

ARBITRATION AND MEDIATION

BETWEEN EUROPE AND THE GULF

Dr. Minas KHATCHADOURIAN¹

Introduction

1- Over the last decades, the World has witnessed a phenomenal growth in transnational trade and investment due to the increasingly, interrelated and globalized economy.

In particular, there has been an extraordinary growing commercial flow between European Companies and their Gulf counterparts. In this concern, it is important to observe that the interaction between Europe and the Gulf has been evolving from traditional natural resources exploration contracts or raw material extraction agreements² to a more sophisticated trade in goods and services, as parties from both sides have been exploring new commercial opportunities³.

¹ Professor of International Business Law, Alexandria Pharos University. Special Advisor to the Sharm El-Sheikh International Arbitration Center (www.shiac.com) Member of the Egyptian Bar Association. Member of the Egyptian ADR Association.

² The Gulf countries together pump 16 million barrels of oil/day or about 20 percent of world supplies. They are home to some 45% of the world's proven reserves of crude oil and approximately 22% of the world's reserves of natural gas. The European Union currently imports around 50% of its energy needs of which approximately 20% are sourced from the Gulf.

³ The GCC is currently the EU's sixth largest export market and the EU is GCC's first trading partner. In 2007, the EU exports to the GCC were around €50 billion whereas the EU imports from the GCC amounted to around €37 billion. GCC countries currently benefit from preferential access to the EU market under the EU's

2- Nowadays, there is a substantial amount of contracts governing these investments that need to be properly drafted in order to provide *inter alia* effective out-of-court methods to resolve any conflict between the parties.

Resorting to "Mediation" and/or "Arbitration" as alternative and efficient methods to settle disputes between contracting parties presumes that a contract has been negotiated earlier between these parties and that a substantial flow of trade or a free movement of invested capital took place between the European Union (EU) Member Countries and the Gulf Cooperation Council (GCC) Member States⁴.

3- Moving into the core of our subject, no doubt that the Arab Countries in general - including the Countries of the Gulf - are familiar with Arbitration, Conciliation and Mediation as they have been practicing them since a very long time especially in internal trade⁵. The aforementioned means for settlement of commercial disputes are deeply rooted in the Arab traditions and

Generalized System of Preferences (GSP). A Free Trade Agreement (FTA) is actually under negotiation between the EU and the GCC.

⁴ Moreover, the accession to the World Trade Organization (WTO) by the totality of the GCC Countries would certainly increase the possibility of trade disputes. All GCC Countries became Members of WTO at the date indicated hereafter: Bahrain, 1 January 1995 ; Kuwait, 1 January 1995 ; Qatar: 13 January 1996 ; United Arab Emirates: 10 April 1996 ; Oman: 9 November 2000 and Saudi Arabia: 11 December 2005

⁵ Wasata (mediation) ; Tahkeem (arbitration) ; Sulh (compromise settlement) and Musalaha (reconciliation)

long been implemented in practice⁶. The Islamic law or Shari'a includes related express provisions which are based on the Quran⁷.

4- However, most "ADR practitioners" admit that some disparities exist in the practice of these out-of-court means of resolving disputes between Western countries and Arab countries in general. This is due in a large part to differences in culture, customs, religion and language existing between these two regions⁸. Such variations may have a direct impact either on the process of alternative dispute resolution methods or on opting for a particular method. Consequently, an overview of arbitration practice (I) followed by Mediation practice (II) in the gulf region will be tackled.

I- Arbitration Practice in the Gulf Region

5- As a regional union of countries which share common cultural background and social heritage, arbitration practice in the

⁶ See in general, Salah El-Hajailan, Mediation as a Means for Amicable Settlement of Disputes in Arab Countries, World Intellectual Property Organization (WIPO) Conference on Mediation - Geneva 1996

⁷ Zeyad Alqurashi, Arbitration under the Islamic Shari'a, published online in the Oil, Gas & Energy Law Intelligence, Volume I, issue n. 2 - March 2003. www.gasandoil.com.

⁸ Abdul Hamid El Ahdab: L'Arbitrage dans les pays Arabes, Economica ; for the same author: General Introduction on Arbitration in Arab Countries, International Handbook on Commercial Arbitration (Suppl. 27, 1998); Fathi Kemicha: The Approach to Mediation in the Arab World, WIPO Conference on Mediation, Geneva 1996.

Gulf represented in the past some particularities. Here are three of them:

A- The arbitrator assumes the responsibilities of a conciliator (arbitration by conciliation):

As a man of confidence for both parties, the arbitrator assumes in fact the responsibilities of a conciliator. Accordingly, he would go between the parties in order to reach a mutually acceptable solution and to let the relationship between the parties continue peacefully⁹.

An author added, "The Islamic concept of arbitration resembles conciliation, on the one hand, and an amicable composition, on the other hand"¹⁰.

Even today, the preference for arbitration by conciliation is prevalent in the Arab world where many arbitration institutions apply this concept of arbitration in combination with conciliation.

B- the arbitrator plays the role of agent rather than an independent judge:

The Arbitrator was in the past perceived as an agent of the appointing party and was supposed to be its voice. Arbitrators as such were not considered as the concept

⁹ Arbitration in the Arab World: An interview with Professor Ahmed Sadek El-Kosheri by Nadia Darwazeh, *Journal of International Arbitration*, Volume 25 , n.2 (2008), p. 203

¹⁰ Salah El-Hajailan, *WIPO Mediation Conference*, op. cit.

of a neutral and independent arbitrator did not exist. As a result, complying with traditional concepts hurts the modern notions of neutrality and independence, which constitute fundamental principles in arbitration.

C- Strong influence of the Islamic Law (Shari'a) on the arbitration process¹¹:

The Gulf Region consists of six Arab-Islamic Countries where Islamic religion is predominant and where Shari'a is applicable in each country to varying degrees. But in some specific countries such as Saudi Arabia, Shari'a is the "only source of legislation and the only applicable law" in the proper sense. There, another very specific aspect in the practice of arbitration can be found. For example, Section 3 of the 1985 Saudi Rules for the Implementation of the Arbitration Regulation states that the appointed arbitrator can only be a Saudi national or Muslim expatriate¹².

¹¹ The Shari'a is the Islamic law as explained by the different schools of thought. It was written in around the years 900 to 1100 AD.

¹² See in general, Zeyad Alqurashi, *op. cit.*, the author concluded his article by stating: "The concept of arbitration is not a Koranic one but a pre-Islamic concept authorized by Islam. The arbitration agreement is the principal basis for conferring upon the arbitrators the power to issue binding decisions. As to the debate over the issue of arbitration clauses, it may be concluded from the aforementioned that arbitration clauses are recognized as valid under Islamic since they do not permit what is prohibited by the Islamic Shari'a. As to the selection of arbitrators, recent trends in Islamic Law would put no restrictions on the selection of arbitrators based on religion or sex. Further, the Koran is silent as to the place of arbitration, the

Gradual disappearance of uncertainty in transnational arbitration:

6- Besides, a certain skepticism and mistrust towards “international commercial arbitration” was felt in many Arab Countries three or four decades ago following the awards issued in several arbitrations relative to the petroleum concession arbitrations of the fifties of the last century such as the cases Abu Dhabi,¹³ Qatar¹⁴ and Aramco¹⁵. The Gulf States have manifested their hostility to transnational arbitration¹⁶.

7- Such wariness in the arbitration process has almost disappeared totally. The situation is turning into a more normal acceptance of the arbitration and trust in the process and its

procedure, the time limit, the applicable rules, remuneration and appointment of arbitrators. This is within the discretionary power of the parties to decide”

¹³ Petroleum Development (Trucial Coast) Ltd. v. Sheikh of Abu Dhabi, 18 International Law Reports I.L.R. 149 (1953)

¹⁴ Ruler of Qatar v. International Marine Oil Co. Ltd., 20 I.L.R. 545 (1953)

¹⁵ Saudi Arabia v. Arabian American Oil Co. (Aramco), 27 I.L.R. 117, (ad hoc arbitration August 23, 1958).

¹⁶ This sentiment is best expressed by Professor Ahmed El-Kosheri who declared: In general, the legal community throughout the Arab world is still manifesting its hostility to transnational arbitration... the continuing attitude of certain western arbitrators being characterized by a lack of sensitivity towards the national laws of developing countries and their mandatory application, negatively affecting the legal environment required to promote the concept of arbitration in the field of international business relationships. ICCA Conference, Seoul 1996. *Adde* Jalal El Ahdab and Ruth Stackpool-Moore: Arab Arbitration v. International Arbitration? The Case for a Reconciliation, Journal of International Arbitration, 25 - No. 2 (2008), pp. 275 – 288.

outcome. A recent study indicated the increase of the Arab parties' participation in general in arbitrations organized under the ICC Court of Arbitration.¹⁷ From 1998 through 2006, 459 Arab Parties took part in ICC Arbitration. Focusing on the Gulf Region States, the study shows that 66 parties were from Saudi Arabia, 56 parties were from United Arab Emirates, 28 parties from Kuwait, 22 parties from Qatar, 7 parties from Bahrain and 5 parties from Oman.

Towards a modernization of the national arbitration laws:

8- No doubt that the Gulf Region is witnessing in the present time an unprecedented level of progress and development. The abundance of infrastructure and construction contracts, the Mega Free Zone projects and the foreign investments in the oil and gas industry are signs of a real economic growth and a future of prosperity. The Arab countries are making significant efforts to expand economic opportunities within their markets in order to attract investors. Accordingly, during the last three decades, the Gulf Region States witnessed an active legislative movement to

¹⁷ Lara Hammoudi and Sami Huerbi: ICC Arbitration in the Arab World, *Journal of International Arbitration*, 25 n. 2 (2008), p. 231

modernize their arbitration laws to attract more foreign investors and to boost their economy.¹⁸.

9- It is absolutely true that facilitation of foreign investment and international trade through the use of arbitration requires a modern and up to date legislative framework for international arbitration.¹⁹ This trend to modernize arbitration legislation in the Gulf has been triggered by the Globalization Phenomenon and by their willingness to afford more transparency in the applied principles. Isn't true that any modern arbitration legislation should reflect the following three principles: a maximum degree of party autonomy, a minimum number of mandatory provisions and a minimum degree of judicial intervention?²⁰

¹⁸ Several Gulf States have adopted the UNCITRAL model Law of 1981 such as Bahrain, Oman, UAE, etc. Fouchard, Gaillard, Goldman: International Commercial Arbitration (Edited by E. Gaillard and J. Savage), Kluwer Law International, 1999, p. 91-92; See also Essam El-Tamimi and Emma van Son: The DIAC Rules and the New U.A.E. Arbitration Law, Journal of International Arbitration, 25, n.2 (2008), p. 211-218.

¹⁹ **Saudi Arabia:** Arbitration Regulation and implementation Rules of **1983** and **1985** as approved by the Council of Ministers. **Qatar:** Law n. 13 of **1990**. **Bahrain:** Royal Decree n.9 of **1994** issuing the Law of Arbitration in Civil and Commercial Disputes. **Kuwait:** Law of Judicial Arbitration on Civil and Commercial Matters **n. 11 of 1995** (organizing Ministerial Resolutions and the Civil & Commercial Procedure, No. 38 of 1980). **Oman:** Royal Decree **n. 47 of 1997** issuing the Law of Arbitration in Civil and Commercial Disputes. **UAE:** Federal Law of **2008** relative to Arbitration within the Civil Procedure Code. **Dubai:** DIFC Law n. 1 of **2008** (based on the UNCITRAL Model Law)

²⁰ Klaus Peter Berger, An outside Perspective in "Preventing and Managing International Commercial Disputes: Towards a EuroMed Alternative Dispute

Adhesion to the International Conventions:

10- Also, these countries have adhered to the international conventions relative to arbitration such as The United Nations Convention on the recognition and the enforcement of the foreign arbitral awards (New York 1958).²¹

In particular, many of the Gulf countries have adopted a set of rules relative to the challenge and enforcement of awards that are in conformity with international standards, in particular the 1958 New York Convention.

The ICSID Convention within the framework of the Bilateral Investment Treaties:

11- All the GCC Countries (with the exception of Qatar) are contracting States of the ICSID Convention and have concluded several tens of BITs with foreign European countries. More than 55 Bilateral Investment Treaties (BITs) for the promotion and the protection of foreign investments have been concluded between a Gulf State and a European Counterpart.²²

Resolution Infrastructure" Rome (Italy), September 2007. He added that these three principles provide the hallmark of any "modern arbitral legislation".

²¹Kuwait: 27 July 1978; Bahrain: 5 July 1988; Saudi Arabia: 18 July 1994; Oman: 26 May 1999; Qatar: 30 March 2003; UAE: 19 November 2006.

²² Kuwait: 18 BITs; UAE: 11 BITs; Oman: 8 BITs; Saudi Arabia: 7 BITs; Bahrain: 6 BITs; Qatar: 6 BITs.

Several examples can be mentioned of foreign investors who have resorted to the ICSID Arbitration according to a clause mentioned in the BIT's concluded between a GCC Country and a European Country.²³

An abundance of arbitration centers in the Gulf States and the Middle East Region in general:

12- The arbitration centers in the Gulf have developed an increased capacity and confidence in handling and resolving commercial disputes. Most of which have been established within the National Chambers of Commerce.²⁴

Therefore, I am glad to announce before this highly esteemed and prestigious audience that a new arbitration center has been created at Sharm El-Sheikh in order to assist parties to overcome any dispute either by mediation or arbitration. The Sharm El-

²³ (1) ICSID Case n. ARB/01/01 (2001) Impreglio, S.p.A and Rizzani De Eccher S.p.A vs. United Arab Emirates (Construction Contract) ; (2) ICSID Case n. ARB/02/07 (2002) Hussein Nuaman Soufraki vs. United Arab Emirates (Concession Agreement Regarding a port) ; (3) ICSID Case n. ARB/03/01 (2003) Ed. Zublin AG vs. Kingdom of Saudi Arabia (Construction contract)

²⁴ **Abu Dhabi (UAE):** Abu Dhabi Commercial Conciliation and Arbitration Center (ADCCAC) (1993); **Bahrain:** GCC Commercial Arbitration Center (1991) and the Arbitration Center of Bahrain Chamber of Commerce. **Qatar:** Qatar International Arbitration and Conciliation Center (2006). **Dubai (UAE):** Dubai International Arbitration Center (DIAC 2003) and DIFC/LCIA Arbitration Centre: Dubai International Financial Center (DIFC) Arbitration Facility along with London Court of International Arbitration (LCIA) 2008

Sheikh International Arbitration Center “**SHIAC**” is offering the facilities and the services of the world’s major international arbitration centers together with the attractions of a top tourist destination. We invite you to benefit from our presence at the crossroads between Europe and the Gulf and to take advantage of our thorough, comprehensive and extensive experience in the Gulf Region as well as the Middle East.

All the major International and European Law Firms are expecting that there will be a lot of disputes arising from the apparently ceaseless property and construction boom as well as telecom, shipping, consultancy and management contracts, etc. and SHIAC is ready to become the leading link between the two major trading alliances of the world and to become the European economic operators’ access to the gulf and middle-East.

II- Mediation Practice in the Gulf Region

13- Based on religious perception and supported by cultural traditions that advocate social peace and harmony, the States of the Gulf were also attracted to mediation as an appropriate means of dispute resolution²⁵. This interest has derived from the earliest sources of the collective Arab heritage. Arabs considered mediation a prompt and confidential method for resolving

²⁵ Fathi Kemicha: The Approach to Mediation in the Arab World, WIPO Conference on Mediation, Geneva 1996.

disagreements. Early Arab Gulf traders found necessary to settle disputes arising from their commercial dealings in a flexible manner by resorting to mediation. The mediator is normally a senior person of a prestigious social status who enjoys the respect of the disputants. Known for his thorough knowledge, honesty and impartiality, the mediator's mission was to offer a solution that the parties will be morally bound to honor.

14- As an eminent author wrote "In the Muslim and Arab traditions the mediator presents guarantees comparable to those imposed by modern ethical codes, but, in the absence of normative texts, the sanctions for professional misconduct are socially based. The mediator must have the moral qualities required of a respectable person, whose impartiality cannot be put into question. The parties do not ask themselves whether they are in the presence of a mediator or of an arbitrator. They place themselves entirely in the hands of a person whom they know, respect and believe to be capable of helping them out of the deadlock. Moreover, the status and the prestige of the mediator oblige the parties, morally and socially, to accept 'his solution'.

The traditional mediator intuitively follows the various stages of scientific mediation. In particular, he establishes his legitimacy from the beginning but he counts, above all, on his gut feeling, his sense of justice, and his experience of life as well as his close

knowledge of the persons and their environment, rather than on knowledge-based norms."²⁶

15- In modern times, several examples coming from all the Gulf countries show successful mediations related to bank transactions, loans, intellectual property disputes, commercial papers, insolvency, commercial agencies, workplace disputes, etc²⁷. Similar to arbitration, the National Chambers of Commerce and Industry in all these States regularly carry out a kind of mediation to resolve the differences that arise among their members or between their members and external parties. It is also significant that the Euro-Arab Chambers of Commerce provide to economic operators in Europe and the Arab world the possibility of settling their differences not only by means of arbitration, but also by means of conciliation²⁸. Mediation has shown some impressive results. Over 80% of the disputes that are voluntarily submitted to mediation are satisfactorily resolved.

²⁶ Nabil Antaki, *Cultural Diversity and ADR Practices in the World in ADR in Business Practice and Issues across Countries and Cultures*, Kluwer Law International, 2006, presented at "Preventing and Managing International Commercial Disputes: Towards a EuroMed Alternative Dispute Resolution Infrastructure" Rome (Italy), September 2007.

²⁷ Salah El-Hajailan, *Mediation as a Means for Amicable Settlement of Disputes in Arab Countries*, World Intellectual Property Organization (WIPO) Conference on Mediation - Geneva 1996

²⁸ See Articles 12 to 18 of the Conciliation, Arbitration and Expertise Rules of the Euro-Arab Chambers of Commerce.

16- It is also interesting to indicate that international practice has developed “hybrid or mixed” means of resolving disputes such as MED/ARB²⁹. In this case, pure arbitration or mediation procedures are replaced by a unitary procedure that combines the different types. The person conducting it, who is always a neutral third party, acts first as a mediator and then as an arbitrator in case of mediation failure.

Expansion of cross-border mediation:

17- It is admitted that cross-border mediation between European and Arabian Gulf Partners requires a combination of specialized competence, cultural sensitivity and keen knowledge of international commercial usages. Differences in conflict resolution processes have historically been discussed under the banner of “cultural differences,” which are the products of the fundamental values of the society, based on history, language, and the perceptions of justice and social norms. Understanding these values has significant qualitative consequences for international mediation.

18- However, in modern times, we may admit that “cultural barriers” have been breached through contemporary flows of

²⁹ See ADR International Applications, Special Supplement 2001, ICC International Court of Arbitration Bulletin.

commodities, financial transactions, people travelling and share of common values. Besides, Globalization has a positive effect on the management style of international companies who are following more or less same management principles. This has the practical results that there is apparently more space than before to direct negotiation between conflicting parties or by opting in favor of mediation.

19- On such account, there have been several interesting steps to promote and develop mediation in the World. One of them is definitely the enactment of the "Model Law on International Commercial Conciliation" 2002 prepared by the United Nations Commission on Trade and Law (UNCITRAL)³⁰. The aim of the Model Law therefore was to establish model legislation that would be acceptable to states with different legal, social and economic cultures, and in the process would contribute to harmonious international legal and economic relations. Some leading arbitration centers such as ICC and WIPO succeeded to settle a lot of disputes through mediation partially on-line.³¹

³⁰ www.uncitral.org

³¹ See ICC rules of conciliation 1998 and WIPO rules of mediation. Over 7000 domain name disputes have been resolved in 2005 (partially online) by the World Intellectual Property Organization (WIPO). Also, over 1,000,000 small value consumer disputes arising out of eBay transactions have been resolved through online negotiation and mediation.

20- Another important cornerstone in mediation culture expansion has been the recent enactment in 2008 of the European Directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters³² as well as the publication of a "Code of Conduct for European Mediators".³³ These encouraging steps presume that mediation in the Gulf Region will know in the near future the same success of arbitration.

21- On a different note, an author placed the success of arbitration rather than mediation on different factors as he noted: "It may appear a paradox that the reserves expressed in various quarters by Arab operators with regard to institutional arbitration do not favorize mediation/conciliation despite its attraction deriving from the earliest sources of the collective Arab heritage. The reasons for that are the non-compulsory nature of decisions

³² EU Directive 2008/52/EC adopted on may 21, 2008 where mediation is defined as "a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator" and the mediator means "any third person who is asked to conduct a mediation in an effective, impartial and competent way". This directive must be implemented into the national law of the EU Member States by the 21 May 2011.

³³ See in general Carrie Menkel-Meadow: Are Cross-Cultural Ethics Standards Possible or Desirable in International Arbitration? in *Mélanges en l'honneur de Pierre Tercier*, Schultess 2008, p. 883 et s.

given in the framework of mediation reduce their credibility and effectiveness on one hand and that arbitration has, paradoxically, become easier due to the modernization of the Arab arbitration laws on the model proposed by UNCITRAL and the ratification of the New York Convention on the other hand”³⁴.

The Mediator mission:

22- The Mediator has an important mission to fulfill when he/she is called to help parties from different cultures to resolve their disagreement amicably. As one commentator noted “The true professionalism of the international arbitrator or mediator is said to lie in their ability to “face the expectations of the parties who have chosen [them] for [their] impartiality and neutrality ... independent from the ‘bag and baggage’ of the system or national systems from which [they] originate, [and] ... not conditioned either by [their] geographical origin or by education, race, religion or even personal sympathies.”³⁵

Conclusion:

23- In today’s global market for arbitration and mediation, the Gulf Region is becoming very attractive and occupies a

³⁴ Fathi Kemicha: WIPO Conference on Mediation, op.cit.

³⁵ Bernardo M. Cremades: Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration, 14 Arb. Int’l 157, 170 (1998). See Also Jalal El Ahdab and Ruth Stackpool-Moore: Arab Arbitration v. International Arbitration? The Case for a Reconciliation, op. cit.

prominent place. ADR have proven to be essential tools in the prevention and settlement of international commercial disputes in the Arabian business circles without the formalities, delay, expense, and vexation of ordinary litigation. Today, very high profile arbitration centers are found in the Gulf including a jurisdictionally specialized arbitration center in financial disputes. All these leading global permanent institutions have a comprehensive and up-to-date set of mediation and arbitration rules, codes of conduct or guidelines for mediators and arbitrators and offer natural justice in business communities inside and outside the Arab world.