An Update and a *Tour d’horizon* on MENA Arbitration

Challenges to the Legitimacy of International Arbitration

29th ITA Workshop and Annual Meeting International Arbitration

Dr. JALAL EL AHDAB
Partner, Ginestie, Magellan, Paley-Vincent
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An Update and a Tour d’horizon on MENA Arbitration
ITA Conference, Plano (Texas), 14 June 2017
I. Introduction

1. Commercial arbitration
2. Investment arbitration
3. The example of Egypt
4. High stake amounts
5. Key trends to apprehend arbitration in MENA region
1. Commercial Arbitration in MENA

Around **12 % of all ICC cases in 2015** involved the MENA region

The ICC statistics for the year 2015 indicate that **44% of all Middle Eastern cases were seated in the Middle East** compared to a trailing five-year average of 34% over the 2010/14 period.
2. Investment arbitration in MENA

By the end of 2015, out of 289 known ICSID cases:
- 29 Arab countries from the MENA region were involved in resolved ICSID arbitration (10%)
- 18 Arab countries from the same region were involved in unresolved cases (9%)

According to the ICSID Annual Report of 2017:
- MENA region represented 10% of all cases brought before the ICSID and 11% of all new cases brought before the ICSID in 2016
- 4% of arbitrators, conciliators and members of ad hoc committee were from the MENA region in 2016

As far as the BIT network is concerned:
- Egypt seems to hold a record of 100 BITs, followed by Kuwait (75 BITs). At the other end of the scale sits Iraq (only 7BITs)

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3. The case of Egypt: a telling example?

- **56% of all cases** involving states from the MENA region were about Egypt between 2011 and 2015

- Egypt witnessed a significant increase in the number of investment-related arbitration brought by foreign investor under various BIT’s:
  - A total of 29 cases have been filed against Egypt in ICSID
  - Of those 29, 17 were filed after 25 January 2011

- Over the total number of cases brought against Egypt in recorded history, approximately **60% of them were registered in the 5 years period after the 2011 revolution**

- Since 2011, Egyptian Government has faced around **37** international and domestic arbitration cases involving claims totaling around **US $14.3 billion**.
  - In comparison, the Iran–United States Claims Tribunal (IUSCT), which was established in 19 January 1981 pursuant to the Algiers Accords, has heard over 4,700 cases and ordered payments totaling over US$2.5 billion.
I. Introduction
II. Treaties and Investment arbitration
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V. New centres

4. High stake amounts

Ampal-American Israel Corp., EMG & others v. Arab Republic of Egypt (ICSID Case No. ARB/12/11)

• ICSID request of EMG (Ampal main holding) in 2012 due to the attack of militants groups on a pipeline which caused a disruption in the supply of gaz to Israel Electricity
• A total award of US $1.8 billion to EMG and Israel Electricity against Egyptian state entities

• Other recent cases: on 31 May 2017, an ICSID tribunal has dismissed a US$4 billion investment treaty claim against Algeria brought by a company owned by an Egyptian billionaire, holding that the pursuit of multiple arbitrations over the same dispute amounted to an abuse of rights

Petrochemical Industries Company of Kuwait v. the Dow Chemical Company (ICC Award rendered in 2012)

• ICC request by Dow Chemical in 2008 due to the breach by PICK of a joint venture that it had already invested $111 millions to get started
• Kuwait was found liable for damages and ordered to pay over $2 billion

• Other recent cases: Algeria’s national oil and gas company Sonatrach has settled a US$1.5 billion ICC arbitration with the US/French energy services company TechnipFMC over a cancelled project to upgrade a refinery near the country’s capital London-based

Citigroup Inc., v. Abu Dhabi Investment Authority (AAA/ICDR)

• ICDR request of ADIA against Citigroup to recover losses resulting from a US$7.5 billion investment made in 2007
• ADIA’s claims vs. the international bank failed as a matter of law (another parallel proceedings has known the same fate)
• In a 14 December 2016 award, a tribunal decided that ADIA had to pay 50% of Citigroup’s legal fees and expenses and 80% of the arbitration cost: ADIA paid Citi approximately US$9.5 million on 6 March 2017 to satisfy the costs award

The booming Islamic Finance market and the potential stake for arbitration:

EY Report on « World Islamic Banking Competitiveness » forecasted that the Islamic finance market will be worth $3.4 billions in 2018
5. Key ideas to apprehend recent MENA arbitration trends

The **multiplication** of commercial and investment arbitration caseload due to the far-reaching consequences of the **Arab spring** with a **new trend** in investment cases: Arab investors suing Arab states, evidencing the rise of inter-Arab commerce and investments (very scarce at the turn of the 21st century).

Most of the commercial cases involve: construction, oil & gas, commercial agency and JV disputes (70% roughly), with little actual influence of Sharia law and increasingly some sanctions issues at stake

Growing acceptance *vis a vis* arbitration: Modern (UNICTRAL-based or following the French model) and regularly-updated laws, Overwhelming favorable court decisions; Development or relaunch of arbitration centers; Rise of a new generation of young practitioners (well acquainted with international techniques).

While the majority of state court’s decisions are in favor of arbitration, there is still some surprising landmark case law annulling awards or refusing to enforce them on very formalistic grounds) from various Arab jurisdictions showing the region sometimes lags being. The two most liberal jurisdictions remain: Lebanon and Morocco.
II. Treaties and Investment arbitration

1. Recent accession to the 1958 New York Convention and the 1965 Washington Convention

The 1958 New York Convention

- Entry into force in Qatar in March 2013
- Ratification and entry into force in Palestine on 2 January 2015

Arab Countries still not parties to the Convention

- Iraq, Libya, Sudan, Yemen are still not parties to the Convention.

II. Treaties and Investment arbitration

1. Recent accessions to the 1958 New York Convention and the 1965 Washington Convention

Recent accessions and entry into force

- Qatar: ratification on 21 December 2010, entry into force on 20 January 2011
- Iraq: ratification on 17 November 2015, entry into force on 17 December 2015
- South Sudan: ratification on 18 April 2012, entry into force on 18 May 2012

Arab Countries still not parties to the Convention

- Libya (yet some ICSID cases still involve Libya)
II. Treaties and Investment arbitration

2. Some recent and telling investment cases

### Cases following the Arab spring

<table>
<thead>
<tr>
<th>Case</th>
<th>Details</th>
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</table>
| **Strabag SE v Libya ICSID case No. ARB(AF)/1/151/1** | - ICSID claim brought by Austria investor against Libya, based on Austria-Libya BIT of 1992, arising out of an alleged non-payment for services under contracts (worth appr. 350M$) entered into prior to the Revolution in Libya and damages for the alleged theft of equipment post-revolution.  
- First case for Libya before ICSID, although it is administered under the ICSID Additional Facility mechanism (Libya not being yet party to the Washington Convention) |
| **Rizzani de Eccher SpA, Obrascón Huarte Lain SA and Trevi SpA v State of Kuwait (ICSID Case No. ARB/17/8)** | - ICSID claim brought by Italian and Spanish construction companies against Kuwait over a billion-dollar project to upgrade one of the Gulf state’s main highways  
- **First case before ICSID for Kuwait** |
| **ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan (ICSID Case No. ARB/08/2)** | - ICSID claim brought by a Turkish investor against Jordan arising out of the annulment by the Jordanian courts of an arbitral award rendered in favor of the claimant  
- Dispute arising from the collapse of a dike constructed by ATA  
- **Jordan had breached its BIT obligations by extinguishing ATA’s right to arbitration** |
| **Al Jazeera Media Network v Arab Republic of Egypt (ICSID Case No. ARB/16/1)** | - Al Jazeera has requested “urgent and necessary” provisional measures in its US$150 million ICSID claim against Egypt, where, since the filing of the case, a journalist has been sentenced to death in his absence and another detained in jail. |

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### Intra-MENA cases

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<thead>
<tr>
<th>Case</th>
<th>Details</th>
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<tr>
<td><strong>Itisaluna Iraq LLC and others v Republic of Iraq (ICSID Case No ARB/17/10)</strong></td>
<td>- See also the recent Itisaluna Iraq LLC and others v Republic of Iraq (ICSID Case No ARB/17/10)</td>
</tr>
</tbody>
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II. Treaties and Investment Arbitration

3. Other Regional Treaties and Investment Arbitration

A) Some regional investment treaties in MENA

II. Treaties and Investment arbitration

Some regional MENA investment treaties to bear in mind for the MENA Region

- The Unified Agreement for the Investment of Arab Capital in the Arab Countries and the Organization of the Islamic Conference Agreement (2 Treaties which we will focus on)
- The Agreement on Investment and Free Movement of Arab Capital Among Arab Countries Association Agreement
- The Agreement on the Encouragement and Protection of Investments and Transfer of Capital
- The Arab Maghreb Union Convention on the Reciprocical Protection and Promotion of Investments (« UMA convention ») concluded on 23 July 1990, within the framework of the Arab Maghreb Union, only in force for 10 years
- Under the Council of the Arab Economic Unity : - The Convention relating to the Promotion and Protection of Investment and Circulation of Arab Capital between Arab States, concluded on 7 June 2000, which was ratified by Jordan, Sudan, Iraq, Libya and Egypt.
- The Convention relating to the Settlement of Investment Disputes in Arab Countries concluded on 7 December 2000, ratified by Jordan, Iraq, Libya and Egypt.
II. Treaties and Investment arbitration

3. Other Regional Treaties and Investment Arbitration

B) Focus on the Unified Agreement for the Investment of Arab Capital in the Arab countries

i) The Unified Agreement for the Investment of Arab Capital in the Arab countries (1980)

Members:
• Came into force in 1981
• Ratified by all member states of the Arab league, except Algeria and the Comoros.

Object:
• Regulation of inter-Arab investments
• Free movement of Arab capital within the Arab states.

Settlement dispute mechanism:
• ad hoc conciliation
• arbitration procedures
• Arab Investment Court: 1st decision issued in 2004 between a Saudi Co. and Tunisia
II. Treaties and Investment arbitration
3. Other Regional Treaties and Investment Arbitration
B) The Unified Agreement for the Investment of Arab Capital

ii) Recent amendment (2013) of the Unified Agreement

Implementation of the new amendment
• Entry into force of the new modified agreement on 24 April 2016
• Ratification by: Saudi Arabia, Oman, Palestine, Jordan, Kuwait, Morocco, Iraq and Qatar. The process of ratification is ongoing in the United Arab Emirates, Yemen and Mauritania

Substantial changes
• The Arab investor only needs to have an « Arab capital » that he invests « in the territory of a State Party of which it is not a national, provided that the Arab investor holds directly at least 51% of the share capital.»
• MFN clause (article 5)
• Just and equitable treatment (article 2)
• Right to transfer capital in the original investment currency or in a convertible currency recognized by the International Monetary Fund (article 6)
• Right to compensation (article 10)
• Conciliation and mediation for the settlement of dispute are now available ADR’s (article 24)
## II. Treaties and Investment arbitration

### 3. Other Regional Treaties and Investment Arbitration

#### B) The Unified Agreement for the Investment of Arab Capital in the Arab Countries

### iii) Investment arbitration cases based on the Unified Agreement

<table>
<thead>
<tr>
<th>1st case Al Kharafi and son vs. Libya</th>
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<tbody>
<tr>
<td>• Kuwaiti investor brought a claim against Libya in 2011 arising out of the issuance of a decision by the Libyan Minister of Industry which annulled its license for the establishment of a touristic investment project in Tripoli</td>
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<tr>
<td>• Award in favor of the investors with the exceptionally high amount of damages of almost 1 billion USD</td>
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<tr>
<td>• It is the first award rendered under the Unified Agreement for the Investment of Arab Capital in the Arab countries</td>
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<tr>
<td>• Action for annulment still pending before the Egyptian courts but the French court of cassation has confirmed on 8 June 2016 the ruling of the Paris CA granting leave for enforcement to the award.</td>
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<thead>
<tr>
<th>Horizon Tourism Company vs. Egypt</th>
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<tr>
<td>• Saudi businessman (Hashem Salah Al Mihdar) brought a claim against Egyptian state entities arising out of the obstruction of Egyptian authorities for the implementation of a tourist complex project</td>
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<tr>
<td>• The Arab Investment Court rejected the case on the merits in 2012</td>
</tr>
</tbody>
</table>
II. Treaties and Investment arbitration

3. Other regional treaties and investment arbitration

C) The OIC agreement

i) The OIC Agreement

(Entry into force on 23 September 1986)

Members:

- Signed by 36 states that are members of the OIC,
- 27 have ratified it

Why is this agreement important?

- First multilateral agreement to grant foreign investors the right to initiate arbitration proceedings against their host state, even before the NAFTA and the Energy Charter Treaty
## I. Introduction

## II. Treaties and Investment Arbitration

### 3. Other regional treaties and investment arbitration

#### C) The OIC agreement

#### III. New laws

#### IV. New cases

#### V. New centres

## II. Treaties and Investment Arbitration

### 3. Other regional treaties and investment arbitration

#### C) Agreement on Promotion, Protection and Guarantee of Investments Among Member States of the Organization of the Islamic Conference 1981 (the OIC Agreement)

#### ii) Some interesting cases brought under the OIC agreement

<table>
<thead>
<tr>
<th>Case</th>
<th>Details</th>
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</table>
| Hesham Talaat M. Al-Warraq v. Indonesia                              | • Saudi investor brought a claim against Indonesia arising out of the Government’s bailout of a bank in which the claimant had allegedly invested, followed by criminal investigations and the subsequent prosecution of Mr. Al-Warraq for fraudulent activities in the Indonesian financial sector.  
  • Decision of 21 June 2012: state parties to the OIC Agreement are deemed to have expressed prior consent to arbitration in relation to future disputes with investors in a way similar to traditional BITs.  
  • Award of 15 December 2014: breach of the fair and equitable treatment standard by Indonesia in dealing with Saudi investor, own wrongdoing of the investor= doctrine of clean hands precluded the award of damages to him |
| Itisaluna Iraq LLC and others v Republic of Iraq (ICSID Case No ARB/17/10) | • Filing of the request the 13 April 2017 based on the Agreement on Promotion, Protection and Guarantee of Investments among member states of the organization of the Islamic conference by using the MFN clause in the Iraq-Japan treaty                                                                 |
| DS Construction FZCO v Libya                                         | • Claim brought by United Arab Emirates company against Libya under the OIC treaty due to construction projects in Libya affected by the outbreak of the civil war causing losses estimated at US $525 million by the investor  
  • OIC should serve as appointing authority but, three cases filed against Egypt in 2014 by the family of Saudi businessman Hashem Al Mehdar failed to get off the ground after Egypt refused to name any arbitrators and the OIC failed to make default appointments  
  • On 27 March 2016 PCA has agreed to designate an appointing authority, academic Pierre-Marie Dupuy, in a case against Libya after the OIC failed to appoint an arbitrator on the state behalf |
| Tekfen Holdings & TML v. Libya                                       | • ICC claim by a turkish investor concerning an investment in a project to extend underground network of pipes supplying fresh water to Lybian cities  
  • The project was disrupted by the February 2011 uprisings  
  • Claim, that invokes OIC treaty, is being heard by a panel chaired by J. William Rowley, G. Born and G. Kaufmann-Kohler |
### III. Recent Laws

#### 1. The New Bahraini Arbitration Act No. 9/2015

<table>
<thead>
<tr>
<th>Some innovations / Progress</th>
<th>CONS</th>
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</table>
| - The new law shall apply to domestic or international arbitration  
- Electronic arbitration agreements are admitted | BCDR and the Bahraini judiciary appear to be slightly too closed / connected |

Arbitrators appointed on the basis of the provisions of the enclosed Law shall not be liable for any act or omission relating to the performance of their duties, unless made in bad faith or was the result of a gross fault (article VII)  

Non-Bahraini lawyers may represent parties in an international arbitration (article VI)  

Liability of the arbitrator in the event of his withdrawal without a serious reason or at an inappropriate time.”
### III. New Laws

#### 2. Sudan Arbitration Act of 2016

<table>
<thead>
<tr>
<th>PROS</th>
<th>CONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Freedom to agree on the law of the contract</td>
<td>« Reciprocal enforcement »: Sudan is not party to the NY Convention but to the Riyadh Convention</td>
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<tr>
<td>All dispute that can be settled through amicable settlement can be subject to arbitration</td>
<td>« double exequatur »: a writ of enforcement must be obtained in the country of origin</td>
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<td></td>
<td>Compliance with constitutional law is still required</td>
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</table>
## III. New Laws

### 3. Qatar Law n°2 on arbitration of 2017

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<tr>
<th>PROS</th>
<th>CONS</th>
</tr>
</thead>
</table>
| Recognition of the Principle of Competence-Competence (article 16 and article 8.1) | Ministry of justice’s oversight:  
- maintains a list of approved arbitrators (article 37)  
- The arbitral tribunal must send an electronic copy of the award (31.11)  
- gives licenses for arbitration center |
| Annulment of the award before a specialized court «Civil and Commercial Arbitration Disputes Circuit» (Court of Appeal formation) or, if the parties so agree, before the Court of 1st instance of the QFC | Liability of arbitrator:  
- bad faith, collusion, gross negligence (article 11.3)  
- article 3 of Penal Code may apply: arbitrator are considered public servants = same criminal liability that applies to public servants |
| Independence of the arbitration clause in an agreement (16.1) / Witnesses and experts are not required to take an oath | Restriction on public entities to resort to arbitration (2.2) |
III. New Laws

4. New laws in the UAE

Federal decree n°7 of 2016
(entry into force in 29 october 2016)

- Amendment of article 257 of Penal Federal Code of 1987 n°3
- Extension of the existing requirement that applied to experts and translators to a much wider category of professional + applying to cases of lack of impartiality or due process
- Very negative reaction of the arbitrators community: already being instrumentalized to place illegitimate pressure on arbitrators

2015 « Arbitration Regulation » created by the “Abu Dhabi Global Market” legal system (ADGM)

- Article 55 : the ADGM may directly enforce and execute (a) Awards made in arbitrations where the seat of the arbitration is the Abu Dhabi Global Market; (b) New York Convention Awards; (c) All other arbitral awards which are sought to be recognized and enforced in the Abu Dhabi Global Market, irrespective of the State or jurisdiction in which they are made

Dubai Decree n°19 of June 2016:

- Created a Committee to establish which court is competent between DIFC and UAE (cf : Oger Dubai LLC v Daman Real Estate Capital Partners over a 1 bln AED) → It has created even more confusion
III. New laws

4. Current drafts

- **UAE**
  - New law to replace article 208 to 218 of Chapter 3 of the Code of Civil Procedure of UAE (federal law n11 de 1992): 61 new articles on domestic and international arbitration to comply with the UNCITRAL model
  - Still no provisions granting immunity to arbitrators

- **IRAQ**
  - A 2012 Committee formed by the Council of Ministers Secretariat finalized a draft arbitration law, based on the UNCITRAL model law (still under review)
  - Requirement for Iraqi courts to enforce foreign arbitral awards
  - Limitation of the courts’ discretion to refuse enforcement

- **YEMEN**
  - Draft law pending since 2011

- **LIBYA**
  - Bill pending since 2010
IV. Recent Case Law

In progress, but still with some hurdles

• There are still regularly some **chocking cases**:
  ▪ UAE Court setting aside awards dealing with real estate issues as a matter of inarbitrability or even awards not rendered in the UAE; Demanding proof of reciprocity to enforce an award (questioning UK’s adhesion to the NY Convention), declining personal jurisdiction to enforce an award in breach of the NY Convention, because the State Respondent (Sudan) did not have a “domicile”, setting aside awards for formalistic reasons (pages not all initialized, absence of ToR, absence of a formal power of attorney to sign the arbitration agreement)
  ▪ Qatari/Syrian Courts refusing to enforce an award for formal reasons because it was not rendered in the name of the Emir of Qatar / the People of the Syrian Republic
  ▪ Courts generally resisting enforcement for awards involving significant amounts and rendered against State entities

• But, again, there are reasons to be **optimistic**:
  → Saudi courts deciding that the arbitral tribunal has discretion as to how to conduct the proceedings, appointing a woman as chair of a Riyadh-seated panel, accepting to enforce an award against a Saudi party (leaving aside the interests as per the applicant’s request)...
  → Algerian courts deciding the arbitration clause is separable from the rest of the agreement
  → Lebanese and Moroccan courts extending the personal reach to non-signatories
  → Ruling consistently that a court may not review the merits of an award and second-guess the tribunal’s decision
V. New Centres
1. The SCCA in Saudi Arabia

Guiding values:
- Independence: Members of the SCCA board cannot be part of the Saudi government
- Neutrality: Freedom in the choice of seat and language of arbitration (Arab is the default language)
- Integrity, Transparency, Privacy, Responsibility

Main features:
- SCCA rules are based on UNCITRAL rules with the SCCA acting as a appointing authority
- Arbitrators are chosen by the parties from a list provided by the SCCA
- Parties can be represented without constraint (no need to have a domestic license to practice)

Opening of the SCCA (Saudi Centre for Commercial Arbitration) on October 2016 after its establishment by a Cabinet decree n° 257 passed on 15 March 2014
Since 2017, there is a possibility to agree on the QFC International Court as a forum to request:

- an interim or conservatory order, or
- the set-aside of an arbitral award, or
- the request to enforce an arbitral award

<table>
<thead>
<tr>
<th>Powers and jurisdictions granted to the QFC:</th>
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<tbody>
<tr>
<td>• Nominate an arbitrator/chairman</td>
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<tr>
<td>• Decide on the challenge request of an arbitrator;</td>
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<tr>
<td>• Terminate the mandate of an arbitrator under specific circumstances;</td>
</tr>
<tr>
<td>• Suspend the arbitration proceedings;</td>
</tr>
<tr>
<td>• Make necessary corrections or give interpretation of the award in case the re-composition of the arbitral tribunal is impossible; and decide on the actions to set aside the arbitral awards, whether rendered in the QFC or not.</td>
</tr>
<tr>
<td>• Order interim or conservatory measures upon the request of a party either before or after the constitution of the Arbitral Tribunal; and Order the enforcement of partial or final awards, whether rendered in Qatar (else than the QFC) or abroad.</td>
</tr>
</tbody>
</table>
In November 2015, the DIFC entered into a fresh agreement with the LCIA for the management and administration of arbitrations.

Arbitration rules have been amended and the new arbitration rules are scheduled to come into force on 10 October 2016 (to reflect almost identically the last version (2014) of the LCIA Rules).

Significant changes: a procedure for appointing an emergency arbitrator; a procedure for consolidation of multi-party disputes; measures to increase efficiency and avoid delays; and sanctions to punish counsel for poor conduct.

Relaunch of the DIFC-LCIA arbitration centre

Unique feature of the DIFC-LCIA

- Expansion of the Arbitral Tribunal’s powers and limitation of the intervention by judiciary.
- Enforcement: Limited list of grounds to refuse enforcement against assets whether located outside the DIFC but within Dubai, in another Emirate in the UAE or regionally in a GCC or Arab League member state.
- Introduction of the emergency arbitrator rules: emergency arbitrator may be appointed to determine urgent matters.
V. New Centres

3. The multiple UAE arbitration free zones

- Newly established free zone in the UAE capital Abu Dhabi
- Arbitration regulation on 30 December 2015: modern law based on the UNCITRAL Model law
- Operates since 25 September 2016
- Dispute resolution mechanism for international and domestic maritime disputes through arbitration and mediation
- Based on UNCITRAL rules of 2010 with few modifications:
  - default seat of arbitration in the DIFC court
  - reciprocal enforcement of judgments with the DIFC courts
  - enforceable in NY Convention signatory States
- Set up in 22 March 2009 / With new headquarters in December 2015
- In December 2016: memorandum of understanding signed with the Kuala Lumpur Regional Centre for Arbitration
- Opening of the 1st international forum on Commercial and Islamic Arbitration
- On 18 May 2017: Launch of the newly amended rules
V. New Centres

4. Other (older) Centres or Specialized Courts

- An independent and non profit international organization established in 1979 under the auspices of the Asian African Legal Consultative Organization: probably still the 1st center in the region
- Between 2010 and 2015, the CRCICA registered an annual average of 68 arbitration cases
- Launched in 2014
- Casablanca Finance City’s initiative for commercial and finance related disputes
- Activities launched in 2010 in association with the ICDR/AAA
- Average annual of one case since 2010
- Dual role: court of first instance of the Kingdom of Bahrain and as an arbitration centre
- Initiative launch in 2013 to create a neutral mechanism for commercial disputes between businesses and individuals from Israel and Palestine
- Joint venture of ICC Palestine and ICC Israel / Default arbitration seat: ICC Paris
- November 2010: Iraq’s Higher Judicial Council established the First Commercial Court of Iraq, a specialized court for disputes involving foreign investors (including IP, commercial agency ones...)
- It has jurisdiction only over cases involving foreign parties in Baghdad province.
- The court heard hundred cases since its establishment.