مركـز عُمان للتحكيـم التجـاري
Oman Commercial Arbitration Centre

Oman
ADR Bulletin

Issue 1, August 2023
Annual Bulletin

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Oman Commercial Arbitration Centre

مجلة عُمان للتحكيم والوساطة

Issue 1, Volume1 | August 2023

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Message

Welcome to this inaugural issue of The Oman ADR Bulletin, the Oman Commercial Arbitration Centre's (OAC) newsletter.

The OAC is one of the most recent additions to the ADR landscape in the Middle East. Stemming from the government of Oman's Vision 2040 plan, the Centre was established by Royal Decree as an independent legal entity with full administrative and financial autonomy in its operations.

The Centre aims to provide an institutional mechanism to ensure the expeditious, cost effective and totally neutral administration of arbitration and other forms of ADR to local, regional, and international parties. This would not only enhance the attractiveness of Oman as an arbitration-friendly jurisdiction but also assist in the wider efforts to attract greater foreign direct investment to the Sultanate.

Oman's strategic geographical location, political stability, neutrality and focus on facilitatory diplomacy using the medium of mediation as a pillar of its foreign policy, provides a strong foundation to the services offered by the OAC.

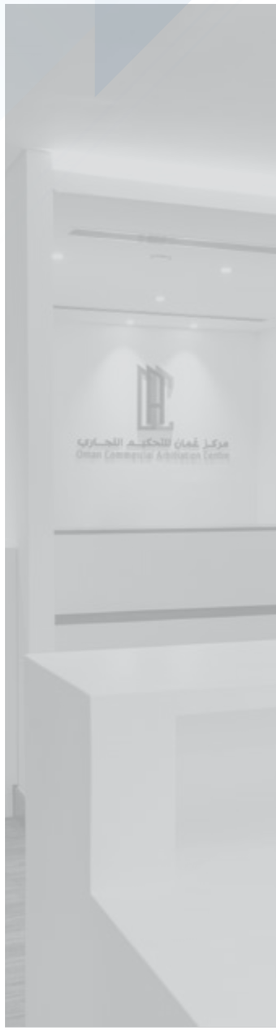
I am delighted to let you know that the OAC is now administering its first few arbitrations, mediations and adjudications, with the total sums-in-dispute close to 50 million US dollars. Whilst this is not a bad start at all, we look forward to receiving a steady stream of cases in the not-too-distant future, and to establishing the OAC as one of the more preferred ADR centres in the GCC and the wider MENA region.

The Oman ADR Bulletin is a biannual publication that would endeavour to showcase contributions from leading arbitration and ADR practitioners from Oman and also globally. This newsletter was conceptualised with a mandate to offer readers relevant and insightful articles on a range of topics from the world of arbitration and ADR.

We at the OAC are extremely grateful to The Honourable Sayyid Khalifa Said Al Busaidi, Chairman of the Supreme Court of Oman for his encouragement and his contribution to this newsletter. I would also like to thank Gary Born, Alexis Mourre, Said Al Shahry, Catherine Dixon, Joe Tirado, Saif Al Mamari, Lydia Louise Clatworthy and Tahmineh Madani for making this newsletter possible at a relatively short notice.

Finally, I encourage all readers to send me your feedback. Until the next issue, happy reading.

Dr. Moosa Salim Al-Azri
Chief Executive Officer



Technology in International Arbitration

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The world has undergone dramatic technological change, impacting all aspect of life, over the past two decades. The practice of law, and particularly international arbitration, has been no different.

Although technological innovations have been used by international arbitration practitioners for the past several decades, the Covid-19 pandemic has accelerated and deepened the extent of such use. Since March 2020, travel bans, social distancing restrictions, government-mandated and other lockdowns, and "work from home" programs have been adopted around the world. These measures have had substantial effects on all industries, including the legal profession, which have been forced to adapt, often putting technologies to new uses.

The most significant application of technology in international arbitration during the pandemic has been the use of video platforms to conduct virtual hearings. High-performance broadband, digital videoconferencing platforms, 360 cameras, cloud-based storage, and case management platforms ("CMPs") have been combined to enable hearings that previously were conducted only in person to be conducted remotely, with all or most participants in different geographic locations. Commercial services, such as WebEx, Zoom, Microsoft Teams, or other specialized teleconference systems, have all been used to conduct both shorter procedural meetings (i.e., ½ or 1 day hearings without witnesses, involving only oral submissions by counsel and tribunal questions) and longer evidentiary hearings (i.e., 1-15 day hearings with testimony by both fact and expert witnesses, as well as submissions by counsel).

Other technologies which have been introduced in international arbitration, often in conjuction with virtual hearings, include data rooms, cloud-based storages, and CMPs, through which participants can share, review, store and retrieve documents in an efficient and secure manner and digital format. Parties are able to file submissions, upload exhibits and other materials, and communicate with the tribunal and arbitral institution through such platforms. Many CMPs include CaseMap, Exhibit Manager, FileCloud, Opus Magnum, or SharePoint.

A number of arbitral institutions have either amended their institutional arbitration rules and/or issued guidance to accommodate the use of technology for virtual hearings in international arbitration. For example, in April 2020, the ICC published a Guidance Note on Possible Measures Aimed at Mitigating the Effects of the Covid-19 Pandemic. Article 11 of the Note observes that "new requests for arbitration (including pertinent exhibits) and other initiating documents [may] be filed with the Secretariat in electronic form." Article 23 of the Guidance Note explains that Article 25(2) of the ICC Rules, which provides that the tribunal "shall hear the parties together in person," can be "construed as referring to the parties having an opportunity for a live, adversarial exchange" and does not preclude a "hearing taking place 'in person' by virtual means." In 2021, ICC updated its Arbitration Rules, with a revised Article 26(1) providing

that hearings may be "conducted by physical attendance or remotely by videoconference, telephone or other appropriate means of communication."

Likewise, in June 2020, the Vienna International Arbitration Centre ("VIAC") released the "Vienna Protocol—A Practical Checklist for Remote Hearings." The Protocol notes that Article 30(1) of the VIAC Rules requires an "oral hearing," but explains that this is not a requirement for a hearing "in person" and that a remote hearing that allows parties to orally present their case can satisfy this provision. And, in August 2020, the London Court of International Arbitration ("LCIA") released an update to its Arbitration Rules, with Article 19.2 providing expressly that any hearing may be held "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)."

The technological developments during the pandemic, and the institutional and other measures described above, have contributed to a robust increase in the use of international arbitration over the past two years. Most arbitral institutions recorded increased caseloads during 2020, with 2021 appearing likely to continue that trend: rather than the pandemic diminishing the use of arbitration to resolve international disputes, it in fact witnessed greater usage of leading institutions' arbitration rules. Similarly, virtual hearings replaced in person hearings, with parties, counsel and arbitral tribunals conducting both procedural meetings and significant evidentiary hearings remotely, using the various platforms and other technologies discussed above.

The use of technology in international arbitration introduces new issues, which parties and other participants in the arbitral process must consisder.

First, despite the actions of arbitral institutions, clarifying that virtual hearings may be conducted, issues have arisen as to the validity and enforceability of arbitral awards made when such hearings, rather than traditional in-person hearings, have been conduct. In the majority of all such challenges, both before and after the pandemic, national courts have both confirmed and recognized arbitral awards made following either video testimony or a remote hearing. Courts have reasoned that virtual hearings do not, in principle, deny a party the right to be heard or subject it to procedural unfairness or inequality. Courts have acknowledged that, in some circumstances, an in-person hearing would be required (for example, to permit inspection of physical exhibits); in most cases, however, this has been treated as an exceptional possibility.

Concerns are raised in some cases regarding witness coaching, which is said to be more difficult to detect in virtual hearings. In response, tribunals have adopted protocols, requiring specific assurances that witnesses are alone, without access to mobile or other communication devices, and using 360 degree cameras or multiple cameras during witness testimony. In the view of most experienced participants, these measures provide more than adequate protections in most cases against procedural irregularities.

Concerns are also raised about arbitrator attentiveness or the ability of counsel to "connect" with members of the tribunal during remote hearings. Again, most of those who have participated in remote hearings conclude that arbitrators are fully capable of remaining fully attentive during such hearings and that counsel is no less able to present his or her client's case remotely than in-person. There may be circumstances, such as time zone differences or technological imbalances, that alter these general observations, but they are rare and unusual.

In some cases, the parties' arbitration agreement or the institutional rules that it incorporates might be interpreted to require an in-person hearing; if so, then one party's refusal to consent to a remote hearing might raise issues regarding recognition and enforcement of a resulting award (under Article V(1)(d) of the New York Convention or Articles 34(2)(a)(iv) and 36(1)(a)(iv) of the UNCITRAL Model Law on International Commercial Arbitration). Thus, Article 22 of the ICC Guidance Note cautions that "[i]f a tribunal determines to proceed with a virtual hearing without party agreement, or over party objection, it should carefully consider the relevant circumstances" and "assess whether the award will be enforceable at law."

Most arbitral tribunals and national courts have been reluctant to interpret either arbitration agreements or institutional rules as requiring an in-person hearing. Rather, tribunals have interpreted such provisions against the background of the parties' desire to resolve their disputes in an efficient and expeditious manner – neither of which can be accomplished during the pandemic without the use of virtual hearings. Similarly, most national courts

> **Although technological innovations have been used by international arbitration practitioners for the past several decades, the Covid-19 pandemic has accelerated and deepened the extent of such use.**

have adopted this reasoning and/or deferred in significant measure to the arbitrators' interpretations of the parties' agreement regarding arbitral procedures. Although there may be exceptions, where, unusually, parties have agreed upon a requirement for an in-person hearing, these are very rare; even where such provisions exist, they must be considered in a context where in-person hearings may not be possible as a practical matter in particular circumstances (e.g., travel restrictions). In any event, all of these considerations must be taken into account in contemporary international arbitration practice.

Second, although there are many providers for videoconferencing platforms, CMPs, and cloud-based systems, such technologies may not be accessible in every location or may have specific limitations. The resulting "digital gap" could undermine the efficiency and fairness of virtual proceedings in particular cases. Similarly, circumstances can preclude use of particular technology platforms in some cases.

Third, a lack of familiarity of parties, counsel or other participants in an arbitration with relevant technologies, including the features of the software and platforms used in a case, can cause delays and other difficulties in the proceedings. Moreover, testimony by some witnesses or experts in virtual hearings might require more time than ordinarily is the case, because of a need for witnesses to familiarize themselves with the platforms and to present their testimony. Additional time might also be required for interpreters or translators, who often log-in to the platform from a different location than that of the witness.

Technical and practical issues can be particularly acute where multiple connections and different time zones are involved. Those circumstances inevitably limit the amount of time available each day for hearing time (for example, where parties from Asia, Europe and the United States are all involved). Similarly, "zoom fatigue" also limits the amount of hearing time.

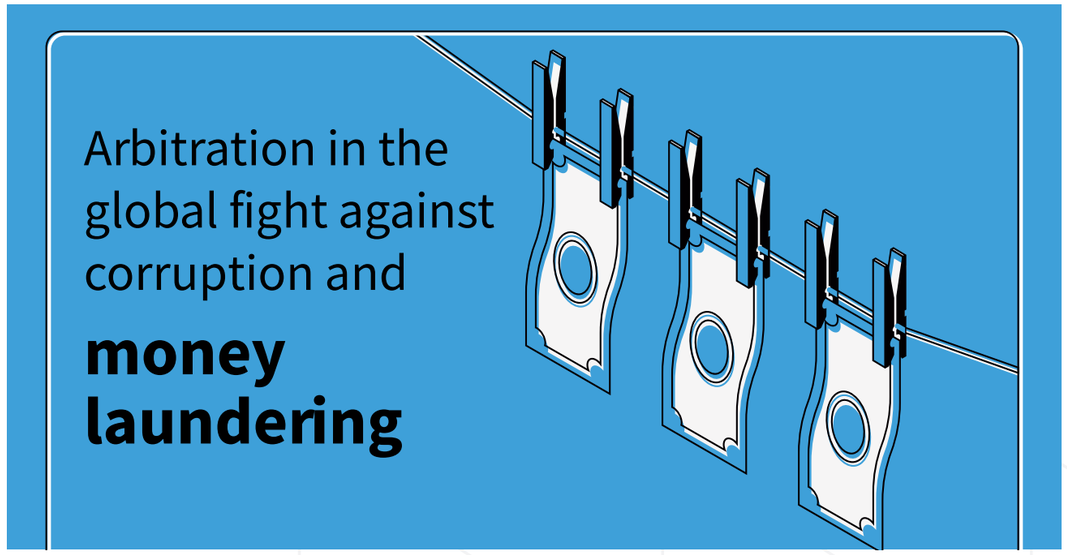
Conversely, hearings need not be conducted in the same manner virtually as when they are conducted in-person. In-person hearings almost inevitably involve a number of consecutive full days (for example, Monday to Friday, eight hours of hearing time each day). In international cases, where parties, counsel and witnesses have assembled at some expense in a single city for a specified period of time, there is an inexorable desire to use all of that time for the hearing – resulting in a single, concentrated hearing event.

In contrast, virtual hearing often cannot easily emulate that model in international cases (because of the factors summarized above). At the same time, virtual hearings can be conducted much more flexibly and creatively than traditional in-person hearings – for example, hearing one witness for six hours one day, taking a day off, then hearing another two witnesses for three hours each, then hearing argument from counsel. Creative and flexible parties and arbitrators can use virtual technology and hearings to achieve much more sensible procedures.

Fourth, in the pre-Covid era, the level of technology-savviness played little role in choosing counsel or arbitrators. The increased use of technology and virtual hearings has made the ability of arbitrators, counsel and expert witnesses to utilize such tools a relevant criteria in the selection of each. Part of choosing legal representation is consideration of counsel's ability to present a client's case in a particular forum; in the pandemic era, the new forum is zoom, and it is counsel's ability to communicate effectively there that is a new, and prime, consideration.

Fifth, data privacy and confidentiality is another challenge of using remote technology in international arbitration. Software and platforms that are used in international arbitration are inevitably vulnerable to hacks and glitches. Videoconferencing platforms and digital tools for document sharing or data storage can be hacked, or overloaded, and thus undermine the privacy and confidentiality of hearings and evidentiary materials. Nonetheless, similar risks existed with in-person hearings and hard-copy data; those risks seldom materialized and there is little reason to believe that there are greater risks in remote proceedings. Continuing diligence is essential, however, to protecting against even those risks.

Finally, the innovations – virtual and otherwise – of the past two years may well outlive the pandemic. Whatever COVID holds for society more generally, international arbitration has responded to the virus by using technology to resolve disputes more efficiently and expeditiously than historically was the case. Many national court systems have failed to do so with similar flexibility, creativity or determination. As a consequence, international arbitration's attractiveness has flourished over the past 24 months, and can be expected to do so in the future. Similarly, even when in-person hearings become possible again, virtual technology will continue to be used in many cases – to achieve the savings in cost and time that remote hearings allow.



Corruption is a plague, which affects economic development, in particular in the poorest countries, weakens the rule of law and threatens the very basis of our social and democratic consensus globally. According to the United Nations, more than 1 trillion US Dollars are paid in bribes every year, with the effect of deterring investments, inflating prices, distorting competition, favouring inefficiencies, and ultimately seriously hampering global growth. The World Bank estimates the cost of corruption to be in the range of 0,5 to 1% of the global economic growth. As to money laundering activities, they represent 2 to 5% of global GDP, 50% of which remain undetected, serving to cover, recycle and finance criminal activities, often as the costs of thousands of human lives. There can be no tolerance for corruption and money laundering in arbitration, as the global dispute resolution system of international commerce and investments, needs to fully play its role to deter, detect and sanction these criminal activities.

The fight against corruption and money laundering from the arbitration perspective raises several issues that we will briefly summarize in this short article.

Jurisdiction and arbitrability: The threshold question for any international arbitrator is whether it has jurisdiction to assess the existence of corruption or money laundering practices. In other words, do these illegal practices have the effect of voiding the arbitration agreement, thereby depriving the arbitrators from jurisdiction? The question may be very relevant, in particular in the context of contracts which very purpose is to organize criminal activities such as the payment of bribes. The famous 1963 award made by Judge Lagergren in ICC case 1101 held that both the contract affected by fraud and the arbitration agreement included therein are null and void. That decision has often been understood as dealing with jurisdiction, while it in fact established a rule of inadmissibility: claims based on illegal contracts cannot be heard and adjudicated, with the consequence that they must be rejected on the merits. This is a consequence of the principle of separability of the arbitration agreement: as the English courts have rightly put it in Westacre, in addressing questions of illegality, and arbitrator does not enforce an allegedly illegal contract but rather a separate arbitration agreement. It is now well established that international arbitrators have not only jurisdiction to address matters of illegality, but also that these matters are arbitrable. Likewise, the fact that a contract has been obtained by bribes will not affect the arbitral tribunal's jurisdiction to sanction that illegality by voiding that contract. The situation may however be different in investment arbitration, when the offer to arbitrate is included in a treaty providing for the regularity of the constitution of the investment as a matter of jurisdiction. In such a case, the illegality of the investment should be treated as a matter of jurisdiction.

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International public policy: The starting point for any international arbitrator is then international public policy or, as Pierre Lalive once characterized it, transnational public policy or truly international public policy. There can be no doubt that the prohibition of corrupt practices and of money laundering are the subject of a global consensus and are as such of a truly international public policy nature. The prohibition is also a rule of international law that is applied by international courts in disputes involving sovereigns. The United Nations Convention against Corruption entered into force in 2005, as well as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and many other international instruments, establish an international legal framework that arbitral tribunals have the duty to apply as part of their jurisdictional functions.

Duty to raise ex officio: One of the most hotly debated topic has been whether, if the parties remain silent, arbitrators can or should raise issues of illegality on their own motion. The answer to that question should be very clear: raising issues of corruption and money laundering is not only a power of the arbitral tribunal, but it should also be seen as an obligation that is fully part of their mandate as international adjudicators. That has two consequences: first, an arbitrator who fails to raise the issue of illegality in presence of serious suspicions would not properly fulfil its mandate and may be seen as being an accomplice of the illegality. For example: in some instances, awards by consent may be used to cover money laundering activities and endorsing these practices without investigating may entail liabilities. Second, an arbitrator raising these matters ex officio does not offend any principle of due process or breach his or her mandate. An arbitrator, however, always has the duty to observe principles of due process by affording the parties a reasonable opportunity to present their observations on the matters so raised ex officio.

Parallel proceedings: A more difficult question, however, may arise in presence of parallel arbitral and criminal proceedings. In such a case, is the arbitrator bound to stay the arbitration until the decision made by the criminal judge? Such a mandatory stay is undesirable, for it opens the gate to dilatory tactics. Courts are however divided on the question. For example, French courts hold that, in international arbitration, arbitrators have the power, but not the duty, to stay, while Spanish courts have the opposite view, which has resulted in the annulment of several awards having failed to stay.

Duty to report? A further question is whether arbitrators have the duty to report suspicious activities to the competent national authorities. That duty may arise from professional bar rules, from the law, from anti-corruption and anti-laundering regulations, of simply from the moral values of the arbitrator. A distinction however needs to be made depending on whether the criminal facts at stake involve the parties themselves and are the very subject matter of the arbitration. If not, reporting may raise an issue of confidentiality, but is conceivable. If that is the case, the situation is more difficult. On the one hand, in presence of very serious indications of an illegality, not reporting may make the arbitrator an accomplice of the parties involved. On the other, an arbitrator has the duty to remain impartial on the disputed question of illegality upon which it could be called to report, and reporting could be seen as a basis for disqualifying him or her. The solution to that dilemma may be for the arbitrator to either report and resign, or to report only once it has made an award on the illegality in dispute. In both cases, however it should inform the parties and afford them parties a proper opportunity to set out their views.

Evidentiary issues: Illegal behaviors are by nature dissimulated and establishing them may be difficult. Some authors are of the view that allegations of wrongdoing, particularly serious wrongdoing such as criminal acts, fraud, corruption, require more convincing evidence than other facts. Some tribunals have accordingly rejected allegations of criminal offences such as bribery because of insufficient evidence brought thereof (ICC cases Nos. 5622, 6401, 6497, 7047, 12472, 13384, 13515, 14878, 16090). Others hold the view that, because the illegality is concealed, tribunals should be able to make findings by drawing consequences from a series of indicia. That latter method, often referred to as red flags, is preferable and has gained consensus un recent years. First, it is more consistent with the widely acknowledged need to eradicate corruption, which goal would not be fulfilled if a high evidentiary bar were adopted. Second, it is consistent with the discretion that is afforded to international arbitrators in their assessment of the evidence.

Absolute v. relative nullity: International arbitrators obviously do not have the powers of a criminal judge. They can and should, however, draw the civil consequences of an illegality. That includes, first and foremost, the power (and duty) to investigate and characterize the existence of an illegality when there is one. Such a finding then has consequences as to the validity of the contract.

A fundamental distinction should be made at this point. The first scenario is that of contracts which very purpose is to organize an illegal activity, such as to allow the payment or to organize money laundering. These contracts are radically null and void and can produce no effects. It is an absolute nullity, and no party can be allowed to make claims, either for payment or restitutions, based on them. The principle in pari causa turpitudinis cessat repetitio then imposes to the tribunal to void the contract and reject all claims based on it.

The second scenario is that of contracts which subject-matter is not illicit, but which have been procured by corruption. These contracts, at the difference of those which subject matter is illegal per se, are voidable, which means that the tribunal may void them in full or in part, or only decide that damages should be awarded to the innocent party. The first question which arbitrators may face in these cases is one of causality. The fact that the existence of a bribe has been established does not necessarily mean that the contract should be voided in its entirety: it may in fact happen that the bribe was paid in the course of the performance of the contract to obtain a particular advantage, or that it is immaterial. The tribunal should therefore assess what the consequences of a bribe may have been and decide what its consequences should be. A bribe paid to a state official may for example be treated as a misrepresentation having vitiated the consent of the state to the contract or be seen as an incidental dolus justifying damages or partial restitutions. If the contract is annulled, the question will arise of whether nullity operates retroactively for the future only, which question will be very relevant in long-term contracts having been performed during a number of years, as well as the question of restitutions. While the principle nemo auditur propriam turpitudinem allegans should normally not allow the party having paid bribes to draw benefits from the contract obtained by bribes, the nullity should also not result in an unjust enrichment of the other party. Accordingly, tribunals should have discretion to assess, in case of annulment of a contract which has been performed over several years, which compensation for the activities performed the corrupting party should be able to retain and how it should be penalized for its wrongdoing.

> **“Where the matter has been properly considered and decided by the arbitral tribunal, the courts should save in case of fraud or manifest error, defer to what has been decided by the arbitral tribunal.**

Finally, in some jurisdictions, the issue may arise whether arbitrators may order treble or punitive damages. In civil law jurisdictions, arbitrators would normally not increase damages beyond the amount needed to compensate the loss of the injured party. The situation may however be different in the United States, as illustrated by the US Supreme Court decision in Mitsubishi, holding that, notwithstanding their policy function, treble damages are of a civil nature.

Setting aside proceedings and finality of awards: Lastly, the presence of an illegality will raise questions related to the level of review that setting-aside and enforcement courts should have on the award. The question here is that of the balance between the finality of the award, the prohibition of the revision on the merits, and the effectiveness of the second look that state courts should be able to have on the award. While French courts, in presence of an allegation of illegality, entertain a full review of the award, in fact and law, courts in other major jurisdictions, such as the United Kingdom, the United States or Switzerland, have a more restrained approach. A balanced approach, in our view, implied that where the matter has been properly considered and decided by the arbitral tribunal, the courts should save in case of fraud or manifest error, defer to what has been decided by the arbitral tribunal. When, to the contrary, the matter has not been considered by the tribunal, a distinction should be drawn depending on the seriousness of the illegality at stake. In case of a contract which subject-matter is illegal, the court should review the matter de novo, while in cases of less serious offenses the rule of estoppel should prevent a party from raising for the first time at the annulment stage an argument of nullity that it could have raised before the arbitral tribunal. This does not mean that the breach of public policy would in such cases be condoned by the legal order, but that it would have to be pursued and sanctioned by other means.

Enforcement of Arbitral Awards
in the Sultanate of Oman: An Overview

Introduction:
The issue of enforcement of arbitration awards is one of the most important issues that can be raised in the context of studying legal problems related to arbitration. While we are in the process of an introductory article on the legislative system regulating arbitration in the Sultanate of Oman, which does not allow us to discuss the issue in depth, we will try to provide an overview of the general features of the location of arbitration in the Omani context, while identifying the most important general and procedural legal rules related to this topic.

The Omani legal system has witnessed rapid developments since the seventies of the last century, manifested in the establishment of an integrated legal and judicial system, which provides an atmosphere of confidence in judicial institutions, and governed by the principles of the rule of law. After laying the first building blocks for the institutions of the modern state, the Omani legislators worked to continue creating the optimal legal environment to advance the comprehensive development movement and provide full legal and judicial guarantees. To establish a modern economy based on the principles of transparency, equality, equal opportunities and the independence of the judiciary. The issuance of the Basic Statute of the State pursuant to Royal Decree No. 101/96 was a milestone and a pivotal link in this path, followed by another step with the issuance of the new Basic Statute pursuant to Royal Decree No. 6/2021 in the approach of consolidating a set of political, economical, social, cultural and legal principles which had crystallized during the seventies and eighties, and necessitated its alignment with all future challenges and the aspirations of the state.

The Basic Law of the State dedicates a chapter on the judiciary; it enshrines, through the thirteen articles that constitute it, the concept of judicial independence: “There is no authority over judges in their adjudication other than the law, they are not subject to impeachment save in instances specified by the law, and no party may interfere in cases or in the affairs of justice, and this interference is considered a crime punishable by law and the law shall set all provisions related to judges”

The Basic Law of the State between 1996 and 2021 constituted a legislative engine for restructuring the Omani judiciary and consolidating its principles and independence. At the level of laws, Royal Decree No. (90/99) promulgating the Judicial Authority Law is the cornerstone of structuring the regular judiciary. It defined the types of court, their jurisdiction and organized the work of judges. This was followed by Royal Decree No. (91/99) issuing the Administrative Court Law, which came as an embodiment of what was stipulated in Article (79) of the new Basic Law of the State: “The law regulates the adjudication of administrative disputes by a special court or panel, as well as its system and how to exercise the administrative judiciary.” According to this Decree, the judicial system in the Sultanate became a dual judicial system, in which the administrative courts, with their primary and appellate circuits, are competent to hear all administrative disputes. The amendments made by Royal Decree No. (9/2012) to Decree No. (93/99), which established the Supreme Judicial Council, are considered the culmination of the principle of judicial independence. This is particularly evident in the judges’ complete independence from the Ministry of Justice.

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Returning to the subject of arbitration, and in the same legislative climate in which we briefly reviewed its most important features, if the issuance of the Royal Decree No. 47/97 issuing the Law on Arbitration in Civil and Commercial Disputes was the first law in the Sultanate that directly and in detail organized commercial arbitration, that does not mean the absence of arbitration from the Omani legal scene before that decree. This is attested by the large number of arbitration-related cases examined by the Commercial Dispute Resolution Commission, which was established by Royal Decree No. (79/81).

In the same context, and to complete the legal system regulating arbitration, Royal Decree No. (36/98) was issued in respect of accession of the Sultanate of Oman to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Arbitration issues in the Sultanate are no longer updated issues, as the legislation has tightened their organization and practice is rooted in them, this does not mean that arbitration cases no longer raise legal problems at the level of the legal text or at the level of practice. In keeping with the topic of the article, the problem that we will raise is mainly related to the issue of the implementation of arbitral awards.

Do arbitration awards have legal authority and exclusive force in the Sultanate ? How did the Omani legislature regulate the procedural issues related to the enforcement of these awards?

I. Executive Power of Arbitration Awards:
Executive power means the executive effect of the arbitration award What is meant by enforcement power is the enforcement effect of the arbitral award, that is, the extent of the binding legal force it enjoys, which makes it possible for the arbitral award to produce its full executive effects. It is recognized that the effect of legal action follows its nature and not the other way around. Hence, the nature of the arbitral award is the basis of its executive power.

A- The Source of the Executive Power of the arbitral award:

The enforcement power, having an executive effect, i.e. a legal effect, must have a basis to that power. The basis of the enforcement power of the arbitral award is the law. It is the law that determines the extent of the enforcement power, its time and form of existence, its significance, the situation of suspending it and the manner of its expiration. Referring to the provisions of the Omani Arbitration Law (No. 47/97), it is evident that the legislation has devoted Chapter Seven of the law to the issue of “Conclusiveness of Arbitration Awards and Enforcement Thereof. “Article 55 stipulates that: “The arbitrations’ awards issued pursuant to this Law shall be as conclusive as final judgement and shall be enforceable subject to the provisions set forth in this Law”. It is well known that the “authenticity of the res judicata” proves the final court rulings that fulfilled all the means of appeal. It is also known that the authority of the res judicata is considered one of the conclusive legal presumptions that no evidence is acceptable to refute. Article 55 of the Law of Evidence in Civil and Commercial Transactions (No. 68/2008) stipulates that: ““Judgements which have gained determinative effect of res judicata shall be conclusive in respect of adjudged rights and no proof is admissible to rebut the said conclusive effect. However , the said judgements shall not enjoy the said conclusive effect except in a dispute which arose between the same litigants without change in their capacities , and in respect of the same right as to the object claimed and the same cause of action. The court shall adjudge of its own accord on the said determinative effect “..” The conclusiveness of the arbitral award is, therefore, one of the issues related to public order, and it is something that may be raised at any level of litigation, and the court must raise it and rule on it on its own. And when we learned that the Omani Arbitration Law stipulated in its first article that:

“Without prejudice to the provisions of international agreements in force in the Sultanate, the provisions of this Law shall apply to every arbitration between parties who are persons of the public or private law whatever the nature of the legal relation may be in respect to which the dispute arises if such arbitration is concluded, in the Sultanate, or in an international commercial arbitration concluded abroad, and the parties thereto have agreed to subject it to the provisions of this law “ .

B- Extent of Conclusiveness of Foreign Arbitration Awards:
After we have seen the validity of the arbitral award subject to the Omani Arbitration Law, it is necessary for us to ask about the extent of the validity of the foreign arbitral awards; in other words, about the extent of the validity of the foreign arbitration awards that the parties to the dispute did not choose to subject to the Omani Arbitration Law, and the source of their authenticity.

To answer this question, we must refer to the provisions of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards - which we noted in the introduction that the Sultanate has acceded to under Royal Decree No. 36/98, which is considered the reference text in what is outside the scope of the arbitration law i.e. in relation to foreign arbitration awards. Article 3 of that Convention reads as follows:

“Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the

recognition or enforcement of domestic arbitral awards."

Returning to the preparatory work committees for the New York Convention, it becomes clear that what is meant by "...the procedural rules followed in the region in which the decision is invoked..." is the procedural law followed in the Sultanate, specifically the Civil and Commercial Procedures Law, and since Article 1 of the Arbitration Law No. 47/97 obliges not to violate the provisions of the international agreements in force in the Sultanate, the law specified in the 1958 New York Convention must be adhered to.

Referring to the Civil and Commercial Procedures Law No. 29/2002, specifically Chapter Four titled "Enforcement of Foreign Judgments and Orders", we find that Article (352) requires the first instance panel, with three judges, to verify five (5) conditions before issuing an order for the enforcement of judgments and orders issued in a foreign country, these conditions are as follows:

1. The judgment or order is passed by a competent judicial authority, in accordance with the rules of judicial international jurisdiction prescribed in the country in which it is rendered; that it has become final and that it has not been issued by fraudulent means.
2. The parties to the action object of the foreign judgement have been summoned to appear before the court and they were properly represented.
3. The judgment order does not include a claim based on violation of one of the laws in force in the Sultanate.
4. It is not in contradiction with a judgement or order previously rendered by a court in the Sultanate and does not violate Public Order or morality.
5. The country which rendered the judgment to be enforced accepts to enforce on its territory judgements rendered by Omani courts.

Article (353) of the same law adopted these five conditions upon issuing orders to enforce arbitral awards issued in a foreign country, adding two other special conditions:

- That the arbitrators' award must have been passed in a matter that may be arbitrated in accordance with Omani law and enforceable in the country in which it was issued.

As for Article (355) of the said law, it is required that the rules provided for in the preceding articles should not violate the provisions of treaties between the Sultanate of Oman and other States in this respect .

C- Application of the Omani courts in the matter of Enforcing Foreign Arbitral awards:

The ruling of the Supreme Court, Appeal No. 280/2010, Commercial panel , and No. 143/2010 Muscat Appeal, session 27/4/2011, represented a clear and important position for the Omani judiciary in determining the package of conditions that must be verified for the recognition of a foreign arbitral award and the acceptance of its enforcement on the territory of the Sultanate. In this regard, the facts are summarized in the claimant's request before the Court of First Instance dated 5/7/2009, ordering the enforcement of a final arbitration award passed on 10/24/2009 in Copenhagen, Denmark, which obliged the respondent to compensate for grievous violations of the concession agreement between the two parties, no later than 7/11 /2008, and although the claimant announced the judgment to the respondent immediately after award is passed, claimant failed to enforce it, and accordingly filed their lawsuit, which was rejected by the court on 9/1/2010.

The claimant appealed to the Court of Appeal in Muscat to rescind the appealed judgment and the judiciary to re-order the enforcement of the arbitral award. The Court of Appeal passed its judgment in response to the claimant's requests.

As the respondent was not satisfied with the judgment of appeal, they appealed it in cassation before the Supreme Court.

The Supreme Court passed its ruling on 27/4/2010 in Appeal No. (80/2010), which indicates that it applied the Civil Procedures Law and the Arbitration Law as one package, taking into account its affiliation to the 1958 New York Convention ratified by the Sultanate, and which represents the position of the Supreme Court, saying that "it is necessary to recognize and enforce foreign decisions and judgments in the Sultanate, because the Sultanate is a member of the United Nations Convention of 1958 AD...", and in its support of the judgment of the Court of Appeals ordering the enforcement of a foreign arbitral award on the basis that the conditions stipulated in Article (352) of the Code of Civil and Commercial Procedures, and also when it referred to the fulfilment of the arbitration awards, the condition that the period for appealing for nullity has passed(ninety days), which the Omani Arbitration Law requires.

In all cases, a distinction must be made between the issue of recognizing the arbitral award (substantive conditions) and accepting it (formal conditions), as there is no order for enforcement unless all the conditions are met together "Proving the authority of the foreign judgment does not necessarily mean its enforcement, since its enforcement needs to be ordered according to significant conditions .". This recognition is based on the extent to which the judgment observes legal principles and the extent to which the rules of its issuance conform to the general policy of the state on whose territory the enforcement is requested. And since the conditions that came in Article (352) of the Civil and Commercial Procedures Law are at the heart of the state's general policy, and since the 1958 New York Convention affirmed in Article V, paragraph (2), item "B" that it is permissible to refuse recognition of a foreign arbitral award if; "… the recognition or enforcement of the decision is inconsistent with the general policy of that country." Accordingly, foreign judgments issued by foreign courts and foreign arbitration awards are equal in terms of the conditions for their recognition, taking into account the two conditions for recognition added by Article (353) of the Civil and Commercial Procedures Law.

In this respect, we make the following three observations:

- The first note: the mutual reference between the 1958 New York Convention and the national law (Article 355 of the Civil and Commercial Procedures Law) makes the aforementioned Article (352) applicable when verifying the availability of the conditions for recognition of a foreign arbitral award under the New York Convention in addition to its application outside the umbrella of this Convention.
- The second note: that the judge competent to issue an order to execute a foreign arbitral award does not have the discretionary authority to verify the availability of the recognition conditions stipulated in Article (352) of the Civil and Commercial Procedures Law. He only concludes on his own; As for the conditions contained in the New York Convention, he concludes and estimates the extent to which they are available or not, at the request of the party who invokes them to refuse to recognize the judgment.

The third note: The principle of reciprocity is given precedence over the rest of the conditions for recognition of a foreign arbitral award, as the judge considers or does not consider the availability of the conditions for recognition of the award based on this principle, bearing in mind that Article 1 of the 1958 New York Convention authorizes the ratifying state to declare its commitment to the Convention on the basis of this principle. The Omani Supreme Court has gone to implement the principle of reciprocity as one of the conditions of recognition on the occasion of a request to implement a judgment issued by the German Supreme Court; where it stated in its ruling, "The legally determined conditions did not imply the existence of an agreement or treaty. If there is an agreement, it will be the first to be enforced without regard to the legal conditions. German law subjects the jurisdiction of foreign courts to the rules of direct general jurisdiction, while the Sultanate is subject to indirect general jurisdiction, yield of this "Violation of the condition of reciprocity."

II. Procedures of Enforcement of Arbitral Awards:

If the Arbitration Law and Omani legislation in general give the arbitration award an authority and enforcement power, it goes without saying that this enforcement power does not come out of the realm of the legal text into the actual reality, except by following a set of procedures. The Arbitration Act, the Code of Civil and Commercial Procedure, and the New York Convention specify these procedures, the conditions for their validity and the effects of breaching them.

A- Enforcement of the arbitral award before issuance of the Omani Arbitration Law:

It should be noted here - and before looking at what currently the matter is - that the aforementioned Commercial Dispute Settlement Authority had to consider issues related to applications for the enforcement of arbitral awards, of course, prior to the issuance of Judicial Authority Law No. (90) /99), and before the issuance of the Law on Arbitration in Civil and Commercial Disputes, and given the importance of the principle that came in the text of the judgment issued by the Commercial Disputes Settlement Authority, due to the importance of the principle laid down in the judgement issued by the Authority , we think it is prudent to provide it in full l:

"Royal Decree No. (32/84) [special] on the system of hearing cases and requests for arbitration before the Commercial Dispute Settlement Authority , has laid down In Chapter Two, the provisions relating to arbitration, which the parties to the dispute agree to refer to this body with a special arbitration document in a particular dispute or in all disputes that arising between them from the implementation of a specific contract, and the Omani legislation did not present the provisions regulating arbitration that the disputing parties agree to refer to other than the authority, but according to the general rules, and inspired by the texts mentioned in the aforementioned Royal Decree regarding arbitration that the litigants agree to refer to the Authority, it can be said that with regard to the arbitration that the litigants agree to refer to other than the Authority, [it] is a condition that the disputed right is valid for arbitration [...] that is, the right is one in which reconciliation is permissible and that the issue or issues in dispute shall be specified, and that the agreement shall include appointing the arbitrator or arbitrators, and that the arbitrators respect the basic principles of litigation, such as the principle of equality between litigants [...] and that they pass their award after deliberating in secret and within the specified time, and that they pass their award in writing and deposit this award with Authority. Then the executive formula will be stamped on it, and if it appears from the papers that the arbitrator complied with the previous conditions and the respondent did not plead that the judgment passed violates the law or the arbitration agreement then the Executive formula must be stamped on this award .

B- Enforcement of the arbitration award governed by the provisions of the Omani Arbitration Law:

Article (56) of the Law on Arbitration in

Civil and Commercial Disputes states that the jurisdiction to issue an order to implement the arbitrators' award lies with the president of the commercial court originally competent in the dispute , or his delegate from among its judges. The application for the enforcement of the award shall be submitted with the following documents:

1. The original award or a signed copy of it.
2. A copy of the arbitration agreement/ clause.
3. A certified translation into Arabic of the arbitration award, if it was not issued in Arabic.
4. A copy of the record indicating the deposition of the award according to Article 47 of this Law.

It is noted that the legislation stipulated in Article 58/1 of the Arbitration Law accepting the request for enforcement, provides the expiry of the deadline for filing invalidation claim of the arbitral award, which is ninety days from the date on which the award was notified. As for the mere filing of a nullity lawsuit, according to Article (57), the enforcement shall not be suspended.

The judge competent to consider the enforcement application does not have the authority to consider the award from an objective point of view, and assess its validity, invalidity, suitability of what the arbitrator concluded, or the correctness and validity of his interpretation of the law and its application to the facts as he is not an appellate authority . nor competent to consider nullity of the judgment. Nevertheless, Article (58/2) of the Arbitration Law requires the judge examining the request, and before ordering its enforcement, to verify that:

a. That it is not in conflict with a judgement already passed by the Omani courts on the subject of the dispute.
b. The award does not contain what violates public policy in the Sultanate of Oman.
c. That it has been properly notified to the party against whom it has been issued.
d. Enforcement of Foreign Commercial Arbitration Award in the Sultanate of Oman:

- It is known that the 1958 New York Convention aims to strengthen the role of arbitration in support of the growth of international trade and investments, and to achieve stability in international commercial transactions. This Convention, which has become effective in Oman since the Sultanate's accession to it in 1998, sets out the formal conditions that must be met in a request to enforcement of the arbitration award. It is well known that this agreement is the legal framework for arbitration that is outside the scope of the Omani Arbitration Law, i.e. foreign arbitration.

Article (4) of the Convention stipulates: 1. To obtain the recognition and enforcement contained in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

a. The duly authenticated original award or a duly certified copy thereof;
b. The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent."

Accordingly, when a party submits an application for enforcement to the competent court , and it is accompanied by the stipulated documents, the competent Omani court is obliged to recognize the arbitral award and order its implementation, in accordance with the provision of Article (3) of the Convention, provided that the award to be enforced satisfies the conditions and requirements of Article (58/2) of Royal Decree 47/97 mentioned above, meaning that it does not conflict with award passed by the Omani courts, and does not contradict or is contrary to public order in the Sultanate, and finally, that the judgement debtor has been notified of the award in a proper manner.

III. The Legal and Practical Reality of the Enforcement Order:

The judiciary constitutes the sovereignty of the state "and the principle in foreign judgments is that they are not enforced by power of law in a country other than the country in which they were passed" (Al-Busafi, 2016). However, economic openness and the predominance of direct investment over international trade, represented a necessity for the openness of justice through the enforcement of awards that were not passed by the local judiciary, based on international agreements and within the limits of what is imposed by legal principles, rules of sentencing, and the general policy of the state, without the need to file a new lawsuit in the same right in respect of which a foreign judgment was passed.

Contrary to "...judicial judgments that do not require such an order, as the enforcement formula is accepted directly without an order" (Al-Busafi, 2016), the compulsory enforcement of the arbitral award cannot be carried out without the competent judiciary passing an order to enforce it in accordance with Article (56) of the Arbitration Law No. 47/97.

The question that arises in light of the reality of Omani law:

How does a foreign arbitration award become enforceable in the Sultanate of Oman? What is the applicable law?

The answer is based on four facts:

- The first fact: that the amendment of Article (56) of the Arbitration Law conferred the jurisdiction to pass the order to the enforcement of the arbitrators' award to the President of the Commercial Court or his delegate from among its judges, and this amendment was issued in the year 2007, that is, after the issuance of the Civil and Commercial Procedures Law issued in the year 2002.

- The second fact: that Article (352) and Article (353) of the Civil and Commercial Procedures Law, as amended by Royal Decree No. 55/2010, are implemented in the matter of requesting the enforcement of a foreign arbitral award, as the New York Convention 1958 mandated the application of "the rules followed in the region" in which the decision is invoked, and for the Sultanate of Oman it is the Code of Civil and Commercial Procedures.

- The third fact: Article (352) of the Civil and Commercial Procedures Law is a rule of public order, and the judge has no discretion in its application.

Fourth fact: Article (58/2) of the Arbitration Law does not permit the issuance of an enforcement order unless it is verified that the arbitral award is free of three impediments, and one of these impediments is that the arbitral award includes what violates the public order in the Sultanate of Oman.

Whereas the conditions of Article (352) of the Civil and Commercial Procedures Law are at the core of the public order, and as Article (353) of the Civil and Commercial Procedures Law extends these conditions to arbitration awards. The competent judge, in this case, only has to verify the availability of the recognition conditions stipulated in the aforementioned Article (352), within the package of conditions stipulated in the Arbitration Law No. 47/97, taking into account the international agreements and treaties that bind the Sultanate with the country in which the arbitral award was issued. In this regard, we recall what we mentioned earlier that the Supreme Court, in its ruling issued on 27/4/2010 in Appeal No. (280/2010), where the Court adopted the position of implementing the Civil Procedures Law and the Arbitration Law as one package, taking into account the international treaties of the Sultanate.

In terms of the practical reality, Judge Ahmed bin Suleiman bin Muhammad Al-Busafi (Sultanate of Oman) believes that this reality must be strengthened by addressing the problem of "lack of confrontation" with regard to orders on petitions, in particular, the order to implement a foreign arbitral award, and where the arbitration law does not help in this matter, the Omani judge must draw inspiration from the 1958 New York Convention, in order to be able to hold the confrontation between the two parties to the arbitration to make it easier for him to observe all the necessary conditions for issuing the enforcement order.

Prior to applying for enforcement, the original award, or a signed copy of it in the language in which it was issued, must have been deposited with the Secretary of the Competent Court in accordance with Article (9) and Article (47) of Arbitration Law No. 47/97, and Article (6 bis) of Administrative Court Law No. 91/99.

The court secretary shall write minutes of this deposit, and each of the arbitration parties may request to obtain a copy of it.

The application for the enforcement of the arbitrators' judgment shall be submitted to the President of the Commercial Court of First Instance (if the arbitration award is local or the parties to the arbitration agreement agree to apply Omani law), and the application for the enforcement of the arbitrators' award shall be submitted before the Court of First Instance consisting of three judges in whose circuit the enforcement is intended in the usual procedures for filing a case. If the arbitral award is foreign, a request to enforce the arbitrators' award is submitted to the President of the Administrative Court if the subject matter of the arbitration is related to an administrative contract.

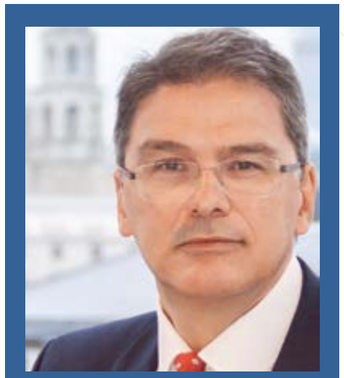
The application for the enforcement of the arbitrators' award shall be accompanied by the necessary documents stipulated in Article (56) of the Arbitration Law No. 47/97, to be verified by the competent judge passing the enforcement order.

The judge in charge of passing the enforcement order has the jurisdictional authority that enables him to order the enforcement or the order to refuse the enforcement (by noting the application submitted to him), according to Article (58/3) of the Arbitration Law No. 47/97, the order of enforcement of the award shall not be challengeable, but the order rejecting enforcement may be challenged before the court stipulated in Article 9 of this Law within thirty days of the issuance of such order .

In the case of the judge's order of enforcement, the copy of the judgment according to which the enforcement will take place is stamped with the court's seal and signed by the secretary after he appends it to the executive form, and the holder of the enforcement copy is keen to announce the other party of the enforcement.

If the other party (the debtor) does not comply with the enforcement order, despite its announcement, the person in whose favour the arbitration award has been issued, bearing the enforcement copy, may file an "enforcement case" before the enforcement judge in accordance with the provisions of Book Two of the Civil and Commercial Procedures Law, and thus the arbitration award is equal with the judicial rulings at this stage.

Mediation and Arbitration:
Living together in perfect harmony?



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Mediation and arbitration are very different processes. They are not, however, mutually exclusive and are able to exist in harmony either in their separate or hybrid forms

Those of certain age may recall the 1982 the hit musical collaboration between Sir Paul McCarty and Stevie Wonder entitled "Ebony and Ivory" which raised the question of whether it was possible for the two to live together in perfect harmony. Much has been written on mediation and arbitration as "alternative" dispute resolution methods to resolve disputes. Less has been written on the subject of mediation-arbitration or "Med-Arb", amiable composition or binding mediation, but in recent times there has been increasing interest in these further "alternative" forms of dispute resolution. The question arises as to whether mediation and arbitration (or their various hybrid forms) can also live in harmony (perfect or otherwise) or whether the two are mutually exclusive. This article seeks to explore this question.

Mediation

Mediation is a flexible process conducted confidentially in which a neutral person actively assists the parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution.

The principal features of mediation are that it:

- involves a neutral third party to facilitate negotiations;
- is quick to set up and is inexpensive, and, in most circumstances, is without prejudice and confidential;
- involves party representatives with sufficient authority to settle;
- is flexible, enabling the process to be designed and managed by the Mediator to suit the parties, in consultation with them;
- puts the parties in control (unlike litigation/arbitration);
- enables the parties to devise solutions which are not possible in an adjudicative process such as litigation or arbitration, and which may benefit all the parties, particularly if there is the possibility of a continuing relationship between them;
- can be used in both domestic and cross-border disputes, two-party and multi-party disputes, and whether or not litigation or arbitration has been commenced.

Any contemplated or existing litigation or arbitration in relation to the dispute may be started or continued despite the mediation, unless the parties agree or a Court orders otherwise. If settlement terms cannot be agreed through mediation, the parties can revert to litigation or arbitration.

Arbitration

Arbitration is a process in which two parties in a dispute use an independent, impartial third party (the arbitrator) to settle the dispute, often by making a decision that they both agree to. For a process to be considered arbitration, it must involve an impartial third party, which can be a single person or a team (usually three) of people, otherwise known as the arbitral tribunal.

Arbitration is a contract-based form of binding dispute resolution. In other words, a party's right to refer a dispute to arbitration depends on the existence of an agreement (the "arbitration agreement") between them and the other parties to the dispute that the dispute may be referred to arbitration.

Commercial contracts will commonly include provision for how disputes relating to that contract are to be resolved. If the parties choose arbitration, the arbitration agreement will generally be part of the document recording the terms of the commercial transaction. Parties can also enter into an arbitration agreement after a dispute has arisen.

In entering into an arbitration agreement, the parties agree to refer their dispute to a neutral tribunal to decide their rights and obligations. Although sometimes described as a form of alternative dispute resolution, arbitration is not the same as mediation or conciliation. A mediator or conciliator can only recommend outcomes and the parties can choose whether or not to accept those recommendations. By contrast, an arbitration tribunal has the power to make decisions that bind the parties.

One of the attractions of arbitration is that it is typically easier to enforce an award in another country than it is to enforce a court judgment. That said, enforcement regimes vary and it is crucial to take into account the prospects of enforcement in deciding whether, and if so how, to arbitrate a dispute before spending too much time and money.

Amiable composition

Amiable composition, also known as ex aequo et bono, is a concept that is known to numerous systems of law and arbitration. It nonetheless remains relatively little used in practice and is often poorly understood.

A number of reasons can be identified for this. The first might be that it could open the floodgates to an overly subjective approach by arbitrators. A second is that it could be argued to be futile, to the extent that arbitration intrinsically is a system which involves the application of good commercial sense and common practice in the resolution of disputes.

Amiable composition imposes on an arbitrator the task to give a solution to a dispute that may be based in law but that in all cases is consistent with equity. When parties have not chosen a system of law to be apply to their contract, the arbitrator chooses the rules of law that he or she deems appropriate. This may include the lex mercatoria whose flexible nature permits a wide latitude to apply a rule which is apt to produce the desired result. The arbitrator to a certain extent can choose the rules of law in such a way that they coincide with the solution to the dispute in equity.

Where, on the other hand, the parties have made a choice of the rules of law applicable to the dispute the arbitrator is bound to follow this choice. However, he or she is free to interpret these rules in such a way that the equitable solution that he or she gives to the dispute is presented as being based in law.

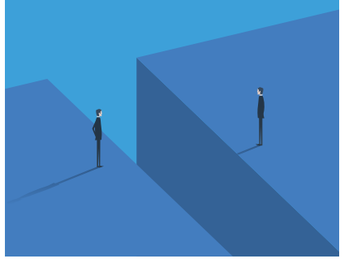
Failure to render an award that is not found in equity, may mean that the arbitrator has not fulfilled his or her duties and thus risk rendering the award ipso facto voidable by an action for avoidance.

Med-Arb

Med-Arb, as the name implies, is a hybrid dispute resolution process that seeks to combine the benefits of mediation and arbitration. These include, for example, providing the parties with autonomy, control of the process, flexibility, confidentiality, interest-based solutions and a final determination in the event of no settlement between the parties.

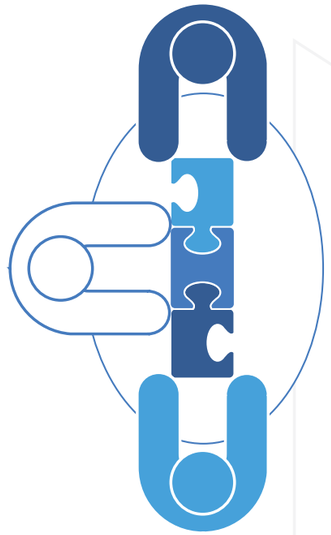
It can be used where mediated negotiations do not lead to a settlement. In these circumstances the parties can agree that the mediator becomes the arbitrator and renders a final and binding award on the outstanding matters.

It can also occur where within the framework of arbitration with the parties being encouraged to explore mediation at appropriate stages of the arbitration. Typically, should the parties go to mediation, the arbitration proceedings will be stayed pending the outcome of the mediation or a "Mediation Window" provided for in the procedural timetable.



An arbitration process based on that agreement should obviate many of the objections that have been raised to having the mediator serve as the arbitrator. Those objections arise in the context of a strictly law-based arbitration and would be largely irrelevant if the parties agreed to an amiable composition.

Generally, Med-Arb will involve the same third party neutral acting as both mediator and arbitrator. Adopting such a combined role may offer advantages since it avoids the need to educate



two different people on the same facts and legal submissions. This increased efficiency may provide the parties with significant time and cost savings. This is certainly true if the parties reach a partial agreement where they dispose of factual or legal issues during the mediation part of the proceedings.

Where the arbitration focuses on the parties´ future commercial relationship, Med-Arb´s efficiency becomes even more crucial to the parties. In the arbitration phase of the process, the Med-Arbitrator will use his or her understanding of the relationship between the parties during the mediation phase, or use his or her prior knowledge of their respective underlying interests to find an adequate resolution that the parties may find more acceptable.

The prospect of the same mediator becoming the arbitrator (or vice-versa), however, may cause some to be concerned that this dual role risks undermining the benefits of mediation and arbitration. For example, it may inhibit the parties in engaging in full and frank discussions with the mediator if there remains the possibility that he/she may later become the arbitrator who will determine the dispute. It may also risk exposing the arbitrator and the award to challenge on ethical and due process grounds.

It is a fundamental principle in international arbitration that an arbitrator must be and remain impartial and independent. Not surprisingly, the predominant concern of arbitration specialists is that, as a result of his/her active involvement in both the mediation and the arbitration phase of the process, the mediator-arbitrator may lose his/her impartiality by becoming privy to information regarding the motivations and interests of the parties that would otherwise be privileged and/or confidential, and/or that might separately influence an arbitrator´s judgment in considering the terms of the award.

Some might argue that an arbitrator (like a judge) can close his/her mind to information acquired while wearing the mediator´s cap when determining an issue as arbitrator and wearing the arbitrator´s cap. The reality, however, is that is quite difficult (if not impossible) to do. For example, parties often provide a mediator with both the strengths and weaknesses of their positions, so as to give the mediator the best possible assessment of the case in brokering a realistic settlement. Indeed, such information will be provided as a result of the mediator having worked hard to win a party´s confidence to make such full and frank disclosure. Parties, rarely, if ever, provide this same level of candour to an arbitrator who has authority to decide the merits of the case.

A clear tension exists, therefore, where one person assumes the role of both the mediator and arbitrator.

Binding mediation

While binding mediation has all of the characteristics of Med-Arb in that a final decision is made by the neutral if no agreement is reached, the essential difference is that there no final award that is rendered that is capable of enforcement under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Instead, it is a decision that is made subject to contract, such that failure to comply with the decision would be actionable as a matter of breach of contract.

If the parties wish to combine the virtue of all of these processes and obtain an award that should be enforceable, an agreement can be reached to conduct a Med-Arb, with the arbitration phase, if necessary, to be decided based on the principles of amiable composition.

Conclusion

As noted above, mediation and arbitration are very different processes. They are not, however, mutually exclusive and are able to exist in harmony either in their separate or hybrid forms.

While Med-Arb, amiable composition and binding mediation continue to be relatively uncommon in common law jurisdictions in particular, there is certainly scope for their far greater use in the future. Creative counsel and parties should seize the opportunity to consider employing more innovative approaches to combining these existing process models to achieve a just and more efficient resolution of their disputes.

Saving Time and Costs in Arbitration - A Practical Perspective

Parties often seek to resolve their disputes in the quickest possible way; through amicable settlement or the courts. During this process, parties may be troubled by the length of time and cost involved until final judgment. The parties may become further discouraged when proceedings to do not progress as anticipated or parts of their claims are struck out. Arbitration provides, at least in some respects, an alternative to the option of resolving disputes solely via the courts. Taking certain steps to ensure clarity around the arbitration process can go a long way to ensuring disputes are dealt with as efficiently as possible.

New York Convention and modern arbitration

Generally speaking, arbitration has a long history: impossible to fully address in this article. However, the modern era of arbitration as we know it today arguably has its roots in the United Nations' adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1958; often simply referred to as 'New York Convention' amongst lawyers.

As a result, arbitration became one of the most important mechanisms for settling and resolving commercial disputes as the New York Convention provided a harmonized framework for enforcing awards. Hence, many nations raced to enact national legislation to align with the requirements of the New York Convention; the ratification of which soon became an integral part of creating a favorable environment for foreign investment.

Arbitration in Oman

In the Sultanate of Oman, arbitration has been expressly codified in law since as far back as the 1980s. In 1984 (now repealed) Royal Decree 32/1984 was enacted. This was the first step in formally recognizing arbitration in the Sultanate. Two major developments would subsequently occur in the 1990s, being the enactment of:

- Royal Decree No. 47/1997 On the Promulgation of the Law of Arbitration in Civil and Commercial Disputes (Oman Arbitration Law); and
- Royal Decree No. 36/1998 On the Accession of The Sultanate of Oman to the UN Convention of 1985 on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention Law).

Saif Al Mamari
Partner, Addleshaw Goddard, Oman

The above developments arguably helped to cement arbitration as an established dispute resolution mechanism in Oman. Litigants increasingly turned to arbitration for its multiple advantages, including confidentiality, efficiency, and the ability to choose the arbitral tribunal.

Oman's tradition of embracing arbitration has continued. On 17 October 2018, Royal Decree No. 26/2018 establishing the Oman Commercial Arbitration Centre (OAC) was enacted. This has ushered in a new chapter for arbitration in Oman; with the Sultanate now having a world leading arbitral institution within its borders with clear and progressive procedural rules.

Despite all its inherent advantages, arbitration does require litigants and lawyers alike to be mindful of certain practicalities. Being mindful of such, and the need to address them proactively, can have a huge impact on the progress and eventual outcome of an arbitration. Outlined below are some core notions that parties need to consider at the outset of negotiating an arbitration agreement:

What is arbitration?

Firstly, we must define arbitration as the exceptional mechanism through which disputes can be resolved, without going through the traditional litigation process via the courts.

As the Omani Arbitration Law does not define arbitration in an all-encompassing manner, the Supreme Court of Oman has defined arbitration in the context of several of its rulings, including Order No. 186 in Appeal No. 136/2005 which stated (as translated):

"Arbitration is an exceptional way to resolve disputes, based on not following the traditional litigation way, made by an agreement between the parties in dispute, and therefore it is not related to public order, and the court may not rule it on its own, rather it must be adhered to before it"

> **"Wording an arbitration agreement with precision will not only save time and costs, but also ensure the parties (and the arbitrators themselves) can focus on the underlying dispute, rather than getting distracted by procedural irregularities.**

This means that the agreement on arbitration takes away the jurisdiction of the national judiciary in the settlement of the dispute, unless the parties to the contract expressly agree at a later time to rescind the arbitration agreement. Hence, resorting to arbitration for the purpose of resolving disputes means that the parties in dispute agree to waive their right to bring their dispute before the courts.

Arbitration agreement:

The arbitration agreement should comprise clear and written text contained within the provisions of a contract that refers any dispute between its parties regarding the contract to arbitration.

Article 10(1) of the Omani Arbitration Law defines the arbitration agreement as (as translated):

'The arbitration agreement is the agreement whereby the parties agree to refer to arbitration for the settlement of all or some of the disputes which have arisen or may be arising between them in connection with specific legal relationship, whether such relationship is contractual or not.'

Often, the importance of the arbitration agreement can be overlooked during contract negotiations. This is perhaps not surprising: the prospect of a dispute may be far removed from the minds of parties during the natural excitement and optimism that can accompany a new transaction. Nonetheless, if an arbitration agreement is worded incorrectly or is otherwise ambiguous, that alone can derail the arbitration process before it has even, in substance, begun.

Common arbitration agreement mistakes:

Outlined below are some common mistakes that can be found in arbitration agreements and give rise to unintended and unpleasant consequences.

- **Ambiguity**

A lack of precision in the wording of the arbitration agreements can leave the reader in doubt that the parties intended to resolve disputes exclusively via arbitration. For example, wording stating that a party "may" as opposed to "shall" refer all disputes to arbitration can give rise to uncertainty as to whether the parties could elect to proceed via arbitration or courts to resolve their dispute.

Hence, parties would be well advised to consider adopting the template arbitration agreements provided by all leading arbitral institutions, for example, the arbitration agreement standard wording/template of the Oman Commercial Arbitration Centre included in Appendix (2) of the Center's arbitration rules.

- **Failure to specify the language**

A properly drafted arbitration agreement should always specify the language of the arbitration which, in almost all cases, should be the same as the language of the underlying contract.

A failure of an arbitration agreement to specify the language of the arbitration can lead to costly and unintended consequences. For example, a construction law contract in English may include an ad hoc arbitration agreement that neglects to specify the language of the arbitration. That could lead to a scenario where the arbitration proceeds in the Arabic language; necessitating the translation of voluminous documents, plans and submissions: a costly and time consuming process.

- **Needless complexity**

Bespoke arbitration agreements can sometimes escribe needlessly complex procedures for the appointment and selection of the arbitral tribunal or in regards to other procedural issues. At best, such wording is superfluous. At worst, such wording can cause uncertainty that can derail the entire arbitration process. Again, simply following the template arbitration agreements of the leading arbitral institutions will generally avoid this risk.

- **No reference to institutional arbitration rules**

Many arbitration agreements fail to specify that the arbitration is subject to the rules of an arbitral institution (which gives rise to an arbitration known as an ad hoc arbitration). The default rules which will apply to an ad hoc arbitration are those largely set down by the Oman Arbitration Law. However, the arbitral tribunal is given wide ambit in the procedures to be adopted; particularly in regards to the costs of the arbitration.

There is also less certainty on procedural aspects in an ad hoc arbitration compared to an arbitration conducted via the express rules of an arbitral instructions. As such, arbitration agreements should, as a matter of best practice, specify that the relevant dispute will be resolved under the rules of an established arbitral institution.

- **Seat**

Parties must also have regard to the seat of the arbitration. This choice will likely dictate the venue of any hearings, as well as the jurisdiction where any application to seek to nullify or set aside an arbitral award is to be filed.

The basis of arbitration is the free will of the two parties, and it also means that the choice of the place of arbitration should be agreed upon in advance. However, one of the disputing parties may choose a seat of arbitration that has no connection to either of the parties nor the underlying contract itself. For example, it would not be appropriate for two local parties to choose the place of arbitration in a distant country to resolve a dispute where arbitration expenses and registration fees are equal to the value of the dispute or even half of it. That said, it is possible for parties to expressly agree that the venue of any arbitration hearings will differ from the seat of the arbitration; although the increase in online hearings via digital means post COVID 19 is making this issue less relevant.

The selection of the place of arbitration must therefore be very precise, even if one of the parties is a foreign entity, as this process must take into account the parties' practical ability to go to the seat of arbitration if required, the nature of any likely dispute and the mechanisms for the enforcement of any award.

- **Specifying the substantive law governing the contract:**

Some contracts contain arbitration agreements, yet neglect to specify the substantive law governing the contract. This in turn can cause costly and time consuming 'side disputes' as to the proper governing law of the contract: detracting from the substance of the underlying dispute.

Procedural aspects that may be overlooked:

It is vital that any arbitration claim strictly complies with all procedural requirements. By way of background, the submission of an arbitration request is usually the first substantive step of the arbitration process. A claimant will therefore need to play close attention to the procedural rules governing the service of the arbitration request on the respondent. A failure to comply with such requirements or inability to provide evidence that the respondent was given notice of the arbitral proceedings can ultimately prove fatal to an arbitral award's validity.

A claimant should also consider if expert evidence will be needed in the course of the arbitration and any other evidentiary burdens that must be discharged. Giving detailed thought and consideration to such issues at the outset is vital to ensure the arbitration proceeds as expeditiously as possible.

Enforcement of the arbitral award:

The stage of enforcing the arbitration award is considered the most important and most difficult stage of the arbitration procedure.

Whilst in theory, a party to an arbitral award against it should proceed to pay the award amount without delay, in reality it is often necessary for the successful party to instigate enforcement proceedings before judicial authorities to compel compliance. However, the enforceability of an arbitral award is subject to many conditions, including compatibility with public order or public policy, and the legality and authenticity of the arbitration procedures, from drafting of the arbitration agreement to the issuance of the award.

The methods to enforce the arbitral award also vary according to the manner by which the arbitral award was issued. In Oman, an applicant for the enforcement of the arbitral award must file an application in the Court of Appeal in Muscat or the Court of First Instance pursuant to articles 9, 47 and 56 of Oman Arbitration Law. In seeking to enforce an award, an applicant may have to file a case to obtain an order to enforce the arbitral award according to articles 352 and 353 of Royal Decree No. 29/2002 "Civil and Commercial Procedure Law", which means that the applicant may incur other additional expenses that may amount to 3,000 Omani riyals, plus translation costs to ensure the award if translated into Arabic (if issued in another language). As such, being mindful of the procedural requirements to enforce an arbitral award at the outset of a dispute is also vitally important for claimants and respondents alike.

Conclusion

In summary, arbitration can offer a number of key benefits for resolving disputes without recourse to the courts. However, parties would be well advised to give careful consideration to the dispute resolution clause at the outset of contractual terms being negotiated. Wording an arbitration agreement with precision will not only save time and costs, but also ensure the parties (and the arbitrators themselves) can focus on the underlying dispute, rather than getting distracted by procedural irregularities.

Construction Disputes: The Importance of Proper Contract Administration and Good Record Keeping

Lydia Louise
Lead Counsel at OQ
Muscat

Introduction

Should parties to a construction contract find themselves in the unhappy circumstance of a dispute, so much will turn on the documents brought by the claimant and respondent to assist in presenting and substantiating their arguments. In this regard, the importance of proper contract administration and good record keeping cannot be understated.

Scope and Cost of Work

Sometimes, where the parties have a good working knowledge of the contract and their respective rights and obligations at the beginning of a project, this diminishes over the life span of the construction phase of the project. Parties may not refer to the contract when they should. One of the purposes of the contract is to be a continual aid which guides and works with design and construction activities and progression on site, from implementation of front-end engineering design (FEED), to mobilisation, throughout pivotal milestones, to acceptance, handover and operation. Rather, the contract is often signed and then filed, due to a successful project inception and later down the line when parties' interests diverge, the contract is neglected and not referred to for direction.

In the construction, infrastructure and energy sector, the two principal reasons for disputes arising between parties are invariably (1) scope of work and (2) cost of work. A well-drafted construction contract will have very thorough and robust mechanisms which deal with fluctuation of these two key elements, whether the contract is on a lump sum, cost plus or remeasurable basis and whether the contract is based on a templates such as the FIDIC suite of contracts, the Oman Standard Conditions of Contract, another industry standard (such as NEC or JCT) or a bespoke arrangement (which may be preferable in for example, a multi-billion dollar, multi-EPC mega project).

If it is a build-only contract such as the Oman Standard Conditions of Contract, the interface with the employer's design provisions are crucial and disputes often arise here. The employer may assume that the contractor will be proactive in ensuring that materials used fit the design and the end user requirements. The contractor may incorrectly assume that the employer has vetted the contractor's bid and been unable to identify any potential issues with the interface between design and build. Considerations such as these should be very clearly addressed in the contract. Who has the responsibility for design?

In terms of scope of work, one very common theme in construction disputes is that the contractor believes certain works and/or services are outside of its remit, yet the employer considers these same works and/ or services are the contractor's responsibility. How do parties demonstrate to the Arbitral Tribunal that they are correct? Variation and change order provisions will set out the mechanism by which adjustments to the scope of work can be initiated. This may include negative variation provisions whereby the employer can instruct reduction in the scope of work, either because it has become redundant for the project (perhaps as a result of value engineering) or because the employer has chosen to procure this directly. Has the Contractor raised a question at bid stage, via a clarification, in relation to a particular scope of work? Some contracts include the entire RFP documents including the contractor's proposal, along with a scope of work which may not mirror the responses to contractor's clarifications and which has not been picked up until a conflict arises. A well drafted 'priority of documents' clause may go some way to solving issues like this.

Another consideration is that the parties' conduct may contradict the scope of work assigned to the contractor (or not) within the contract. Correspondence will be of great assistance to parties in their submissions, such as one party outlining to the other the reasons why the party believes that a particular item of work or services is within or outside the contractual scope of work. If the contract is unclear on this, the parties may be able to come to some agreement in order to move forward with the project. However, the greater the cost associated with the scope of work in question will make an agreement more difficult to reach, and there are further considerations such as who will take responsibility for this scope and any defects arising from it, and this will need to be appropriately recorded. Often, parties are unable to reach agreement about disputed scope of work, and hence, this ends up being escalated. Not only is the contract helpful in supporting parties' arguments, but so is demonstration of correspondence, notices and conduct for example, has the employer acted in such a way that the contractor could only interpret certain works are outside of its scope? Has the contractor confirmed this or otherwise demonstrated and acted in accordance with this?

Delay, Cost and Contractual Remedies

Another consideration for both parties is whether delay to works and/ or services has been caused exclusively by one party, or whether there has been concurrent or parallel delay i.e. delay caused by both parties which cannot be neatly separated and attributed to one party or the other. An example of this may be where the contractor was late obtaining the necessary materials which it was required to obtain, but the employer was concurrently late in granting access to site to the contractor. Notwithstanding the contractor's delay, there would have been delay in any event, a contributory delay. The success of either party's claim/ defence in this regard will ultimately hinge on the substantiation it can provide. If no delay was documented and there were only telephone calls between the parties in this regard, this will be difficult to claim or defend successfully.

Very often the contract will permit the employer recourse to delay and/ or performance liquidated damages and a performance bond, the latter in the region typically being capped at 10% of the contract value and sometimes with a cap on contractor's overall liability as a percentage of the contract price. Whilst the performance bond may be unconditional between the employer and the guarantor bank, the recourse to the bond under the contract between the contractor and the employer, is likely to be attached to conditions under the contract,

the purpose of which is to secure the contractor's obligations pursuant to the contract. The employer must consider how to demonstrate that these conditions have been met and how to show that the delay and/or performance is not in accordance with the contractor's obligations. The onus is on the employer to act in good faith and it must consider how to justify its recourse to these and demonstrate why it believes that entitlement has arisen to utilise these cost recovery mechanisms.

In terms of loss and assessing quantum, does the contract permit direct and indirect recovery for loss associated with delay? If the contract is silent, what does the governing law permit? For example, under Omani Law, it is generally understood that the recovery of indirect loss is only permissible in limited circumstances and the loss suffered cannot be too remote. The parties need to consider and plead this as part of their submission. The relevant party will face difficulties arguing this successfully if it has not calculated and demonstrated clearly, as a result of the delay:

- the loss that has been caused; and/or
- is currently being caused; and/or
- is projected to be caused and must clearly show whether:
- the loss caused is exclusively caused by the delay;
- whether it is seeking a percentage of the loss caused as a result of contributory delay and how this has been calculated; and
- whether the loss caused is a direct or indirect result of delay, and how this percentage has been calculated.

A further consideration for the contractor is whether the necessary provisions in the head contract have been cascaded down to the subcontracts on a back-to-back basis and whether the contractor has a record of notices to, and correspondence with, the subcontractor in this regard.

Claims Management

In substantiating claims, or defending claims and brining counterclaims, it is immeasurably important that the employer and contractor (or perhaps, contractor and subcontractor) can clearly identify:

(1) the relevant provisions within the contract on which they seek to rely;

(2) documentation which clearly demonstrates why they believe that their rights under the contract have been infringed and that this has been timeously communicated to the other party; and

(3) steps that have been taken to mitigate loss and/or delay before the dispute has crystallised (since dispute should naturally be the last resort between parties).

This will strengthen the argument of the claimant or respondent and will also serve to demonstrate to the Arbitral Tribunal that the correct steps have been taken and that the party has acted within the letter and the spirit of the contract.

Ultimately, the aim of either party must be to ensure that the Arbitral Tribunal can only agree with its arguments, which must sufficiently demonstrate, with substantiation:

(1) the Party's interpretation of the contract, in line with the parties' true intentions at the time of contract execution;

(2) steps taken by the party to follow the contract;

(3) open channels of communication between the parties via written communication and formal notices;

(4) early and appropriate intervention and mitigation steps to avoid issues arising on the project; and

(5) collaborative ways of working with the other party including amicable settlement of disputes where possible.

This can only be properly demonstrated by the contractor or employer, by clear and thorough site records, analysis, written correspondence between the parties to the contract and the timeous service of notice as required by the contract. Parties should consider time limits imposed by the contract and the type of notices required, i.e. does the Contract permit electronic means of communication? Most jurisdictions, including Oman, permit this. Timely correspondence and correctly served notices also help demonstrate a party's understanding of the contract and a willingness to follow its terms. This also goes a long way to assist with dispute avoidance.

COVID Considerations

Although we move towards a post-COVID era, many claims which have arisen during the pandemic will continue to affect projects and the impact will be felt in the long term. Not only will COVID-related claims (such as, most typically, those associated with force majeure and change in law provisions) continue to arise, these may be joined globally to other (non COVID-related) claims. If either party can hope to be successful in its arguments, it is crucial to substantiate claims and counterclaims with site records, written correspondence and clear, timely notices.

Crucially, although contractors are often required to provide up-to-date site records to the employer on a regular basis, where the employer is able to prepare its own records and substantiation, particularly where the contractor and employer's interest diverge, this can be an invaluable tool to assist the employer rebut contractor's claims under the contract as well as in a contentious scenario following crystallisation of a dispute. The importance of the employer's reliance on its own records and documentation is felt particularly during arbitration where the contractor may deploy the tactic of inundating the employer with unnecessary documentation during discovery, and it is difficult for the employer to track down certain key site records or documents (if any), or perhaps where such documents do not support the employer's arguments.

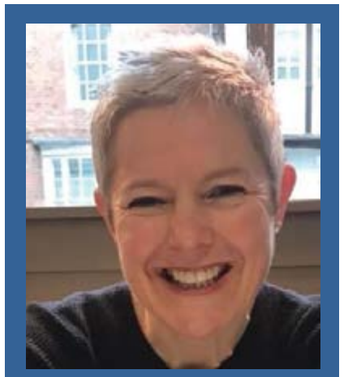
Consultants

Early engagement with specialists, such as lawyers and technical experts, can also help offset some of the difficulties with contractual claims and help provide clear, independent advice on the next available steps, overall strategy, best practice and lowest risk options. For example, early appointment of an independent delay expert during the contractor's submission of extension of time (EOT) claims not only provides a welcome third-party view of the alleged delay (and perhaps associated cost) under a contract and before a dispute crystallises, but a delay analysis could serve as a useful tool in arbitration to show the Tribunal that the employer was taking the contractor's claims seriously and sought independent advice. Early advice by lawyers is also useful to assist with general strategy, due process and identifying any issues with the contractual or procedural processes as followed, or not, by one or both parties. Again, accurate site records, good contract administration and robust record-keeping will assist these independent experts support a party's arguments to the fullest extent possible.

Conclusion

A construction contract should be referred to during the execution of the scope of work and services which it governs and mechanisms which assist in dispute avoidance and amicable settlement should be followed. Where the parties to a contract end up in a dispute, it is crucial that each party is able to substantiate its claims and defences/ counterclaims with the appropriate supporting documentation. This will support the party's arguments and assist the Arbitral Tribunal in understanding the events that have led up to the dispute. Proper contract administration and good record keeping should not be an afterthought; it must go hand-in-hand with the execution of works and services, can assist with dispute avoidance and is a key component of a successful claim or counterclaim.

Musings from 12 Bloomsbury Square



Catherine Dixon
Director General, CIArb
London

By way of introduction, I am the director general of the Chartered Institute of Arbitrators (CIArb), and it's an absolute pleasure and honour to be invited to contribute to this newsletter.

For those of you not familiar with CIArb, CIArb is global professional and membership organisation for those practicing or aspiring to practice as alternative dispute resolvers

CIArb has over 17,000 members globally, practicing in 150 jurisdictions through 42 branches which are run by members for members.

CIArb's aims are to promote ADR, be a global thought leader and create a diverse community of dispute resolvers. We offer world class training in arbitration, mediation and adjudication which differentiates our members from other practitioners. CIArb members' sign up to an ethical code of practice.

CIArb is excited to be working with the Oman Arbitration Centre (OAC), to deliver International Arbitration training in Oman with the aim of establishing a CIArb branch in Oman. This will enable CIArb members to come together to build capacity and establish Oman as a seat for international arbitration and in other complementary ADR processes.

CIArb also supports equality, diversity and inclusion enabling the best to succeed irrespective of background. We also focus on the use of technology, on supporting sustainability and produce best practice guidance which helps us encourage Governments around the world to adopt best practice in ADR. In that regard, we see ADR as an enabler to access to justice and supporting the rule of law and as such I thought I would use the rest of this article to focus on how ADR can support the rule of law and enable access to justice.

It was Aristotle who wrote "It is more proper that law should govern than any one of the citizens". This principle is recognised as one of the earliest references to the rule of law which is defined in the Encyclopaedia Britannica as "the mechanism, process, institution, procedure or norm that supports the equality of all citizens before the law, secures a non-arbitrary form of government and more generally prevents the arbitrary use of power", or could be more simply described as ensuring that "no one is above the law".

The role of ADR is increasingly being recognised as a way to strengthen the rule of law. ADR including arbitration and mediation, (particularly court annexed mediation), can be used as important mechanisms for enabling access to justice which can support economic development by expediting the disposal and resolution of disputes, thereby contributing to human security.

Of the factors measured by the world justice project - the rule of law index, the access to civil justice is a key factor. It is also the case that the lack of access to civil justice was a contributing factor leading to the establishment of modern forms of ADR.

Business requires mechanisms which result in the swift workable and appropriate outcomes for resolving disputes particularly, where there is a lack of relevant legal or court processes or where such processes are seen as arbitrary, corrupt or inappropriate.

During the pandemic we have seen many court systems become overwhelmed and this has resulted in many businesses and individuals seeking alternative ways of resolving disputes quickly and effectively.

If the rule of law is weak and access to justice problematic, ADR processes can provide the bridge to re-establish justice systems as well as longer term solutions which match the type of justice sought with the process used.

Most legal systems offer limited types of justice. However, there are many different types of justice mechanisms including distributive, relational, reparative, retributive and procedural to name a few. Very few justice systems seek to match the party need with the form of justice. ADR enables individuals and businesses flexibility thereby matching need with form. The more flexible the approach, the more the parties are able to shape the process to meet their needs. Mediation is a good example as it can offer access to different forms of justice including, integrative, relational and distributive.

It is also the case that in some jurisdictions accessibility and affordability are linked and access to justice through civil procedure and the courts is limited to those who can afford it. Where this occurs, ADR can provide cost effective mechanisms which are accessible, more affordable and effective.

> **CIArb is excited to be working with the Oman Commercial Arbitration Centre (OAC) to deliver International Arbitration training in Oman.**

That said, even disputes involving complex issues of law such as international commercial and investor-state disputes involving detailed legal appraisal of the issues and risks, can benefit from ADR. Particularly, where the parties are attempting to manage complexity and looking for what can be seen as more workable solutions as well as avoiding having to rely on justice systems where the rule of law is weak, resulting in enforcement problems.

Arbitration offers the parties the ability to choose where the dispute should be resolved, which law should be applied and who should determine the issues, thereby enabling enforcement which underpins economic investment. Although, settlements arrived at following mediation, (because they are agreed by the parties), tend not to require enforcement, the Singapore Convention on Mediation can provide assurance to the parties that enforceability is possible and therefore supports the ability of international mediation to sit alongside international arbitration as a legitimate and complementary ADR process.

To summarise, this article seeks to demonstrate the importance of ADR in supporting the rule of law and enabling access to justice. ADR can offer businesses and individuals complementary ways of resolving disputes flexibly and effectively thereby supporting the rule of law, enabling access to justice and supporting economic certainty and investment which can contribute to human security and well-being.

In Conversation The Honourable Sayyid Khalifa Said Al Busaidi President of the Supreme Court of Oman

How would you summarize your mission in general as the President of the Supreme Court of the Sultanate of Oman? What aspects of it are the most challenging?

Presiding over the Supreme Court is a great responsibility. The Supreme Court is at the highest judicial level in the Sultanate of Oman, and it determines the extent to which the actions of entities and individuals comply with the laws and also the correctness of the courts' interpretation of legal texts and the application of these texts to the factual matrix of each case. The President of the Supreme Court is tasked with following up on the fulfilment of this duty by the Supreme Court, and in doing so complying with the applicable rules and norms, and always ensuring the independence of the judiciary.

In addition, the law entrusts the President of the Supreme Court to chair the Commission for the Unification of Principles issued by the Supreme Court in accordance with the provisions of Article (9) of the Judicial Authority Law. This body is of great importance because of its role in establishing judicial principles and unifying the interpretation of laws, and in controlling the application of texts to achieve justice.

In addition to this judicial role, the Royal Decree 35/2022 entrusts the President of the Supreme Court with the duties of a member of the Supreme Judiciary Council chaired by H.M. The Sultan of Oman. This Council is entrusted with tasks related to laying down the principles and foundations upon which the judicial system in the Sultanate of Oman operates, and also giving effect to these principles to ensure the efficacious administration of justice.

You have been a judge for more than three decades. What in your opinion makes a good judge?

There are many virtues and skills a judge must have in order to be good. Some of these are academic, others moral, and also intellectual. Perhaps, the most important of them is that a judge should be independent, which means being free of any loyalties or interests that might inappropriately influence the performance of a judge's function. The ability to deal with work pressures that require settling a large number of cases within the shortest possible period, and always upholding the rights of individuals to present their arguments and defence is another attribute of a good judge. In addition, a judge is expected to have the intellectual and linguistic ability to interpret legal texts correctly. Also important is the ability to have an open mind while hearing all sides of an argument and not be reluctant to ask for advice from judges who are more knowledgeable and experienced.

Do you have any suggestions on how to improve the judicial system in Oman?

I do have a long wish list of suggestions and ideas to improve the judicial system in Oman, and God willing, I hope to push through some of these in the not too distant future. Perhaps, the most pressing of these improvements are related to the digitization of judicial work which would ensure quicker turnaround of disputes without affecting due process requirements. Also on my wish list is creating specialized judicial competencies capable of adjudicating cases accurately and expeditiously.

Has mediation in the Sultanate of Oman made great progress? And what are your suggestions for promoting an effective and sustainable mediation culture?

ADR in the Sultanate of Oman has made significant progress. Recent statistics show that the conciliation and reconciliation committees in Oman, which have been playing an important role to ease the burden on judicial authorities, have been very popular with litigants. Also, the recent establishment of the Oman Commercial Arbitration Centre would increase access to alternative dispute resolution mechanisms and encourage them to include arbitration and mediation clauses in commercial contracts. However, building a culture of resorting to these alternative means of resolving disputes will not happen overnight, but it is a continuous process. This will happen with the diligent work and efficiency shown by mediators and arbitrators. Further, arbitration and mediation centres should also focus on marketing their services to the society at large, and encourage parties to use the services of such centres, more so given the numerous advantages of the services that these centres offer, which includes removing procedural rigidity by introducing simpler procedures, and alleviating the financial burden on the disputants by introducing time bound procedures. Without proof of efficiency evidenced by statistics and sincere marketing efforts, parties will not resort to ADR and they will continue to remain faithful to traditional methods of dispute resolution.

In light of the prevalence of ad-hoc arbitration in Oman, it has been remarked that there has been some hesitancy amongst parties and lawyers towards institutional arbitration. What can be done to promote institutional arbitration, in Oman?

In order to encourage people to resort to arbitration in general, and to institutional arbitration in particular, it is necessary to understand and analyse the apprehensions and concerns of parties which have hitherto been hindering them from using arbitration to resolve their commercial disputes. It would be important to allay the apprehensions of parties by showing how institutional rules and procedures have sought to resolve these concerns or at the very least mitigate their effects.

One of the major concerns that parties have qua arbitration relates to the independence and impartiality of arbitrators, and the extent to which arbitrators are subject to the norms of independence, impartiality and objectivity applicable to judges, and the extent to which there is oversight from a higher authority over the actions of these arbitrators, as is the case in the judiciary where there is an internal system of inspection and supervision of the work of judges. Perhaps, this particular problem is more visible in ad hoc arbitrations than in institutional arbitration. In general, institutional arbitration being relatively new in Oman, it would require greater efforts to increase its popularity and this could be done by highlighting its advantages compared to ad-hoc arbitration and other dispute settlement systems.

Some experts mention that one of the challenges related to arbitration in the Sultanate of Oman is the lack of an independent system for the implementation of arbitration rulings before Omani courts. What are the steps that can be taken by the judiciary to overcome this challenge?

The Courts seek to solve all concerns related to implementation, whether of judicial rulings or arbitral awards. Whenever the terms apply on an order, the Courts take the necessary implementation measures without prioritizing other orders to the extent permissible by law. However, the problems of implementing the orders are linked to a number of legal and realistic issues, and these problems apply to judicial rulings as well as to the implementation of arbitrators' awards. As such, if a special system was placed for executing arbitrators' awards, that system would not deviate from the general rules that preserve the rights of the litigants. Nor will there be a privilege for arbitration rulings over judicial rulings; because saying so underestimates the execution of judicial decisions. In addition, by imposing special rules for the enforcement of arbitral awards, the factual concerns with the losing party's refusal of consensual enforcement will still remain. Therefore, it means resorting to forced execution, which has its own procedures, the consequences of which are well known to you.

In conclusion, I do not see any obstacle to a special system for implementing arbitrators' awards, but we do not believe that its issuance will solve the problems that exist for the implementation of the above-mentioned as most of the problems are not due to the regulations themselves. Rather, it is factual and practical that the existing regulations exist and are applicable to the implementation of the arbitrators' awards, and it is not by sorting these texts into a special system for a practical solution to these problems. In other words, we do not see that the real challenge lies in the independence of the rules for implementing arbitration awards in a special system.

Can the Sultanate of Oman be a prominent centre for arbitration and mediation in the region? How can specialists assist in this endeavour?

Yes, I do believe that the Sultanate of Oman can be a reputable centre for arbitration and mediation. However, this requires diligent work on many fronts. As such endeavour can only be achieved if there are large companies and investors in the Sultanate working in its commercial markets and trusting the country's mechanisms for settling disputes. The presence of such companies in Oman can be achieved by providing an attractive investment environment that includes modern legislation protecting the rights of investors and procedural simplicity for both local and international investors. Given the Sultanate's economic potential, we hope that such an idea will be properly explored in line with the objectives of Oman Vision (2040).

Certain jurisdictions have specialist judges with a background in arbitration hearing arbitration-related cases. Would you think it might be a good idea to implement such a system in Oman?

There is no objection to the appointment of specialist judges to hear disputes exclusively relating to arbitration. However, the appointment of these specialist judges would depend upon the number of arbitration matters that come to be referred to the courts. For these numbers to increase, steps need to be taken to inculcate a culture in society of resorting to arbitration or mediation and other alternative means. In the event that this happens, the Courts will not have any difficulty in keeping pace with that development by allocating some departments and judges to exclusively consider these types of dispute, and also invest in development and training of judicial competencies in order to deal with this specialization. In the current situation, the number of disputes arising from the issuance of arbitrators' awards do not warrant the establishment of such specialised units.

In conclusion, do you have any suggestions to promote arbitration in the Sultanate of Oman?

I believe that it is necessary for the arbitrators' awards to be founded on legally correct basis from a procedural as well as substantive law perspective, which would avoid invalidation of these awards by courts. This can be achieved by building a pool of qualified and trained arbitrators by competent arbitral institutions. In establishing such a pool, institutions must be careful to ensure that their choices must be correct and on objective grounds.

It would also be important to review the Law of Arbitration in Civil and Commercial Disputes promulgated by Royal Decree 47/97 starting with its name whereby it does not suggest that its provisions are limited to purely civil and commercial disputes, but rather includes disputes related to administrative contracts in which it has become possible to resort to arbitration after adding Article (6 bis) to the provisions of the Administrative Court Law. Also, some provisions of this law need to be more capable of accommodating economic and investment developments in the Sultanate of Oman, taking into account some procedural specificity in the law as its provisions include procedural rules that would encourage people to resort to arbitration.

OAC News

24 October 2021: Muscat

The inauguration of the OAC offices and headquarters took place under the auspices of His Excellency Dr Abdullah Al Saidi, the Minister of Justice and Legal Affairs and his Royal Highness Prince Bander Al Saud, the Honorary President of the GCC Arbitration Centre. The event was split into two sessions, the first being the official inauguration of the Centre which was followed by a dinner hosted at the Crown Plaza Hotel.

8 February 2022: Muscat

The OAC participated in a 3-day workshop titled the "Settlement of Islamic Banking Disputes by Conciliation and Arbitration". The seminar was hosted by the College of Sharia Sciences and sponsored by Bank Nizwa. The Centre represented by its CEO presented a power point presentation titled "Mediation and Institutional Arbitration in the Sultanate of Oman" on day two of the workshop.

11 November 2021: Al Buraimi

Oman Chamber of Commerce and Industry (Buraimi branch) hosted a seminar titled "Commercial Arbitration as a Means of Resolving Commercial Disputes" under the auspices of His Eminence Dr Hamad Al Jahuri, President of the Court of Appeal in Al-Buraimi Governorate, with the participation of Dr Moosa Al Azri, CEO of the OAC and Dr Jamal Mabrouk, Assistant Professor, Al Buraimi University College.

21 November 2021: Muscat

The OAC hosted a seminar in partnership with ALC Lawyers and Counsels titled "The Oman Arbitration Landscape". The keynote speaker at the seminar held at The Intercontinental, Muscat was Adrian Cole, an UAE-based international arbitrator.

3 March 2022: Twitter

Dr. Moosa bin Salem Al-Azri, CEO of the Oman Center for Commercial Arbitration, presents a working paper on the competencies of the Oman Center for Commercial Arbitration.

18-19 Septemper 2022

Dr. Moosa Al Azri, CEO of the Oman Commercial Arbitration Center, participated in the 25th Conference of the International Council of Commercial Arbitration (ICCA), which was held in Edinburgh, the capital of Scotland, in the United Kingdom, from September 18 to 21, 2022. This conference is the largest international gathering of specialists in alternative dispute settlement and is held every two years.

1-7 November 2022: Muscat

Oman Commercial Arbitration Centre was delighted to host an internationally accredited course in collaboration with Centre for Effective Dispute Resolution (CEDR) program pertaining Effective Mediation Skills in dispute resolution. The training program aims to qualify and enable the participants to acquire professional skills and strategies in mediation.

The program was to be hosted in the center's headquarters starting from the 1st to the 7th of November 2022.

17 November 2022: Dubai

As part of Dubai Arbitration Week, Oman Commercial Arbitration Centre in partnership with the DIFC Courts organised a seminar titled: "Sharpening the Sword of Efficiency in Arbitration in the MENA Region", with the participation of a panel of speakers. The Seminar was attended by a number of those interested in the field of commercial arbitration. On the sidelines of the meeting, the most important roles and specializations of the Oman Commercial Arbitration Centre were introduced.

16 February 2022

The OAC and the Chartered Institute of Arbitrators (CIArb) entered into a MoU to offer CIArb's 'gold standard' arbitrator training and accreditation courses in Oman. The MoU signed on 16 February 2022 comes in response to the growing demand for alternative dispute resolution (ADR) training. Under this strategic partnership, the two institutions will jointly offer, for the first time in Oman, CIArb's world-renowned 'Pathways in International Arbitration' programme.

20 February 2022: Twitter

The OAC was delighted to host a hearing in an arbitration administered by @PCA_CPA. The hearing was held in hybrid-format and commenced on the 14th of February 2022 at the Centre which is equipped with state-of-the-art audio-video conferencing facilities.

24 February 2022: Webinar

The OAC was delighted to host the first event of its 2022 Webinar series on 24 February. The event titled "Arbitration and mediation: Strange bedfellows or compatible partners?" saw participation from 121 delegates from 21 countries. The discussion revolved around the myriad ways in which arbitration and mediation could be blended into one seamless dispute resolution process through the use of hybrid solutions.

9 March 2022: Salalah

Oman Chamber of Commerce and Industry (Dhofar branch) hosted a full day conference on "The role of the OAC in resolving commercial disputes and taxation law" at the Millennium hotel in Salalah. The conference was attended by more than 200 participants. Panelists included Dr Moosa Al Azri, Dr Taha Zahran (legal advisor and arbitrator) and Tayseer Al Rawahi (Director of Taxation services at Crowemak and Al Ghazali LLC). The event took place under the auspices of the Head of the Court of Appeal in Salalah.

3 March 2022: Sohar

Oman Chamber of Commerce and Industry (North Batinah branch) hosted a seminar on "OAC's mandate and competencies". Dr Moosa Al Azri was invited as a special guest to deliver a speech on the OAC and the efforts undertaken by the Centre to resolve commercial disputes in an expeditious and cost efficient manner. The event was organised under the auspices of the Head of the Court of Appeal in Sohar.

13 March 2022: Muscat

The OAC Breakfast Talks Series is a brand-new initiative of the OAC with an aim to disseminate good practices in arbitration to the legal community in Oman. The first talk in this series was delivered by Joe Tirado of Garrigues, London who took for his theme, "The do's and don'ts of international arbitration: A practical road map for in-house counsel".

The event saw participation from General Counsel and Head of Legal Departments from a cross-section of prominent Omani companies and international companies doing business in Oman.

23 March 2022: Qatar

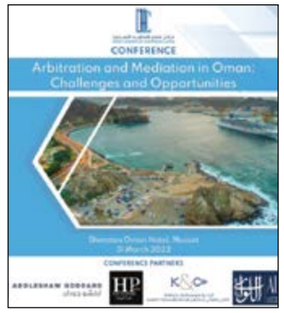
4th World Conference on International Arbitration' #4WCIA: Dr. Moosa Al-Azri CEO of the Oman Commercial Arbitration Centre highlighted the arbitration in the Sultanate of Oman and overview of rules of the Oman Commercial Arbitration Centre.

28 March 2022: Muscat

The OAC hosted the Omani British Lawyers Association (OBLA) at the OAC hearing facilities in Muscat. The attendees comprised in-house counsel from state-owned enterprises, multinational corporations and individual lawyers and also those from Omani and international law firms.

31 March 2022: Muscat

The OAC hosted its first face-to-face conference at the Oman Sheraton Hotel in Muscat on the theme "Arbitration and Mediation in Oman: Challenges and Opportunities". Panelists included eminent and experienced arbitration practitioners from Oman and overseas who discussed a plethora of topics relating to the law and practice of arbitration and mediation in Oman and the wider MENA region.

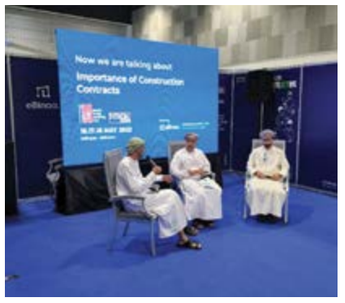


5 April 2022

The OAC and CEDR, headquartered in the United Kingdom, signed a MoU to develop research and education cooperation and facilitate exchanges between professionals involved in ADR, and specifically in mediation, facilitation and negotiation. The MoU also aims to offer high quality mediation skills training to a new generation of mediators within Oman as well as the wider region, ensuring that those with commercial disputes in the jurisdiction can be confident in using the mediation process. The training will be offered by OAC in Arabic as well as English.

17 May 2022: Muscat

Dr. Moosa Al Azri participated in a panel discussion titled "The importance of construction contracts" hosted by E-Binaa at the Interior Design & Furnishing Expo held at the Oman Convention and Exhibition Centre. Dr Moosa highlighted the role of the OAC in resolving all types of commercial disputes in general and more specifically those involving the construction and infrastructure sector.



23 February 2023

The launch of an in-person training program entitled International Commercial Arbitration Law: Practices and Procedures, which is organized by Oman Commercial Arbitration Centre in cooperation with the Chartered Institute of Arbitrators (CIArb).

28 February 2023

The OAC Breakfast Talks Series is an initiative of the OAC. The fourth talk in this series was delivered by James Bridgeman SC, Chartered Arbitrator on the topic "Commencing an International Arbitration under the Laws of England and Wales".

23 April 2023

The launch of the second edition of the training program: "International Arbitration Law: its practices and procedures (Level 1)" in cooperation with the Chartered Institution of Arbitrators (CIArb) at the headquarters of the Oman Commercial Arbitration Centre.

5 June 2023

The Oman Commercial Arbitration Centre (OAC), in cooperation with the Centre for Effective Dispute Resolution (CEDR), organized a round table discussion on the use of mediation in commercial disputes at the OAC's headquarter in Muscat. Mr. Wolf von Kumberg, a leading internationally recognised mediator and arbitrator, spoke at the round table discussion. Mr. Tjalling Wiersma, General Counsel of PDO, also participated in the panel. The participating jurists from different institutions also discussed the role of mediation in settling commercial disputes in the Sultanate of Oman and the most important practices and challenges in order to activate the role of mediation in settling commercial disputes.