

ARBITRATION - THE LEGAL FRAMEWORK

Presentation to the Chartered Institution
of Civil Engineering Surveyors

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The business of relationships.



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- Mechanical Engineering Career in the UK
- BSc(Hons) Business Information Technology
- Commercial Career in New Zealand
- Juris Doctorate in Law at Melbourne University
- Construction Disputes Australia and UAE
- Primarily Arbitration



Arbitration – The Legal Framework

Agenda

- Methods of Resolving Construction Disputes
- Arbitration History, and Strengths & Weaknesses
- Importance of Legal Framework
- Legal Frameworks UAE, DIFC and International
- Entry into the Legal Framework
- Seat of Arbitration
- Enforcement
- Administration and Rules



Construction Dispute Resolution

- Non-Binding
 - Mediation, Negotiation
- Determinative (Binding?)
 - Litigation - Court with Judge
 - Legal Framework - Binding Enforceable Decision
 - Expert Evaluation
 - Contractual Arrangement
 - Dispute Adjudication Boards (FIDIC 1999)
 - Contractual Arrangement
 - Arbitration
 - Contractual and Legal Framework

International Arbitration – A Long History

- Ancient Egypt (arbitrator - high priests)
- 15 c England
 - Pies Poudres (Dusty Feet)
 - King's charter to sit
 - Dispute between buyer and seller (often international pedlar)
 - Could turn into riot or lynching
 - Man of Standing – Steward or Mayor
 - Dispute resolved before parties had time to shake the dust off their feet
 - Early form of international arbitration



Arbitration – Strengths and Weakness

■ Strengths

- International Standard
- Party Control
- Finality (up to a point)
- Confidentiality
- Legal Framework
 - Procedural Law
 - Local Enforcement
 - International Enforcement – New York Convention

■ Weakness

- Lengthy
- Costly
- Formal
- Adversarial
- Judicial Protectionism



Importance of Legal Framework

- Sits Above Rules of Arbitration (ICC, DIAC etc)
- Stay of courts jurisdiction/jurisdiction to Tribunal
- Scope of Legal Framework varies by country
- Procedure & Protection
 - Arbitrator selection and neutrality
 - Confidentiality
 - Default procedure
 - Interim Measures
 - Timeframes



Importance of Legal Framework

- Court assistance
 - appointing Tribunal
 - taking evidence
 - correction of award
 - setting aside award
- Recognition and enforcement of award
- International enforcement

Legal Framework - International Standard

- Courts – different processes, languages etc
- Arbitration – standardised (to a point!)
- United Nations Commission on International Trade Law
- Arbitration Law (Legal Framework)
 - UNCITRAL Model Law
 - 70 Countries Arbitration Law
 - Incl. Oman, Jordan, Egypt, Bahrain, Iran
 - DIFC Arbitration Law
 - Proposed New UAE Arbitration Law



Legal Framework - International Standard

- Standard Procedural Rules
 - UNCITRAL Model Rules
 - Most International Institution's Rules Based on these

Legal Frameworks

- Domestic
 - UAE Law
 - Federal Law No. 11 of 1992, The UAE Civil Procedure Code
 - Dubai International Financial Centre Law
 - Arbitration Law DIFC Law No. 1 of 2008
- International Enforcement
 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention)

UAE Arbitration Law

- Civil Law System
- Federal Law No. 11 of 1992, The UAE Civil Procedure Code
- Primarily Court Procedural Law
- Arbitration law embedded in Articles 203 – 218
- Basic and ambiguous
- Enforcement can be tricky
- Reform promised (since 2008!)

DIFC Arbitration

- “Offshore” Dubai Jurisdiction
- Common Law System
- Not subject to UAE Procedural Law
- Arbitration Law DIFC Law No. 1 of 2008
- Comprehensive Arbitration Law
 - similarities with UNCITRAL Model Law
- DIFC Courts
 - English Language
 - Common Law Principles
- DIFC/LCIA Arbitration Centre and Rules



New York Convention

- International Enforcement
 - Arbitral award issued in one country enforceable in member countries
- 146 Member Countries
- GCC
 - UAE, Bahrain, Oman, Qatar, Saudi Arabia & Kuwait



Arbitration Agreement

- How does Arbitration fall under this legal Umbrella?
- Arbitration Agreement
- The Entry point into the legal framework
- Contractual Agreement to refer Disputes to Arbitration
- What does the Law require then?

Arbitration Agreement – UAE Domestic Law

- Federal Law No. 11 of 1992, The UAE Civil Procedure Code

- Article 203(1)

The parties to a contract may generally stipulate ...that any dispute arising between them in respect of...a particular contract shall be referred to one or more arbitrators...

- Article 203(5)

If the parties agree to arbitrate the dispute it shall not be permissible to bring an action in respect thereof before the courts but nevertheless if one of the parties does have recourse to litigation without regard to the arbitration clause and the other party does not object at the first hearing the action must be tried and the arbitration clause shall be deemed to be cancelled.

Arbitration Agreement – DIFC Law

- Arbitration Law DIFC Law No. 1 of 2008
- Article 12(1) – Definition and Form of Arbitration Agreement

...an agreement by the parties to submit to Arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

- *Article 13(1)*

If an action is brought before the DIFC Court in a matter which is the subject of an Arbitration Agreement, the DIFC Court shall, if a party so requests...dismiss or stay such action

Arbitration Agreement - NYC

- Double Protection for Signatories!

- Article II.1:

Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.....

- Article II.3

The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this Article, shall at the request of one party, refer the parties to arbitration...

Arbitration Agreement - Example

- FIDIC 1999 Red Book – Clause 20.6

Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:

- a) the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce,*
- b) the dispute shall be settled by three arbitrators appointed in accordance with these Rules; and*
- c) the arbitration shall be conducted in the language for communication defined in Sub-Clause 1.4*

FIDIC - Arbitration Agreement

- Sets Parameters of Arbitration
 - Rules of Arbitration – ICC Rules
 - Number and selection of Arbitrators – 3
 - ICC Rules - 1 nomination by each party – Chairman by ICC Court
 - DIAC – Chairman by co-arbitrator nomination
 - Language
- but not “Seat” or “Place” of Arbitration (see FIDIC guidance notes – Country with modern and liberal arbitration law and signatory to New York Convention)

Tiered Dispute Agreements

- e.g. Negotiation, Mediation, DABs
- Take Care - ADR Prior to Arbitration – Cassation Appeal 204/2008:

An Arbitration clause may incorporate certain conditions which outline settlement attempts which must be fulfilled prior to the parties resorting to arbitration

- FIDIC 1999 Clause 20.8 – Get Out of Jail Card!

“Seat” or “Place” of Arbitration

SEAT OR PLACE OF ARBITRATION

e.g. London, Dubai, New York

Arbitration Agreement

**SETS COUNTRY WHOSE LAW WILL
GOVERN THE ARBITRATION
PROCEEDING**

Enforcement – UAE Domestic

- UAE Civil Code
- Article 212(3)

The special rules pertaining to immediate enforcement shall apply to arbitration awards

- Article 215

An award of the arbitrators shall not be enforced unless it is ratified by the court with whose clerk the award has been deposited, [such ratification to be made] after perusal of the award and the arbitration instrument and an ascertainment that there is no obstacle to enforcement thereof

Enforcement – UAE Domestic

- Grounds for nullification
- Article 216
 - issued without or with invalid terms of reference
 - arbitrator exceeded limits of terms of reference
 - dispute not specified in terms of reference
 - time limit expired for award
 - arbitrator not appointed in accordance with law
 - number of arbitrators incorrect
 - Procedural errors

Enforcement - DIFC

- Article 43 – Recognition

upon application of a party for recognition of an arbitral award, if the DIFC Court decides that the award shall be recognised, it shall issue an order to that effect.

- Article 42(4)

Awards issued by the DIFC Court may be enforced within the DIFC in the manner prescribed in this Law [and] may be enforced outside of the DIFC in accordance with the Judicial Authority Law..

Enforcement – Outside of DIFC

- Judicial Authority Law
- The Law of the Judicial Authority at DIFC Dubai Law No. 12 of 2004
- Article 7 The Enforcement
 - (2) *Should the subject of execution fall outside the Centre, judgements, awards and orders issued by the Courts and Arbitral Awards ratified by the Courts shall be enforced by an **executive judge at Dubai Courts**, subject to the following:*
 - (a) *The judgement, award or order is final and is appropriate for enforcement; and*
 - (b) *The judgment, award or order has been translated into Arabic.*
 - (3) *The executive judge at Dubai Courts has no jurisdiction to review the merits of a judgement, award or order of the Courts.*



DIFC – Setting Aside an Award

- Article 41
 - DIFC Court may set aside award prior to seeking recognition on generally the same grounds as NYC



Enforcement – Outside of DIFC

- Possible alternative
- New York Convention?

Enforcement - International

- New York Convention
- Article III

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...

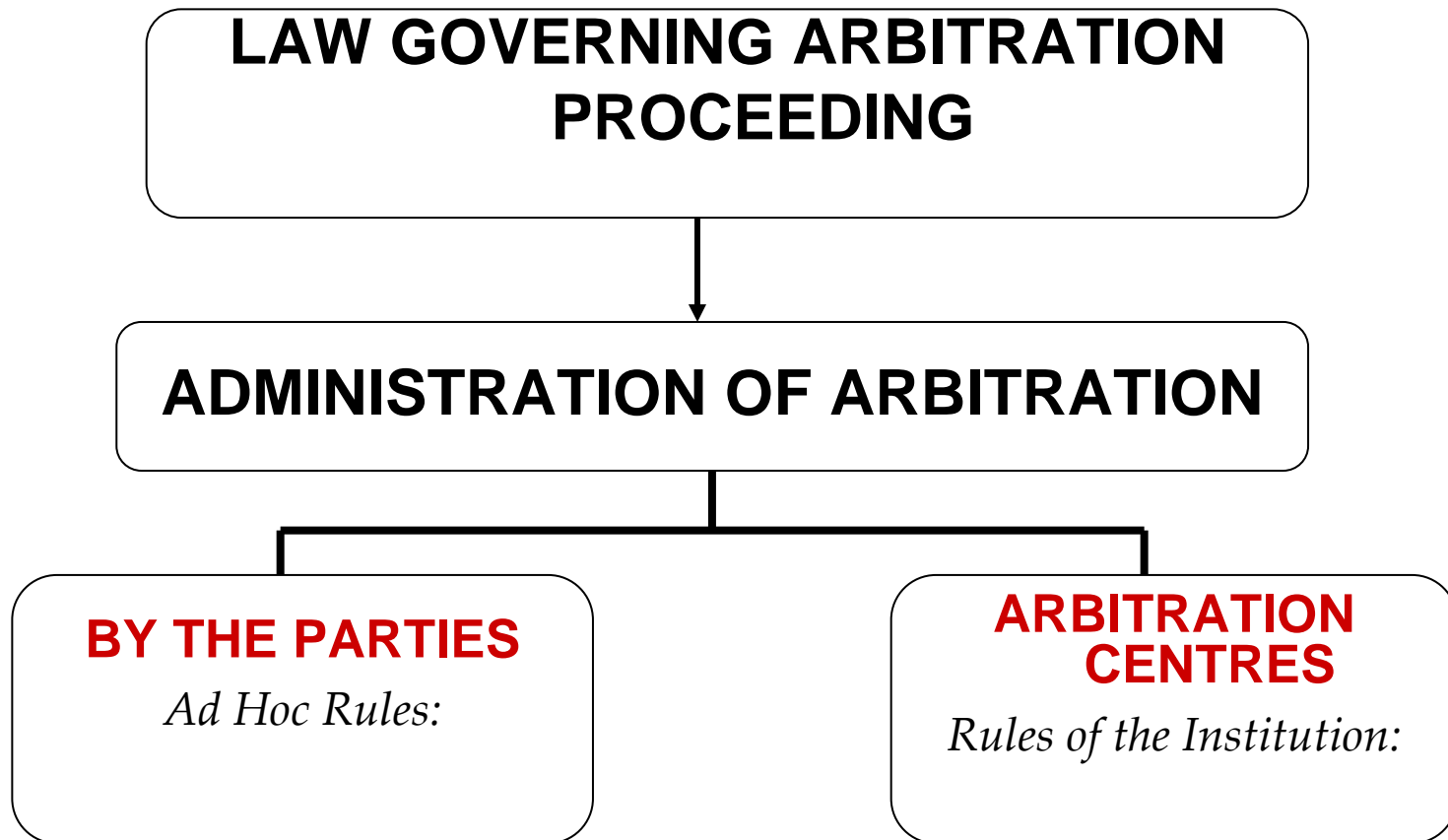
Enforcement - International

- Grounds for Refusal – NYC Article V
 - Invalid agreement
 - e.g. the arbitration agreement was not valid under the law to which the parties subjected it to.
 - Incapacity of party
 - e.g. a party was so seriously ill that it was impossible for him to instruct a lawyer to present his defence
 - Due Process
 - e.g. not given proper notice of the arbitration and really did not learn of the appointment of the arbitrator as opposed to just a failure to comply with a notice requirement.
 - Award beyond scope of reference to arbitration
 - e.g. if the award contains decisions falling beyond the scope of the submission to arbitration.

Enforcement - International

- Grounds for Refusal – NYC Article V [Contd]
 - Composition of Tribunal not in accordance with parties' agreement or law of seat
 - Award not binding yet on parties
 - e.g. if the arbitration agreement requires another step to be taken, the court will not enforce the award unless that step has been taken.
 - Set aside
 - e.g. upon proof the award has been set aside by a competent authority under the law of which it was made, the court may refuse to enforce a New York Convention Award.
 - in country of enforcement
 - subject matter not capable of settlement by arbitration under the law of that country
 - against public policy e.g. maintaining the fair and orderly administration of justice.

Administration and Rules





Ad Hoc Arbitration

- Very unusual in construction disputes
- Free to select rules - UNCITRAL Rules
- Either Administered by parties or alternative centre

Arbitration Centres - Administration

- DIAC, DIFC/LCIA, SIAC, ICC
- Arbitration Administered by Centre prior to Tribunal being established
 - Appointment of arbitrators
 - Arbitrator fees
 - Advances on costs
- Issue of awards
- Final cost of arbitration

Arbitration Centres - Rules

- Fairly detailed procedure
 - Commencing Arbitration
 - Formation of Tribunal
 - Proceedings
 - Hearings
 - Awards
- IBA Rules on the Taking of Evidence in International Arbitration



QUESTIONS?