increasingly popular in the coming months and years, and we are seeing many international companies choosing to have DIFC-LCIA arbitration clauses in their contracts. This facility can be used by companies which have no connection with the DIFC. The Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC) is growing in importance, and we expect that they will re-launch themselves in due course, and in particular as and when the UAE's new Federal Arbitration Law is enacted. More widely in the region, arbitration facilities are available across the Middle East. Bahrain has taken a step forward this year by establishing the Bahrain Chamber for Dispute Resolution (BCDR) in partnership with the American Arbitration Association (AAA). With a fresh approach to arbitration and with the internationally recognised AAA onboard, the BCDR is positioning itself as a leading forum for international commercial disputes in the region.

FW: What arbitration-related challenges have you seen in your jurisdiction of focus?

Portwood: One of the main difficulties, if not a true challenge, that we have faced to arbitration in the region is a belief that the process and the persons involved in the process will suffer from the same sort of weaknesses as civil servants and other state officials. Our experience is thankfully the opposite, and all of the arbitrations in which we have been involved have been free of any form of undue influence. It is of course of utmost importance that this remains the case, although much rests on the shoulders of the institutions, arbitrators and counsel to be sure that things do not change.

Thacker: The credit crunch and recession have led to filing of thousands of cases before the arbitration centre. Arbitration bodies in the GCC may need to take appropriate measures in responding to claims in a timely manner. The number of arbitrators in several countries is not sufficient and there is a clear demand for professional arbitrators. The principle objective of arbitration is speedy disposal of suites, and arbitration centres must endeavour to meet this objective.

There is a need to introduce detailed rules of arbitration, procedures and manuals – and arbitration centres in the GCC must hold seminars and events from time to time to educate investors and practitioners.

Bourke: The primary challenge in the UAE is the present lack of a bespoke Federal Arbitration Law based on the UNCITRAL Model Law. Arbitration is recognised under UAE Federal law, but there are only three short chapters of the UAE's Civil Procedure Code which are devoted to arbitration, and these provisions are insufficient. Secondly, while there has been a very significant number of arbitrations commenced in the last 18 months, in particular in Dubai, there have as yet been very few, if any, reported decisions of courts having enforced arbitral awards in the region – irrespective of which rules the arbitrations were conducted under. Unless and until those cases come through the courts, and are reported, there will remain some scepticism among companies and individuals as to the efficacy of arbitration in the Middle East. Finally, some of the institutions in the Middle East would benefit from revising their rules and internal processes to bring them in line with international standards.

FW: Are there any problems with the enforcement of arbitration awards by Middle Eastern Courts?

Bourke: The vast majority of Middle East countries are signatories to the New York Convention, and there appear to be few issues in relation to courts recognising and enforcing arbitration agreements, by referring contractual parties to arbitration. While that is encouraging, it remains important for the perception of arbitration in the region that arbitral awards are seen to be recognised and enforced in the region, and preferably without the need for any lengthy court process. To date, to our knowledge there have been very few awards enforced in the region. Enforcement of foreign arbitral awards before the local courts has at times proved problematic. In some instances, the reason behind a court's decision not to enforce an award has been justified, where, for example, the contents of an award can be shown to be contrary to established principles of Shariah law – and these issues often arise where the parties and the arbitral tribunal are not aware of these issues during the course of the arbitration. However, there have also been instances, albeit some time ago now, where enforcement has been refused for somewhat technical reasons, and it is these cases which it is hoped will be eradicated from Middle Eastern jurisprudence, as the region and its courts become more familiar with the arbitral process. ▸▸

Thacker: There are virtually no treaties for the reciprocal enforcement of court judgments between Middle Eastern countries and Western nations; an enforcement treaty between France and the UAE being one of the few. Saudi Arabia acceded to the New York Convention in 1994, but enforcement has proved problematic. A foreign award needs to be ratified by the Saudi Arabian Board of Grievances, which is the commercial court having jurisdiction to enforce foreign judgments and arbitral awards. In so doing, the Board of Grievances would likely consider the issues ab initio, thus adopting a merits review of the award. Enforcement of DIFC awards is also not very straightforward. As every DIFC Arbitration Award is ratified by the DIFC Court, awards can be enforced outside of the DIFC. There is a mechanism in place whereby DIFC Court judgments will be enforced by the execution department of the Dubai Court. This is done by presenting the DIFC judgment to the execution judge at the Dubai Court who will convert the DIFC judgement into a judgement of the Dubai Court. Such a judgement is enforceable in Dubai as well as the UAE and the wider GCC.

Portwood: Enforcement of arbitral awards in the UAE has not always been easy. An infamous example is the case in 2004 where the UAE Court of Cassation annulled a domestic arbitral award on the basis that the witnesses who had given evidence before the arbitral tribunal had not been sworn under oath. The UAE's ratification of its accession to the New York Convention is a clear sign that this is changing. Indeed the first decision from a first instance court In the UAE under the New York Convention took a pro-arbitral approach, applying the Convention literally. It refused to apply domestic law to the application for enforcement and stated that under the Convention rules it could not entertain a review of the merits of the arbitrator's decision. All that it required to issue an enforcement order was prima facie proof of the arbitration agreement and the final award of the arbitrator thereunder. It should however be noted that in addition to the five criteria for challenge to the recognition or enforcement of an arbitral award in the New York Convention, UAE law includes the grounds that the subject matter is not capable of settlement by arbitration under UAE law (and this could include matters under Shariah law) and if the recognition or enforcement of the award would be contrary to UAE public policy which may give some leeway for interpretation by the local courts.

FW: To what extent is the region being influenced by international dispute resolution processes?

Thacker: In several aspects, the GCC is being influenced by international dispute resolution processes. There is a clear demand by the parties to assert claims before the arbitration centre. Most of the arbitration centres allow parties to carry out the proceedings in the English language. More importantly, the arbitrator's experience and qualifications allow him to think outside the box besides applying the letter of law. The procedures of arbitration are quite informal, allowing parties to consider settlement options.

Bourke: The influence of international dispute resolution processes is evident from the main institutions in the region: for example, the DIFC-LCIA uses a more or less identical version of the LCIA Rules, and utilises the LCIA Court, its database of arbitrators and other infrastructure on a daily basis; the BCDR is a partnership with the international arm of the AAA; the DIAC uses rules closely based in the ICC Rules, and has employed former employees of the ICC to administer its arbitrations.

An increasing number of countries in the region have adopted arbitration laws based on the UNCITRAL Model Law. Finally, regional offices of international law firms, and local firms, increasingly employ arbitration lawyers from outside the region, who bring with them international perspectives on arbitration practice.

Portwood: It is my experience that the region is being inundated by the Western style of arbitration and in particular the Anglo-Saxon / common law approach that has come to dominate European international arbitration practice. The cause of this is simple. It is the foothold that many of the global firms, using the English language, have taken in the region to share in the upsurge in interest in international arbitration generally. With Western and often Anglo-Saxon arbitrators and counsel being involved in an arbitration, the tendency is to see the procedure sway towards the common law approach with emphasis on witness evidence, disclosure of document processes and oral argument. This means that many local firms have taken to hiring common law trained lawyers to bolster the ranks of their arbitration teams.

FW: What changes would you make to existing arbitration rules, and why?

Bourke: Most of the major arbitral institutions in the region have based their rules on rules of arbitral institutions which are either linked to the institution – for example, the BCDR-AAA and the AAA-ICDR Rules; the DIFC-LCIA and the LCIA Rules – or which are internationally accepted – for example, the DIAC and the ICC Rules; the CRCICA and the UNCITRAL Rules.

Portwood: Many local institutions have already taken the trouble to craft their rules on the tried and trusted rules of existing institutions and have done what they can to cream off the best of all worlds. In most cases, this means increasing the power of the arbitrator in respect of provisional measures (given the time and complexity involved in obtaining the assistance of the local courts) and leaving considerable leeway to the arbitrator to administer his or her own procedure (within the bounds of due process). It is however too early to judge whether any particular provision of these rules would merit amendment. Time will tell.

FW: What clauses would you recommend that Middle Eastern companies insert into their commercial contracts to manage potential disputes down the line?

Portwood: I would most definitely recommend a simple arbitration agreement that chooses the rules of one of the now established institutions, which could be local or one of the more global ones such as the ICC or the LCIA. The clause should identify the number of arbitrators as an odd number – and I would usually advocate for three – to be appointed in accordance with the chosen rules, which would usually leave each party to nominate its own co-arbitrator and the third, who would act as chairperson, would be appointed by agreement or by the arbitral institution. The seat of the arbitration as well as the language of the proceedings should be clearly specified. The question often arises whether a pre-arbitral process of negotiation, mediation or the like should be included. The risks associated with these types of clause (do they operate as a bar to jurisdiction or were they merely intended to be a voluntary attempt at settlement) advocate in favour of their exclusion. Finally, I would advise specifying that the entire procedure is to be confidential if this is the wish of the parties.

Bourke: We would recommend that all Middle Eastern companies include a dispute resolution clause which provides certainty between the ▸▸

parties as to the following. First, certainty as to which law will govern any dispute. Second, certainty as to which court or arbitral tribunal shall have jurisdiction to hear the case. Third, certainty as to clear steps that the parties must adhere to if a dispute arises. There is no one dispute resolution clause which can be applied to all contracts; the specific nature of the contract and a number of other issues – such as the nationality of the counterparty and the location of the assets of the parties – must be considered when drafting any dispute resolution clause.

Thacker: Parties must under all circumstances choose a proper forum for resolving disputes. Choosing arbitration as a forum may not at all times be advisable. Parties must choose one forum to resolve disputes and must refrain from providing jurisdiction to both – courts as well as arbitration. The parties must assess risk involved in a given transaction, value the risk and claim and accordingly consider costs of arbitration or court costs. The clauses as to arbitration must be certain and definite and not loose or vague. ■

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