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MINI-ROUNDTABLE

DISPUTE RESOLUTION IN THE MIDDLE EAST

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CD: To what extent has there been an increase, or otherwise, of commercial disputes in the Middle East over the past 12 months? What types of dispute are typically being seen and in which sectors are they most prevalent?

Beer: As a benchmark, in the DIFC Courts the volume of commercial disputes has generally remained constant over the last 12 months. However, the value of cases filed in 2016 increased by nearly 400 percent as compared to 2015, signalling the significance of these disputes. Furthermore, although the number of cases has been constant, the steady volume of disputes in 2016 comes after a marked increase from 2014 to 2015 and thus the region remains busy with dispute resolution. An extended dip in oil prices has caused adjustments in the economy which may lead to conservative growth outlooks, stalled projects and further disputes in the near future. Many ongoing disputes revolve around failure to pay or complete work in the construction industry and thus construction-related dispute resolution is on the rise in every form. The DIFC Courts are seeing an increase in cases related to technology, as well. The growth of disputes in these two key industries has triggered the development of a new Technology and Construction Division of the DIFC Courts, intended to take effect in October 2017, to streamline these types of proceedings, ensuring expert judges and tailored case management for technology and construction related disputes.

Cole: The Middle East consists of a diverse group of countries – each with their own particular circumstances that give rise to commercial disputes. Common drivers for commercial disputes are the fall in oil prices, real estate development and the Qatar crisis. The fall in oil prices has impacted the viability of a number of projects, with many being shelved or reduced in size. Disputes as to contractual entitlements have subsequently arisen, fuelled by parties seeking to manage their cash flows by making late or reduced payments. While the energy sector has been under some pressure, real estate continues to prosper with large, complex real estate developments being procured. Bahrain, Saudi Arabia, Qatar and the UAE are all particularly active markets. In the UAE, the 2020 Expo in Dubai is adding additional volume to an already buoyant market. Real estate developments are ripe for disputes as issues relating to time, quality and cost are contested. Construction periods that are perhaps shorter than necessary generate delays, coupled with a lack of skilled labour, create fertile grounds for disputes.

Vidal: There has been a steady increase in disputes across the Middle East over the past two years, with the difference over the last 12 months as opposed to 24 less noticeable. Disputes continue to

predominantly relate to property and construction and disputes involving financial institutions. We have also seen a rise in the number of internal corporate investigations being conducted.

Stephen: The DIFC-LCIA Arbitration Centre saw a 20 percent increase in its case load in 2016, which has been followed by a 100 percent increase in the first six months of 2017. Put another way, the same number of cases were registered from 1 January to 30 June 2017 as in the whole of 2016. These cases cover a broad range of disputes including construction, telecommunications, M&A and JV, real estate and hospitality, financial services and shipping. They all arise from alleged breaches of commercial contracts. The increase in case load is also reflected in discussions with in-house counsel, arbitration lawyers and arbitrators in the region, who all seem to be very busy.

CD: To what extent are companies in the region embracing alternative dispute resolution methods? What mechanisms are proving popular?

Cole: Arbitration is the most common alternative form of dispute resolution to litigation in local courts. The ability of the parties to appoint their own tribunal, free from any perceived interference by the host state, flexibility of process and international enforceability of arbitral awards, among others, makes arbitration particularly attractive to both domestic and international companies in the Middle East. Where the language of a project is English or another international language, the cost and difficulty of effectively translating all documentation into Arabic is unappealing to many parties. There is, however, a marked growth in litigation before so called free zone courts. The courts of the Dubai International Financial Centre (DIFC), the Qatar International Financial Centre (QIFC) and the Abu Dhabi Global Market (ADGM) courts are among these. These courts are flexible as to the languages in which cases are conducted and have commonly

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adopted English court procedures that are generally familiar to international investors.

Vidal: If alternative dispute resolution (ADR) is to include arbitration, it is evident that international as well as domestic parties are including arbitration clauses in their contracts and this trend is likely to continue. Arbitration has increasingly become the 'normal' means of resolving complex commercial disputes in the Middle East. The growth in recent years is reflected by the overall increase in the number of cases registered with institutions throughout the region. In relation to other ADR methods, informal negotiation or mediation has always been a longstanding part of the tradition and culture in the Middle East. What we are seeing, however, is an increase in the number of both international companies based in the region and local companies wishing to include more formal ADR steps in their contracts, including formal mediation before any arbitration is commenced.

Stephen: The Middle East has a chequered history of arbitration, which led to scepticism about the concept following some unfortunate 'colonial' decisions more than half a century ago. That has now been consigned to history, with companies in the region embracing arbitration rather than non-international local courts, particularly when contracts have an international element or party. Mediation has not yet been widely adopted in the Middle East. Although found in FIDIC type construction contracts, often as a requirement prior to arbitration in a 'tiered' dispute resolution clause, this does not necessarily encourage good faith mediations. Further, the hierarchical structure of many companies in the region – in which the ultimate decision maker is not prepared to attend a mediation – makes achieving successful results where regionally based companies are involved much more difficult. Over time, I expect mediation to become more developed and there is certainly no shortage of attempts to popularise the process.

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> *Norton Rose Fulbright (Middle East) LLP*

Beer: As the costs related to dispute resolution have continued to increase over the years, there

has been a corresponding rise in more formalised mediation processes in the Middle East, with mediation centres opening in Lebanon, Jordan and Dubai. Courts in the Middle East are increasingly likely to encourage and even require mediation as an important step in the dispute resolution process, evidenced by the DIFC Courts' Small Claims Tribunal, which includes a required mediation and conciliation phase for all cases. While parties cannot be forced to participate substantively in mediation, requiring them to come to the table often prompts settlement of at least some issues or procedures, reducing the overall cost and length of the dispute. Increased use of mediation is certainly a positive dispute resolution trend in the Middle East and one I am sure will continue.

CD: Could you provide an insight into the efficiency of court systems across the Middle East? What pre-action considerations and other preparations do parties need to be aware of when undertaking dispute resolution proceedings?

Vidal: Traditionally, there has been a lot of reluctance with international clients in particular toward using the court systems in the Middle East. There is often more uncertainty as to processes for foreign parties and courts require proceedings, as is to be expected, to be in the local language. Complaints relating to the amount of time proceedings initiated in court systems in the Middle East remain commonplace. There have been moves, however, towards the modernisation of the courts in the region. Efforts have also been made to speed up filing and general case-management processes. In the UAE, recent reforms include the introduction of new case-management offices and the development of electronic systems allowing litigants to file and track filings online. Saudi Arabia also expanded the computerisation of its courts and introduced electronic filing recently.

Beer: Court systems across the Middle East vary considerably, with the UAE an excellent example of this. In the UAE, there are federal and local courts operating in Arabic and applying civil law and procedure. Concurrently, courts like the DIFC Courts have been created to offer English-language, common-law options to parties operating in the UAE and to those other parties wishing to opt-in to these business-friendly options. Parties need to be adequately advised on this increased level of choice available to them. It is no longer the limited choice between litigation, arbitration and mediation. Instead, the possibilities are multi-dimensional with several options even for litigation through national courts in the UAE. Making one choice or another may have lasting effects on the duration and cost of an eventual dispute. Parties must also consider the

enforceability of any resulting award or judgment internationally when making their initial selections.

Stephen: A major reason why parties involved in transactions with an international element choose English language arbitration or the DIFC Courts in Dubai or the ADGM Courts in Abu Dhabi is because the international language of commercial contracts is English, and they do not wish to have to go through the difficult and expensive process of translating all the documents for the purposes of 'local' legal proceedings. Parties are therefore aware that by choosing one of the above options they can avoid the time, expense and uncertainty caused by translation and interpretation and engage in a more efficient process. Parties probably also consider and expect that DIFC-LCIA, DIFC Courts and ADGM Courts will manage cases efficiently. Before starting any arbitration, a party should ensure when filing the request for arbitration that the relatively straightforward requirements are followed.

Cole: With the exception of the international courts, the court systems across the Middle East are based on civil law principles. Such courts tend to be very process driven with much formality and cases are generally presented to the court in a series

of memorandum by authorised advocates. Save a few exceptions, only lawyers who are nationals of that state may appear before that country's courts.

The presentation of oral evidence and the cross-examination of witnesses is rare. Commonly, the court will appoint an expert from one of its approved lists to meet with the parties and to report on the facts to the court. It is normal for the courts to adopt the findings of the court appointed expert. Documentation relied upon by parties should ideally be original; otherwise it is open for the other party to challenge its authenticity.

CD: How would you describe arbitration facilities and processes in the Middle East? To what extent are they developing to meet business needs?

Stephen: A key attraction of arbitration is the international enforcement of awards under the New York Convention, now ratified by and enforced in 157 countries, which recognise and enforce awards in arbitrations seated in the countries of the signatories. The process of enforcement is critical to all disputes. Fortunately, all Arab states except Iraq, Libya, Yemen, Somalia and Sudan are now parties to the New York Convention. For cases involving parties in those few Arab countries that

are not signatories, it will be an advantage to seat any arbitration in a state which is party signatory to the Riyadh Convention, such as the UAE, to take advantage of the enforcement mechanisms under that convention. In terms of facilities, this is one area where there is a need for improvement. Hearing centres such as those established in Singapore and Hong Kong significantly enhance the arbitration framework. There has been little similar investment in the Middle East region, except for Bahrain.

Cole: Arbitration facilities in the Middle East are generally first class. High quality venues for hearings supported by a good infrastructure of transcription, document management and other services, all facilitate productive proceedings. There is a broad range of legal practitioners available in the marketplace including a number of firms that specialise in domestic and international arbitration. The arbitral institutions recognise the importance of the Middle East making appropriate investment. Local institutions have followed international ones in revising their rules and procedures to reflect best practice and institutions such as the Dubai International Arbitration Centre (DIAC) and the International Chamber of Commerce (ICC) have invested in new offices in the DIFC and ADGM respectively.

Beer: Arbitration centres across the Middle East are looking to enhance their tools of enforcement to provide more certainty to parties, including emergency and expedited arbitration and interim measures. This effort is especially successful in regions where adequate judicial backing from national courts is prevalent, such as here in the DIFC, where the DIFC Courts support DIFC-seated arbitrations with real efficiency and effectiveness in interim measures and enforcement. On another note, the proliferation of arbitration institutes worldwide creates great potential for collaboration between institutes and across regions in order to better serve customers.

Vidal: Many countries in the Middle East have recently introduced reforms in an effort to try and update their arbitration laws and procedures. For example, the DIAC, the DIFC and, more recently, the ADGM, offer first-class forums to meet the business needs of both local and international clients with top-class facilities and experienced judges and arbitrators. An attempt at reform gone wrong was the recent amendment of Article 257 of the UAE Penal Code that now imposes criminal sanctions, including imprisonment, on biased arbitrators. This has led to the question: how friendly really is the UAE to arbitration? The impact of that 'reform' has thus far been limited – although a small number have refused appointment as arbitrators – and only time will tell.

CD: In light of increased globalisation, how is the increasing demand for accredited arbitrators and arbitration practitioners to resolve cross-border disputes being met?

Cole: The Chartered Institute of Arbitrators (CIArb) is at the vanguard of arbitrator training and accreditation in the Middle East. The UAE branch is one of the largest offering training courses at all levels. In addition, various domestic and international universities offer training in arbitration law and related subjects, both face-to-face and distance learning. Arbitral institutions in many states in the region also host training courses and conferences, with the Bahrain Centre for Commercial Disputes, the DIAC and the ICC being amongst the most prolific.

Beer: There is great opportunity for collaboration and partnerships between law firms and arbitral institutes in the Middle East and those located in previously more established arbitration jurisdictions. While the demand for accredited arbitrators and practitioners is certainly increasing, there has also been a corresponding emphasis on legal training and development in the region. The creation of and continued expansion of offerings of the DRA's Academy of Law is a telling example of how training and legal education has become a priority in the last few years.

Vidal: The increase in world-class arbitrators already in or being brought into the region has gone hand-in-hand, unsurprisingly, with efforts to modernise laws and processes. In the region there is often still, however, the challenge of finding professional arbitrators in matters involving very technical claims.

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Stephen: In general, there has been a significant shift in where parties, institutions, seats and venues are to be found, with a move eastwards and southwards in the geography of arbitration. With the increase in disputes subject to arbitration in the region, and globally, there are a significant

number of arbitrators and many more arbitration lawyers based here and in the region. Some of these are 'homegrown' and others are found in teams in international, local and regional law firms. The CIArb has been a leading provider of education and training in arbitration in the region. Law firms, arbitral institutions and organisations like the International Bar Association (IBA) and the Inter-Pacific Bar Association (IPBA) and DIFC Academy of Law (AOL) all contribute seminars and training courses which can be of assistance in the development of ADR practitioners.

CD: What general advice would you give to parties embroiled in a dispute resolution process? Are there any practical issues specific to the Middle East region, for example?

Stephen: Parties involved in disputes should be looking for positive solutions and outcomes. Too often, going to court or arbitration in the Middle East is regarded as a fight to the death, rather than as a potential tool for reaching a fair settlement considering each side's risks. In my experience, I can see that the percentage of cases that fight 'all the way' in this region is far higher than in Europe or Asia. My advice to parties is to never lose sight of the risks of the dispute, the costs of fighting and potential settlement options.

Vidal: Preparation is key to any dispute resolution process. Understand the region you are operating in. The region's marketplace offers opportunity and risk in equal measures. The political, regulatory and commercial environments are intrinsically complicated and highly charged and clients need to be prepared for that. Things do not always go the way you think in the Middle East. This is also true when things go well, as well as when they do not.

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Beer: Generally, the practical issues faced by parties embroiled in the dispute resolution process in the Middle East are not so different from those faced by parties elsewhere: costs are increasing, delays can mount and enforcement, particularly cross-jurisdictional, can be challenging. One practical issue that can affect ongoing disputes is that

dispute resolution in the Middle East is changing, in my opinion, positively, year by year. In the past, the amendment of the Dubai Judicial Authority Law expanding the opt-in jurisdiction of the DIFC Courts created some initial confusion and uncertainty in the legal community but it also drastically increased dispute resolution choice and efficiency for parties in the Middle East in the long run.

Cole: The law and practice of arbitration in the Middle East has its own characteristics and it is important that parties engage counsel and appoint tribunals that are expert in the issues to be considered. For example, there are a number of unwritten but binding rules about arbitration awards issued in the UAE. These include the need for witnesses to be sequestrated during hearings, oaths to be administered in a prescribed way and for certain formalities to be adopted in signing awards. These include the need for arbitration agreements to be published in full and for each page of the award to be signed by arbitrators present in the UAE. Other countries have their own requirements, although the unusual requirement that arbitration awards in Qatar be issued in the name of the Emir has now been dropped.

CD: How important is it for parties to understand a particular jurisdiction's dispute resolution processes when drafting commercial contracts? What benefits might arise from deciding on the choice of law and whether to include jurisdiction or arbitration clauses at this stage?

Vidal: A commercial contract is a legal relationship. This raises the immediate question: a relationship under whose laws? Different jurisdictions have different laws and the content and effect of those laws can vary greatly, so understanding the dispute resolution processes is of course vital should you decide to submit to that jurisdiction. It is also prudent to state in a commercial contract what set of laws will govern it. Otherwise, if the contract terms become relevant later in a dispute between the parties, there is a risk that the initial battle centres around which set of laws should be used to interpret the parties' obligations as opposed to the substance of the underlying dispute.

Beer: I cannot stress enough the importance of paying adequate attention to dispute resolution clauses; they must be included at the earliest stage. We have seen time and again that the cost of dispute resolution increases significantly due to sloppy contract drafting at the start of a relationship. Parties often do not appreciate the challenges they may face due to their contractual choices, especially when doing business in the Middle East, where there

is considerable choice available regarding dispute resolution and there are significant differences between choosing one option over another. Parties are free to craft the dispute resolution process that serves them best, including choice of language, legal tradition, governing law, dispute resolution body and procedure. However, in exercising this choice, parties should not lose sight of what is usually the main goal of dispute resolution, to convert a contract to cash. This means that parties should seek qualified advice on their enforcement prospects and should tailor their dispute resolution plan accordingly. Nothing can be more frustrating in dispute resolution than winning on the merits but failing to receive the ordered compensation because assets are hidden or located in jurisdictions that do not easily pair with the selected dispute resolution process.

Cole: It is vitally important for those drafting dispute clauses in commercial contracts to fully understand issues of choice of law, jurisdiction and the different types of dispute resolution. Considerable cost and delay can be suffered by parties who have a defective dispute resolution clause as well as adversely affecting the merits of their claim. The creation of new legal jurisdictions in financial free zones – including the arbitration free zone in Bahrain – has given parties an unparalleled choice in how they might resolve their disputes. However, good advice from expert practitioners is necessary if parties are to take full advantage of the choice available to them. Many parties do not do so and suffer unforeseen consequences. For example, parties agreeing to arbitrate in Dubai under the Rules of the DIFC-LCIA arbitration centre, sometimes mistakenly believe that they are agreeing to arbitration in the DIFC under the supervision of the common law based DIFC courts.

Stephen: Dispute resolution clauses are often not considered until too late in the commercial negotiations and drafting stage of contracts. It is crucial to agree the right clause in the contract to avoid wasted time and costs. This includes choosing the right seat for arbitration. So if you want to choose DIFC as the seat, write DIFC not Dubai, as the differences are considerable. The '2017 Middle East Deal Study' released by Clyde & Co LLP shows a continuing trend for choosing DIFC-LCIA Rules for disputes following M&A transactions, with DIFC as the seat of arbitration and English law as the proper law of the contract. Parties should also not be reluctant to seek renegotiation and amendment of dispute resolution clauses based on updates and developments. Parties never revisit the dispute provisions until a dispute arises – at which point it is probably too late to sort out a badly drafted clause.

CD: How do you envisage the nature of dispute resolution in the Middle East going forward? Are there any specific

developments you expect or hope to see over the coming years?

Cole: The importance of having good laws to support dispute resolution is becoming increasingly recognised by countries in the Middle East. Saudi Arabia, Bahrain and Qatar are among those that have in the last few years enacted modern arbitration laws based upon the UNCITRAL Model Law. The ADGM in Abu Dhabi has recently done the same. The UAE has been promising a new arbitration law for many years and it is rumoured that this may be introduced later this year. There can be little doubt however, that well drafted and understood arbitration laws are important for arbitration to thrive in any particular jurisdiction. International courts in the region have sought to capitalise on the growth of international disputes resolution in the region, whether related to arbitration or not. The DIFC and ADGM courts, for example, have been active in agreeing memoranda of understanding with a variety of jurisdictions, such as Singapore, New York, Shanghai and Australia, among others in the case of the DIFC, to promote mutual understanding of each other's laws and judicial processes to facilitate enforcement of court judgments.

Stephen: In its 2016 rules, the DIFC-LCIA introduced an option for online filing of the request for arbitration, including for emergency arbitrations, and also for the response. I envisage that eventually this will become the accepted method of filing cases and that in due course arbitrations will become paperless. I also expect over the next decade that for small claims there will be a significant growth of online arbitration as a means of enabling such claims to be dealt with economically. For larger claims, the physical facilities 'on the ground' in the Middle East need improvement. At the moment, most hearings in the Gulf Cooperation Council (GCC) take place in a hotel or conference centre. There is a need for investment in state-of-the-art hearing centres. I hope that this will happen, but in a collective way in each relevant jurisdiction so as to avoid multiple hearing centres serving the same users.

Beer: If you work in the legal field, you cannot avoid the fact that the cost of dispute resolution is increasing across the board. This trend, which serves to increase the cut-off value of disputes worth pursuing for most businesses, must be addressed with innovation and technology. The Middle East is rising to the challenge and taking advantage of what is really a great opportunity, tapping into the immense global dispute resolution market and undercutting traditionally chosen jurisdictions with innovation, technology and other cost-cutting measures. In the DIFC Courts, the impending creation of a Technology and Construction Division to more efficiently manage these types of disputes, the impending release of updated and expanded

rules regarding eService of claims and the recent expansion of the DIFC Courts' Small Claims Tribunal in terms of claim-value and video-conferencing capabilities are just a few examples of this type of innovation.

Vidal: Arbitration has become the 'go-to' means of dispute resolution in the Middle East for complex corporate and commercial matters. The growth in recent years is reflected by the overall increase in the number of cases registered with institutions throughout the region. The increase in the use of arbitration has been driven by a number of factors, including the widespread ratification of the New York Convention within the region, as well as the perceived disadvantages of court litigation, which include delay and a perceived, though often unfounded, lack of neutrality where a foreign party is involved. CD