

Settlement of Construction Disputes in Oman
“areas of ineffectiveness”
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Abstract

The Research explores the evolving trend of the Commercial Law which appeared as a National Law aiming to regulate domestic relationships, but had to face the continuous extend of the International Trade Relations and its legal sources of rules, especially those international, whether be mandatory or not mandatory.

In view of emphasizing the different phases through which the Commercial Law is going, the Research distinguishes two main phases: the first starts with the European colonialism till the establishment of the World Trade Organization, whereas the second phase starts with the established of the Organization mentioned above and is still running nowadays. That first phase was in fact divided into two periods; in the first period, the process of unifying the rules governing topics of international trade started, but through the traditional tools of International Public Law, namely the signature of international conventions; the maritime and air carriages are the most important examples of such process. The alternative was to elaborate non-compulsory rules, where the states or the contracting parties were invited to adopt these rules, whether as laws or contractual terms, like the Geneva Rules governing the Commercial Papers for instance. The second period of the first phase started with the end of World War II, where the first Institutions of the Word Economy were established, namely the World Bank and the International Monetary Fund, and where the most develop countries started to regulate International Trade through the so-called GATT Agreements.

The second phase of evolution of the Commercial Law starts with the establishment of the World Trade Organization, by which International Commerce takes benefit of a structure in view of regulating its expansion over the entire World. The International Organization's mission is to liberate International Commerce from any obstacle that National States could implement or adopt. This comes in parallel with the obligation of all members to modify their laws in view of a full compliance with all rules agreed upon within the frame of the WTO. The second major impact is that the notions and concepts of Common Law supersede every new regulation of international commerce, and this regardless of the legal system adopted by any of the members of the WTO.

The Research concludes with saying that the trend of unifying the rules governing all activities of International Trade is now amplified, and goes forward whereby the preponderance of the Common law.

I. Introduction

GCC countries (Saudi Arabia, Qatar, Bahrain, Kuwait, UAE, and Oman) are currently dealing with a considerable number of construction projects to complement their intended plan of development. Construction disputes may affect the economic development of the region, as the failure to settle such disputes may discourage investors from practicing their activities in the region. Accordingly, GCC countries are keen to settle any expected construction disputes properly and to create an effective framework to deal with such disputes.

The technical and complex nature of construction disputes requires experts to determine the issues and to settle the dispute effectively within a suitable time frame; consequently, the majority of construction disputes are settled by arbitration.

Over the course of recent decades, GCC countries have steadily created and implemented a legal environment allowing them to comply with the international standards of arbitration. The majority of GCC countries adopted the UNCITRAL Model Law on International Commercial Arbitration in their national arbitration laws. Additionally, arbitration centers have been established in many GCC countries, with the exception of Oman, in order to provide the involved parties with a professional dispute resolution body. Further, national laws in GCC countries play an important role in the settlement of construction disputes.

This paper provides an overview of the legal framework regulating the construction business in the Sultanate of Oman (II) and examines the role of Omani national laws in the settlement of construction disputes (III).

II. Legal Framework of Construction Business in Oman

Bearing in mind Oman's relatively small population of only 2.8 million people, the scale of the construction and infrastructure development projects that have already been committed to or are under construction is impressive. The public sector is by far the largest procurer of construction services in the Sultanate of Oman. In the 2011 budget, the government announced Oman's eighth five-year

plan, to run from 2011 to 2015. It envisages a total capital outlay of US\$79 billion, of which the bulk is set to be invested in large construction projects across the country.¹ The Omani government has created and implemented its own legal environment to comply with the requirements of huge construction projects.

1. Omani Legal Environment

In a process that began in the 1970s,² the Omani legal system has developed into a legal regime which, while being influenced by Islamic Sharia rules, can best be characterized as a civil law regime. Its ongoing development is fostered by the implementation of various sets of rules. Commercial matters in Oman are subject to the Commercial Code,³ and civil matters are governed by the Civil Code (including conflict-of-law matters).⁴ Islamic Sharia principles are, in general, considered as a supplementary source of rules for the Omani laws.⁵ In the commercial context, Islamic Sharia principles constitute the

¹ Major projects already under construction or in advanced stages of engineering, design and/or planning include: **Oman Convention & Exhibition Centre** (cost of US\$1 billion), **Sohar Airport** (cost of US\$500 million), **Salalah Port Expansion** (cost of US\$450 million), **Oman's National Rail Network** (cost not yet known; estimated completion date 2018), **Duqm City Drydocks and Refinery** (cost of US\$20 billion), **Ghubrah Independent Water Project** (cost of US\$380 million), **Batinah Expressway** (cost of US\$2.59 billion), **Muscat & Salalah International Airport Expansion** (cost of US\$5.2 billion), **Salalah Medical City** (cost of US\$1 billion). For more details, see David Courtney-Hatcher, Steven Tee, Dianne Hamilton and James Barton, *Construction and projects in Oman: overview*, Available electronically at: www.dentons.com/~media/PDFs/Insights/2013/September/Omanpdf.pdf.

² Various commercial activities have been regulated in Oman since the 1970s, starting with the Royal Decree establishing the Central Bank of 1974, the Commercial Companies Act of 1974, the Law of Commercial Agencies enacted by Royal Decree No. 26/1977 and Royal Decree No. 8/2011 on the Law of Oil and Gas. The 1990s saw more development in the commercial law field as Oman enacted its Commercial Code in 1990 and its Arbitration Law in 1997.

³ Enacted by Royal Decree No. 55/1990.

⁴ Enacted by Royal Decree No. 29/2013, The rules and principles of Islamic jurisprudence (*fiqh*) shall be relied upon in the understanding, construction and interpretation of provisions of the civil code in Oman, See Art 2 of Royal Decree No. 29/2013.

⁵ See Art 2 Basic Statute of the Sultanate of Oman, Royal Decree No. 101/1996.

second supplementary source of rules for the Commercial Code,⁶ with the first supplementary source being commercial custom.⁷ The contract constitute the main source of regulation in commercial business.⁸ In 2002, Oman enacted the Omani Civil and Commercial Procedural Law, which governs procedural matters in both commercial and civil disputes.⁹

The Sultanate of Oman paved the way for foreign/national investors to settle their disputes by means of alternative dispute resolution (ADR). In 1994, the Omani Foreign Capital Investment Law (OFCIL) was adopted;¹⁰ its Article 14 permits parties to settle their disputes by arbitration,¹¹ thereby providing an exception to the principle found in the Omani Civil and Commercial Procedure Law whereby disputes with Omanis must be settled by Omani courts.¹² In 1997 Oman issued the Omani Arbitration Law and adopted the UNCITRAL Model Law of 1985.¹³ In 1999 Oman ratified the Convention on the Settlement of Investment Disputes between States and National of Other States of 1965 (ICSID Convention), thereby satisfying foreign investors and entitling them to settle disputes with the Omani government by international arbitration.¹⁴ Also, Oman adopted the New York

⁶ See Art 4 of Royal Decree No. 55/1990 *"If there is no contract, or if there is but it contains no relevant stipulation, or the stipulation appearing therein is a nullity, the legislative provisions contained herein and in other laws shall have effect in relation to all matters of which such provisions treat in wording or in purport"*.

⁷ See Art 5 of Royal Decree No. 55/1990.

⁸ Omani High Court, Decision No.207/2005, 18-12-2005

⁹ Royal Decree No. 29/2002.

¹⁰ Foreign Capital Investment Law, Royal Decree No. 102/1994.

¹¹ Art 14 OFCIL: *"It may be agreed to refer any dispute between the foreign investment projects and third parties to a local or international arbitration tribunal"*.

¹² Art 29 Omani Civil and Commercial Procedure Law, Royal Decree No. 29/2002.

¹³ Royal Decree No. 47/1997. See Mohamed Ibrahim Mostafa Aboul-Enein, *Peaceful Settlement of Commercial Disputes* (Dar El Nahda 2005) 65.

¹⁴ See e.g. Adel A Hamadi Al Tamimi v. Sultanate of Oman (ICSID Case No. ARB/11/33): claims arising out of the government's alleged harassment and interference in the operation of claimant's mining companies in Oman, leading to the termination of the relevant lease agreements and the confiscation of the mining facilities by the Royal Oman Police. Decided in favor of the State on 3 November 2015; the award is available electronically at:

http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C1960/DC6932_En.pdf,

Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. Other GCC countries similarly enacted national arbitration Acts influenced by the UNCITRAL Model Law on International Commercial Arbitration of 1985¹⁵ and ratified the ICSID Convention.¹⁶

The construction business in Oman is subject to the cluster of laws mentioned above in addition to the Tender Law of 2008 and some model contracts. The Omani courts have jurisdiction to consider any conflict arising out of a construction contract in Oman unless the parties agree to settle the dispute by arbitration

2. The Regulation of the Construction Business in Oman

There is no specific legislation relating to construction law in Oman. The Omani Civil Code of 2013 regulates the relationship between contractors and employers.¹⁷ Standard form construction contracts represent the main source of obligations in construction dealings in Oman (a), with some national legislation providing the contracting parties with the applicable legal rules in different fields, such as engineering consultancy (b) and public sector procurement (c).

a. Standard form construction contracts

Omani governmental entities use standard form construction contracts.¹⁸ The most common form construction contracts in Oman are found in the Standard Documents for Building and Civil Engineering Works, 4th edition-1999, based upon the Red Book of the FIDIC,¹⁹ and the Standard Documents for Electrical and Mechanical

¹⁵ Saudi Arabia adopted its national arbitration law in 1994, Qatar in 2002, Bahrain in 1988, Kuwait in 1978 and UAE in 2006.

¹⁶ Saudi Arabia ratified the ICSID Convention in 1994, Qatar in 2002, Bahrain in 1988, Kuwait in 1978 and UAE in 2006.

¹⁷ See Arts 626 to 650 Omani Civil Code, Royal Decree No. 29/2013.

¹⁸ Richie Alder, *Oman*, in Peter Feen, Michael O'Shea & Edward Davis (eds), *Dispute Resolution and Conflict Management in Construction – An International Review*, (E & FN Spon 1998) 261.

¹⁹ FIDIC is the International Federation of Consulting Engineers. Its members are national associations of consulting engineers. FIDIC publishes international standard form contracts for works and for clients, consultants, sub-consultants, joint ventures and representatives, together with related materials such as standard pre-qualification forms. For more details about FIDIC See

works, based on an earlier edition of the FIDIC Yellow Book. The FIDIC suite of contracts, including the IChemE suite for plant projects,²⁰ is also widely used and accepted, especially with the private sector.²¹

Standard form construction contracts adopt arbitration as a means of settling disputes.²² The employed forms refer the dispute to a single arbitrator to be appointed by agreement of the parties; the court of appeal is entitled to appoint the single arbitrator upon request of one of the parties if the parties are unable to reach an agreement.

b. The Engineering Consultancy Law of 2016

Engineering consultants play a dynamic role in administering construction projects. They are responsible for providing the required technical and administrative support needed to ensure that a construction project runs successfully. The first piece of legislation regulating the engineering consultancy profession in Oman was the Engineering Consultancy Law of 1994.²³ But on 22 May 2016, Oman issued a new and more comprehensive, Engineering Consultancy Law²⁴ to replace the 1994 law and to provide a comprehensive framework for regulating the engineering consultancy profession. For example, the law has raised the required credentials of an applicant for establishing an engineering consultancy office.²⁵ Also, the law

<http://fidic.org/about-fidic>.

²⁰ The Institution of Chemical Engineers (IChemE) is the global professional membership organization for chemical, biochemical and process engineers and other professionals involved in the chemical, process and bioprocess industries. IChemE's Forms of Contract are an internationally acclaimed series of model forms, developed to reflect best practice for project delivery in the process industries.

See: http://www.icheme.org/about_us.aspx.

²¹ David Courtney-Hatcher, Steven Tee, Dianne Hamilton and James Barton, Construction and projects in Oman: overview, Available electronically on: www.dentons.com/~media/PDFs/Insights/2013/September/Omanpdf.pdf

²² See Art 67 of the Standard Documents for Building and Civil Engineering Works, 4th edition-1999.

²³ Royal Decree No. 120/1994.

²⁴ Royal Decree No. 27/2016.

²⁵ Pursuant to Art 7 Engineering Consultancy Law, in order to qualify to open an engineering consultancy office, an applicant must first have a registered engineering office. The applicant must also meet one of the following criteria: (i) have gained a minimum of five years of specialized work experience after having obtained a BSC

provides new provisions to elevate professional engineering standards, these appearing in Chapter 3, titled "Working Engineer". Specifically, the law limits the right to sign off on key documents (including schemes, graphics, designs, specifications, project report samples, and supervision bonds) to only the licensee and to engineers who: (i) are registered as authorized signatories with the MOCI;²⁶ (ii) have met the requirements for obtaining the professional degree from the institution decided by the ministry of commerce and industry; and (iii) work exclusively for the specific office.²⁷

The Omani Engineering Consultancy Law of 2016, same as Omani Civil law 2013 and the previous Engineering Consultancy Law of 1994, asserts decennial liability of the engineer and the contractor²⁸, both of them shall be jointly but not severally²⁹ liable for a period of ten years for any total or partial collapse of the buildings or other fixed facilities constructed thereby, and for any defect which threatens the stability or safety of the building. If the work of the engineer is restricted to making the plans to the exclusion of supervising the execution, he shall be liable only for defects in the plans.

c. Tender Law of 2008

The first Tender Law in Oman had been enacted by Royal Decree No. 86/1984. In 2008 the Omani legislature, having considered various changes in the Omani legal environment, including the Omani Commercial Code enacted by Royal Decree No.55/1990, issued the new Tender Law of 2008³⁰ to regulate public sector procurement in the construction business. The Omani Financial Law of 1998³¹

(bachelor degree); (ii) have gained three years of specialized work experience after having obtained an MSC (master degree); or (iii) have gained two years of specialized work experience after having obtained a PhD in the same area of specialization.

²⁶ Ministry of Commerce and Industry.

²⁷ Article 17 of Royal Decree No. 27/2016.

²⁸ Art 22 Engineering Consultancy Law 2016 & Art.634/ 235 Omani Civil Law 2013

²⁹ Omani High Court, Decision No.274/2011, 13-3-2013

³⁰ Omani Tender Law enacted by Royal Decree No. 36/2008.

³¹ Royal Decree No.47/1998

regulates any rights or obligation arising out of a public sector procurement³²

The recent Tender Law of 2008 has a wider scope of application compared to the previous one of 1984. The Tender Law of 2008 applies to all the administrative bodies of the state. Public authorities, organizations or any other entity having an independent legal personality, including companies owned totally by the government, are subject to the 2008 Tender Law. The 2008 Law excludes from its scope of application security and defence entities as well as entities subject to the financial regulations of the Royal Diwan. Other governmental organizations could be excluded by any other law.³³

The types of works and services subject to the tender process include contracts for supplies, execution of works, transportation, provision of consultancy services and studies, technical works and purchase and leasing of real estate.³⁴ The law defines the concepts of international tender³⁵ and local tender.³⁶

The Tender Law of 2008 specifies five legal forms by which public procurements can be concluded:³⁷ (1) public tender, (2) limited tender, (3) engagement, (4) direct assignment and (5) competition. All forms, excluding direct assignment, are governed by the principles of openness, equality of opportunity, equality and freedom of

³² Appeals Chamber in Omani Administrative Court, Decision No.1/2017, 31-10-2017. The court has set aside an arbitral award due to ignoring the application of Omani Financial law of 1998 in a dispute between governmental entity and private law person.

³³ See Art 2 of Royal Decree No. 36/2008.

It is important to note the difference between the official version of this article (in Arabic) and the unofficial English version which is published electronically on the website of the Public Authority of Electricity & Water: <https://www.paew.gov.om/TendersLaw/Tender-Law-38-2008>. In the English version, companies owned totally by the government are expressly included in the scope of application of the law, whereas this is not stated expressly in the Arabic version.

³⁴ See Art 3 of Royal Decree No. 36/2008.

³⁵ Art 16 of Royal Decree No. 36/2008 defines international tender as "one wherein international companies and establishments not registered in the Sultanate may participate".

³⁶ Art 16 of Royal Decree No. 36/2008 defines local tender as "one in which participation is confined to companies and establishments enrolled in the Commercial Register or any professional register in which the Board decides to include their names in specific cases".

³⁷ See Art 3 of Royal Decree No. 36/2008.

competition.³⁸ The Tender Board is entitled to supervise and review the practice of public procurements.³⁹

The **public tender** process is the main way in which works and services are procured. **Limited tender** is an alternative to a public tender; it is based on the concept of tender restricted to pre-qualified bidders. Limited tender was included in the previous Tender Law of 1984 for tenders of a specialized nature. The Tender Law of 2008 adopted this concept, and it has outlined the basic pre-qualification procedures.⁴⁰ Compared to the previous 1984 Law, the Tender Law of 2008 enlarges the scope of circumstances where a contract can be assigned directly. The 2008 Law entitles the Tender Board, in special cases, to conclude contracts by assigning the required work or service directly to the providers. The circumstances allowing contracts to be concluded by direct assignment are subject to the discretionary power of the Tender Board.⁴¹ Additionally, concerned bodies are entitled to conclude contracts by direct assignment with governmental entities in cases where the contact is worth less than 10,000 OR.⁴² The amount of contract might be raised to 25,000 OR if required.⁴³ As to both of the previous cases, the prices should be appropriate and the contact should be justified and approved by the head of the concerned body. The 2008 Tender Law entitles the tender board to conclude contracts by **engagement**. The procedure of engagement (*mumarasah* in Arabic) is based on procurement by negotiation in order to obtain the best bids at the best price. The concerned office has the discretionary power to decide on the necessity of concluding contracts by engagement.⁴⁴ Also, the law specifies some certain “specific circumstances” where the concerned bodies are expressly entitled to

³⁸ See Art 4 of Royal Decree No. 36/2008.

³⁹ See Art 8 of Royal Decree No. 36/2008.

⁴⁰ See Arts 47, 48 and 49 of Royal Decree No. 36/2008.

⁴¹ Art 54 of Royal Decree No. 36/2008.

⁴² Art 55 of Royal Decree No. 36/2008.

⁴³ Art 56 of Royal Decree No. 36/2008.

⁴⁴ Art 50 of Royal Decree No. 36/2008:

“Items may be purchased or works executed through engagement in order to secure the best bids at the lowest prices in **special cases** or in any of the following situations:.....etc”

conclude the contract by engagement.⁴⁵ The concerned bodies may conclude contracts through engagement, provided the value in each case does not exceed 100,000. OR.⁴⁶

Furthermore, the Tender Law of 2008 adopts the process of **competition** for concluding public procurement, but only concerning contracts for the purpose of conducting studies or preparing designs, layouts, models or other technical works required for a specific project.⁴⁷

It is safe to say that the Tender Law of 2008, the standard form construction contracts and the 2016 Law of Engineering Consultancy constitute the main pillars of the legal framework for the construction business and, further, provide the main players in Oman's construction field (in both the government and the private sector) with the required rules for regulating their relationships with one another.

As might nevertheless be expected, different types of disagreement can potentially arise out of construction contracts. In this regard, arbitration plays a major role in settling the different types of disputes in the Omani construction field.

III- Dispute Resolution Issues in the Omani Construction Field

⁴⁵ Art 50 of Royal Decree No. 36/2008:

"Items may be purchased or works executed through engagement in order to secure the best bids at the lowest prices in special cases or in any of the following situations:

- A. Articles the manufacture or import of which is monopolized or whose nature or the purpose of whose obtainment entails that they should be purchased from the places of their production or those which are available only with an individual.
- B. Articles for which no exact specifications may be made.
- C. Technical and consultancy works or services that require specific technical know how or specific specialization.
- D. Animals, birds and poultry of various kinds.
- E. Supplies and contracts of works or transport for which tender procedure may not be followed on account of urgency.
- F. Supplies, contracts for works, transport and provision of services for which no tender bids have been submitted or for which bids with unacceptable prices have been submitted and the need for them does not permit re-tendering procedures.
- G. Execution of works or provision of services by concerned entities outside the Sultanate.
- H. Purchase and leasing of real estate."

⁴⁶ See Art 50 of Royal Decree No. 36/2008.

⁴⁷ See Arts 57 to 61 of Royal Decree No. 36/2008.

Disputes between employers and contractors are the most significant problem that a construction project may face. Disputes lead to many consequences, such as payment delay, extension of the time needed and work suspension. The settlement of construction disputes requires both legal procedures and engineering expertise.⁴⁸ The Omani legal environment provides conflicted parties in construction disputes with all means of dispute resolution, including litigation and arbitration. Arbitration plays an important role in the settlement of construction disputes in Oman, as it settles the dispute by means of a final binding decision that is issued by a qualified arbitrator who has been appointed by agreement of the parties (1). Nevertheless, different obstacles may in practice prevent arbitration from playing its expected effective role in construction disputes in Oman (2).

1. Means of Dispute Settlement in Oman

Litigation could be used to settle any type of dispute in Oman, including construction disputes (a), unless the disputing parties prefer to turn to some means of alternative dispute resolution (b).

a) Litigation.

In 2002, Oman enacted the Omani Civil and Commercial Procedural Law (OCCPL), governing procedural matters in both commercial and civil disputes.⁴⁹ OCCPL entitles Omani courts to hear suits filed against Omani nationals or non-Omanis whose domicile or place of residence is in the Sultanate.⁵⁰ Any dispute arising out of a construction contract to be performed in Oman might be settled by litigation. Omani courts are entitled to hear the disputes and examine documents and memoranda presented by counsel to the parties. Additionally, the court may choose to appoint an expert in order to issue the most suitable decision. The expert, who is usually specialized in the field of the dispute, has to give his professional

⁴⁸ For more details about claims in construction projects in Oman, see Mohammed Al Mohsin, Claim Analysis of Construction Projects in Oman, International Journal on Advanced Science Engineering Information Technology, Vol.2(2012). No.2.

⁴⁹ Royal Decree No. 29/2002.

⁵⁰ Art 29 of Royal Decree No. 29/2002.

opinion on the dispute in a written report. The parties to the dispute are entitled to review the expert's report and challenge it. The litigation system in Oman consists of different levels and entitles litigants to challenge the decision of the primary courts before courts of appeal and to challenge the decision of the court of appeal before the high court, which may result in it taking many years to settle the dispute by final binding decision. Specialized courts in the construction field can help to settle disputes effectively; unfortunately, the Omani judicial system is still lacking such a type of specialized court. Furthermore, language may delay the length of litigation. A vast number of construction contracts in Oman are drafted in English, whereas the number of judges speaking English is limited. Most contractors and employers attempt to settle their disputes without having recourse to litigation, but it might be used as a last resort.⁵¹

b) ADR & construction disputes in Oman

All types of ADR are permitted to settle construction disputes in Oman. "Orthodox ADR methods (such as conciliation, mediation and adjudication) have not been widely used in Oman, even on large projects. Generally, negotiated amicable settlements may be used, rather than formal, or even informal or alternative legal proceeding".⁵² Regardless of their benefit, some types of ADR are not commonly used in Oman's construction field, such as dispute reviewing boards (DRB),⁵³ contrary to other GCC countries (e.g. UAE).⁵⁴ Conciliation (through the Ministry of Justice) and

⁵¹ See Mohammed Al Mohsin, Claim Analysis of Construction Projects in Oman, above, note 39.

⁵² See David Courtney-Hatcher, Steven Tee, Dianne Hamilton and James Barton, Construction and projects in Oman: overview, above, note 1.

⁵³ Dispute Avoidance Processes in Oman - Friend or Foe, Published electronically at: <http://omanlawblog.curtis.com/> on 19/10/2016.

⁵⁴ "Since early 2007, construction contracts by the Abu Dhabi Government have provided for disputes to be referred first to an ad hoc dispute adjudication board, in line with International Federation of Consulting Engineers (FIDIC) forms, and then to ADCCAC arbitration." See, Nasser Ali Khasawneh, Gurmeet Kaur and Pooja Kohli, Construction Arbitration in the Middle East, published electronically at <http://www.lexology.com/library/detail.aspx?g=92783179-e253-4ded-9773-8975fbaa8d87> on 16/03/2016.

arbitration are the most prevalent types of ADR used to settle construction disputes in Oman.

The **Conciliation and Settlement Law of 2005**⁵⁵ entitles the conflicted parties to refer their dispute to the Committee of Conciliation and Settlement (an entity administered under the **Ministry of Justice**) by submitting an application, free of charge, before reference is made to the courts. The Committee will attempt to settle the dispute within 60 days from the date of application to the Committee; this period may be extended for a further period of not more than 30 days upon the agreement of parties.⁵⁶ The Committee is entitled to appoint experts or hear any party that may assist in concluding the required conciliation.⁵⁷ If settlement is achieved, the Committee will prepare a report to be signed by all parties, which can then be enforced in the same manner as a final judgment of a court.⁵⁸ Conciliation through the Ministry of Justice might be used to resolve disputes in small-scale projects. Parties to a dispute are also free to explore on their own initiative mediation/conciliation through the appointment of a professional mediator/conciliator. Other than for small-scale projects, construction contracts in Oman, whether awarded by public or private sector project procurers, will habitually provide for disputes to be referred to arbitration.⁵⁹

Arbitration was recognized in Oman a long time ago. That means the settlement of disputes operated under the umbrella of Sharia rules for many decades.⁶⁰ Royal Decree No. 32/1984 is considered the first attempt by the Omani legislature to codify arbitration as a means of settling commercial disputes. The Decree recognized arbitration

⁵⁵ Enacted by Royal Decree No. 98/2005.

⁵⁶ Art 13 of Royal Decree No. 98/2005.

⁵⁷ Art 9 of Royal Decree No. 98/2005.

⁵⁸ Art 15 of Royal Decree No. 98/2005.

⁵⁹ David Courtney-Hatcher, Steven Tee, Dianne Hamilton and James Barton, Construction and projects in Oman: overview, above, note 1

⁶⁰ See, Md. Shahadat Hossain, Arbitration in Islamic Law for the Treatment of Civil and Criminal Cases: An Analytical Overview, *Journal of Philosophy, Culture and Religion*, vol.1 (2013), at 1.

agreements.⁶¹ In 1994 Oman enacted the Foreign Capital Investment Law (FCIL), which permitted investors to settle their disputes with public/private sector entities by arbitration.⁶² In 1997 Oman enacted the Omani Arbitration Law and adopted the UNCITRAL Model Law of 1985.⁶³ The final step taken by Omani legislator to comply with the modern principles of arbitration was accomplished with the ratification of the ICSID⁶⁴ Convention in 1999, which satisfied foreign investors and entitled them to settle their disputes with the Omani government by international arbitration.⁶⁵

2. Arbitration and Construction Disputes in Oman

Standard form construction contracts in Oman have drawn the road map for settling disputes by arbitration, giving special consideration to the role of the project engineer (a). Nevertheless, there are a few obstacles that might prevent arbitration from playing its expected role as the most effective means of dispute resolution (b).

a. Cooperative effort between engineers and arbitrators

Almost all standard form construction contracts in Oman adopt arbitration as a means for the settlement of disputes. The arbitration clause found in these contracts usually requires the referral of any dispute or difference of any kind to the project's engineer for a decision.⁶⁶ It is safe to say that the settlement of construction dispute in Oman is a cooperative effort between engineers and arbitrators. Moreover, in some construction contracts concluded between private

⁶¹ Art 59 of Royal Decree No. 32/1984

⁶² Art 14 Omani Foreign Capital Investment Law, Royal Decree No. 102/1994

⁶³ Royal Decree No. 74/1997

⁶⁴ International Convention on the Settlement of Investment Disputes between States and National of other States of 1965.

⁶⁵ For more details about arbitration in Oman see Amel K. Abdallah, *Oman*, in Gordon Blank (eds), *Arbitration in the MENA*, (Juris, 2016).

⁶⁶ For example See, Art 67 of the Standard Documents for Building and Civil Engineering Works, 4th edition-1999. "If any dispute or difference of any kind whatsoever shall arise between the Employer and the Contractor or the Engineer and the Contractor in connection with, or arising out of the Contract, or the execution of the Works, whether during the progress of the Works or after their completion and whether before or after the termination, abandonment or breach of the Contract, it shall be referred to and settled by the Engineer....."

law parties in Oman, it is acceptable to appointe the consultant engineer as an arbitrator.⁶⁷

Oman's Standard Documents for Building and Civil Engineering Works as well as other standard documents refer disputes first to the engineer⁶⁸ and then, as necessary, to a single arbitrator.

The engineer is required to give his written decision concerning the dispute within 90 days after being requested to do so by either party. Such decision is final and binding unless any of the contracting parties proceed further with the arbitration process within 90 days of receipt of the engineer's written decision. The complex nature of construction disputes may mean that high value is given to the engineer's decision during the arbitration process. The high court has confirmed the obligation of the parties of standard document of construction to start settlement of dispute by alleging to the engineer before proceeding in arbitration.⁶⁹ Oman's Standard Documents of construction entitle the parties to define the position of the project engineer without considering the regulations in the Engineering Consultancy Law concerning professional engineering standards.⁷⁰ It might be appropriate to re-draft the Standard Documents considering the new Engineering Consultancy Law of 2016.

In the event that the parties cannot agree upon **the single arbitrator** who will preside over the case, the president of the competent court of appeal will appoint him, in a decision, upon application of either of the parties. Such decision is not be appealable in any manner whatsoever.⁷¹

⁶⁷ Omani High Court, Decision No.242/2010, 18-5-2011.

⁶⁸ Art.1/C of The Standard Documents for Building and Civil Engineering Works,

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4 edition-1999 entitle the contracting parties to agree on the definition of the project engineer; if not the standard document defines the engineer as "any individual, individuals or undertaking the Employer appoints from time to time and notifies the Contractor thereof in writing to perform the functions of Engineer for the purpose of this Contract".

⁶⁹ Omani High court , Decision No.510/2010 , 25-1-2012

⁷⁰ Art 17 of Royal Decree No. 27/2016.

⁷¹ Art 17 Omani Arbitration Law, Royal Decree No. 47/1997 (modified by Royal Decree No. 3/2007).

The arbitrator has full power to consider, revise and review any decision, opinion, direction, certificate or valuation of the engineer. Parties shall not be limited in the proceedings before such arbitrator to the evidence or arguments put before the engineer for the purpose of obtaining the engineer's decision. The engineer may be called as a witness and give evidence before the arbitrator on any matter whatsoever relevant to the dispute. The language of the arbitration is usually the language of the contract unless the parties have agreed otherwise.⁷² The Standard Document considers the importance of the English language in the construction field; it states that all correspondence exchanged between the employer, engineer and contractor is to be in Arabic and English.⁷³

The Arbitration Law sets out the rules relating to the exchange of pleadings,⁷⁴ which must be in Arabic unless otherwise agreed.⁷⁵ In many construction disputes, parties prefer English. The applicable law is usually Omani law.⁷⁶ The arbitrator may seek the opinion of an expert, upon which the parties to the arbitration are entitled to reply. The arbitrator has to render the award ending the dispute as a whole within the period agreed to by the parties to the dispute. If there is no agreement, the award is to be rendered within 12 months from the date of commencement of the arbitral proceedings. The arbitrator is

⁷² See Art 5-1-a of the Standard Documents for Building and Civil Engineering Works, 4th edition-1999.

⁷³ See Art 5-1-b of the Standard Documents for Building and Civil Engineering Works, 4th edition-1999.

⁷⁴ Arts 25 to 38 of Omani Arbitration Law, Royal Decree No. 47/1997.

⁷⁵ Art 29 Omani Arbitration Law, Royal Decree No. 47/1997 states: "The arbitration shall proceed in the Arabic language, unless the two parties agree, or the arbitral tribunal specifies, another language or languages. That which is laid down in the agreement or the decision shall also have effect in relation to the language of written statements and memoranda, and to oral submissions, and likewise to any decision such tribunal takes, any letter it sends, or any award it renders, unless the agreement of the two parties or a decision by the arbitral tribunal, provides otherwise."

⁷⁶ See Art 5-1-c of the Standard Documents for Building and Civil Engineering Works, 4th edition-1999.

entitled to extend the period for six months or for a longer period if agreed to by the parties.⁷⁷

b. Arbitration, construction disputes, areas of ineffectiveness.

Independent of the road map that the different construction regulations and national laws in Oman create for settling construction disputes effectively by arbitration, we should note the relatively mild degree of construction disputes in this country.⁷⁸ Still, there are a few obstacles that may prevent arbitration from providing parties to a conflict with the benefits they seek from that means of dispute settlement. An absence of arbitration centers, the possibility of inexperienced arbitrators being appointed by the court, the difficulty in challenging arbitrators for a lack of experience, the absence of a provision specifying a time limit for an arbitrator to stepdown in the event of a challenge, and the absence of a mechanism for specifying arbitrator fees in ad-hoc arbitration – these may constitute the most obvious obstacles which could prevent parties to a construction contract dispute from realizing the advantages of arbitration.

Although 20 years have passed since the enactment of the Omani Arbitration Law in 1997, Oman still lacks its own arbitral institutions. If parties to commercial or civil disputes wish to settle their dispute by arbitration in Oman, they must resort to *ad hoc* arbitration or utilize a non-Omani arbitration institution. Foreign contractors are entitled to file with ICSID to settle their disputes with the Omani government.⁷⁹

⁷⁷ Art 45 Omani Arbitration Law, Royal Decree No.47/1997.

⁷⁸ "The total numbers of the claims that occurred in 45 projects were 119 claims with [an] average of 2.64 claims per each project and [a] standard deviation of 1.68. However, the minimum number of claims is 1, and the maximum of the claims 7. As far as [concerns] the number of claims of construction projects in Oman, this number seems to be too less as compared with other countries for many reasons represented by the calm nature of this industry in Oman." See: Mohammed Al Mohsin, Claim Analysis of Construction Projects in Oman, above, note 39.

⁷⁹ For example See ; *Attila Dogan Construction and Installation Co v Sultanate of Oman*, featuring claims arising out of the government's alleged frustration of investments related to an engineering and construction contract concluded by the claimant (*Turkish*

Ad-hoc arbitration in Oman may possess its own problems. For example, parties to a conflict may not reach an agreement concerning the arbitrator at the time of the dispute. In such a case, any of the conflicted parties may apply to the president of the competent court of appeal to appoint the required single arbitrator. In Oman, the court of appeal has a list of arbitrators, as does the administrative court.⁸⁰

Further, in many cases, parties to a conflict may not reach to an agreement concerning numbers of arbitrators at the time of dispute. In such cases, the president of competent court of appeal used to appoint a sole arbitrator to guarantee speedy proceedings and fewer expenses regardless the wording of Article 15/1 of the Omani Arbitration Law, which states: "*In case, the parties fail to arrive at an understanding with regard to the number of arbitrators, the number shall be three.*" Such practice in Omani courts may jeopardize the validity of many arbitral awards as the arbitrator appointed contrary to the law.⁸¹

In disputes arising out of administrative contracts, the appeal chamber in the Administrative Court has jurisdiction to appoint the sole arbitrator/the arbitral tribunal where the disputing parties are unable to agree.⁸² Appointment of an arbitrator by the president of the ordinary court of appeal entitles the award debtor to challenge the award by annulment. Recently, the appeal chamber in the Administrative Court has set aside some arbitral awards issued by

Construction and Installation Company) with Petroleum Development of Oman (PDO), a majority State-owned company, after winning the tender. According to the claimant, authorities delayed or prevented the entry of its qualified foreign personnel into Oman and required the claimant to hire additional Omani nationals from a local construction company. Petroleum Development of Oman later redistributed 60 percent of the contract work to the previous local contract-holder and eventually terminated the contract in favor of the latter and other contractors. (ICSID Case No. ARB/16/7) available electronically at: <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB%2f16%2f7>.

⁸⁰ Applications to the president of the court with a copy of the applicant's CV, accompanied by certificates, are required documents for registration in such lists. Once the applicant submits such documents, registration is subject to the discretionary power of the president of the court of appeal.

⁸¹ See Art. 15/1/e of Royal Decree N.47/1997 'No action for annulment of an arbitral award shall be admissible save in the following cases.....e..If the arbitral tribunal was constituted or arbitrators were appointed contrary to the law.....'

⁸² Art.6 bis of The Administrative Court's Law - Royal Decree No. 91/1999

arbitral tribunal has been appointed by the president of the ordinary court of appeal in disputes arising out of administrative contracts.⁸³ The Appeal chamber justifies the annulment of mentioned arbitral awards by violating the Judicial Public Policy in Oman.⁸⁴

The Omani Arbitration Law specifies the grounds for challenging and replacing arbitrators. Only circumstances giving rise to serious doubts concerning the impartiality or independence of an arbitrator entitle a party to challenge the arbitrator.⁸⁵ A written application declaring the grounds of the challenge must be submitted to the arbitral tribunal within 15 days of the date that the applicant knew of the constitution of the tribunal or of the grounds for the challenge.⁸⁶ The tribunal has to decide on the application, unless the concerned arbitrator steps down. There is no time limit for the arbitrator to step down or for the tribunal to reach a decision. The applicant must simply wait for the decision. In the case of construction disputes, the single arbitrator may refuse to step down or take a long time to decide in this regard. This gap in Omani law is inconsistent with the nature of arbitration as a type of ADR used to settle disputes speedily. Other Arab legislatures have filled similar gaps by including time limits both for the arbitrator and for the tribunal deciding on the challenge.⁸⁷

Unfortunately, the Omani Arbitration Law is silent on the possibility of challenging an inexperienced, overwhelmed or otherwise unqualified arbitrator. The wording of neither Article 18⁸⁸ nor Article 20⁸⁹ of the Omani Arbitration Law entitles the parties to a dispute to

⁸³ Appeal Chamber of administrative court, Decision No.544/2014, 5-5-2014 and Decision No.925/2016, 7-11-2016

⁸⁴ Appeal Chamber of administrative court, Decision No.925/2016, 7-11-2016

⁸⁵ Art 18 Omani Arbitration Law, Royal Decree No. 47/1997.

⁸⁶ Art 19/1 Omani Arbitration Law, Royal Decree No. 47/1997.

⁸⁷ See Art 19 Egyptian Arbitration Law No. 27/1994 - amended by Law No. 8/2000.

⁸⁸ Art 18/1 Omani Arbitration Law, Royal Decree No. 47/1997: "It shall not be permissible for an arbitrator to be challenged unless there be circumstances giving rise to serious doubts as to his impartiality or independence."

⁸⁹ Art 20 Omani Arbitration Law, Royal Decree No. 47/1997: "If an arbitrator is unable to perform his mandate, or does not proceed with it, or ceases to perform it in such manner as leads to unjustifiable delay in the arbitral proceedings, and if he does not withdraw and the two parties do not agree on his removal, it shall be permissible for the President of the

request that the court unilaterally remove an arbitrator upon his ineffectiveness being discovered; this result is especially true if the arbitrator has been appointed by a decision from the president of the court of appeal, as such a decision is not appealable.⁹⁰

Further, the regulation of arbitrator fees constitutes an important gap in the Omani Arbitration Law. Regarding the *ad hoc* nature of arbitration in Oman, such a gap may affect the impartiality of the arbitrator. For example, some arbitrators overestimate their fees, especially in construction disputes. Parties to a conflict could bring a court challenge to the fees being imposed by the arbitrator. But in such cases, a party who refuses to pay exaggerated fees might believe that there is no longer a guarantee of the impartiality and the independency of the arbitrator. A party who disputes the arbitrator's bill may believe that it will no longer receive fair treatment from this arbitrator. Moreover, the appeals chamber in Omani Administrative Court recently has declared that the arbitration fees is an essential matter should be agreed upon in a separate agreement between the parties and the arbitrator. The court of appeal entitles the arbitrator to stay the procedure of arbitration and allege to the court to settle the dispute about arbitration fees before proceeding in arbitration again.⁹¹

IV. Conclusion

The legal environment of the construction business in Oman complies with recent developments in the field; nevertheless, it still needs more attention from the Omani legislature, especially after the 2016 enactment of the new Law of Engineering Consultancy. The Standard Documents for Building and Civil Engineering Works need to be revised in consideration of the requirements for professional engineers imposed by the new Law of Engineering Consultancy. Means of dispute resolution, especially arbitration need some improvements. The number of disputes that proceed to arbitration could be reduced – especially as concerns big projects – by adding

competent Court of Appeal to order that his mandate be terminated, on application by either of the two parties.”

⁹⁰ See Art 17/1 Omani Arbitration Law, Royal Decree No. 47/1997.

⁹¹ Appeals Chamber in Omani Administrative Court, Decision No.579/2016 , 3-5-2016

into the Standard Documents the possibility of settlement by a dispute review board. Some gaps in the Omani Arbitration Law should be filled in order to avoid their negative effects in practice. For example, a ministerial decision specifying arbitrator's fees as a certain percentage of the amount in dispute could encourage parties to a conflict to settle their dispute by arbitration, as this would save time and avoid the concerns about impartiality that arise when a party challenges the arbitrator's fees. Further, a modification to the Omani Arbitration law that would, first, compel a challenged arbitrator to decide within a certain period of time whether to stay on the tribunal and, second, add time limits to a subsequent challenge of this decision could also help to save more time in such cases.

Finally, the absence of an Omani arbitral institution represents the most important gap in that field as it is inconsistent with the governmental desire to encourage international trade and foreign investment.