

# Tokyo Dispute Resolution and Crisis Management Newsletter

January 2016

Edition No. 2

In this January edition, we are delighted to present legal and industry updates from the firm's global network of offices. The selection is based upon our experience of the wide variety of issues faced by our clients in their business operations and investments around the world.

We hope that you enjoy the edition, and would welcome the opportunity to discuss further any matters which impact your business today.



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King & Spalding's international arbitration group is ranked in Band 1 and has a "stellar reputation".

*"What makes them great lawyers is that they understand arbitration ... and the limits of what can and cannot be advanced".*

Chambers Global 2015

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#### In This Issue:

Lead Article.....Page 1

Resources & Links.....Page 4

Our Team.....Page 5

## Middle Eastern Disputes: Top 10 Tips for In-House Counsel<sup>1</sup>

The lowdown on what every in-house counsel should bear in mind with regard to arbitration proceedings in the UAE.

We set out our list of the top 10 tips for in-house counsel who may have to deal with arbitrations in the UAE. We have also picked up on some of the more interesting developments in arbitration in the UAE from the recent past, and focus on those matters which will enable in-house counsel to maximise the prospects of a successful outcome.

### Tip No. 10 – Tailor the dispute resolution clause

When transactions are being negotiated, the dispute resolution clause should be tailored to your needs so that if a dispute does arise, you are placed in the best possible position. Factors to be thoroughly considered include whether to go for ad hoc or institutional arbitration, the arbitral rules to be adopted, the number of arbitrators and the seat of the arbitration.

Depending on the rules chosen and the seat of the arbitration, other considerations may also come into play such as making express provision for the confidentiality of the proceedings and providing the tribunal with the power to apportion legal costs between the parties at the conclusion of an arbitration.

The importance of the latter in the context of the DIAC Rules was underlined by a recent case in which the Dubai Court of Cassation found that the DIAC Rules do not give an arbitral tribunal the power to apportion counsel's fees in an arbitration.<sup>2</sup> Where DIAC Rules are specified, it is therefore necessary to cover this off in the arbitration clause, or failing that, in the Terms of Reference for the arbitration.

### Tip No. 9 – Ensure that the signatories to the arbitration agreement are properly authorized

It is crucial to ensure that the parties signing the arbitration agreement have authority to do so.

Failure to do this can open up an award to challenge pursuant to Article 203(4) Civil Procedure Code on the grounds that the arbitration agreement was invalid.

Whereas for an individual, this is straightforward, for a corporate entity or government department, it is less so. Whilst this is a topic for an article in itself, the recent case of *Middle East Foundations LLC v Meydan Group LLC*<sup>3</sup> has shown that the arduous approval requirements to enter into an arbitration agreement with a government department are not generally necessary where one is simply dealing with a private company in which the government has a shareholding.

#### **Tip No. 8 – Avoid the “without prejudice” trap**

In many jurisdictions correspondence marked “without prejudice” cannot be referred to in any subsequent proceedings without both parties consent. In the UAE such privilege does not generally apply. Parties should therefore be careful to ensure that they avoid the trap of referring to matters in such correspondence which they would not wish disclosed to an arbitral tribunal.

#### **Tip No. 7 – Follow the machinery in the dispute resolution clause**

Dispute resolution clauses frequently contain a tiered process which should be followed before arbitration proceedings are issued. These may require the service of formal notices and/or that the parties first attempt amicable settlement. Such provisions are ignored at a claimant’s peril as they can, amongst other things, result in a tribunal refusing to take jurisdiction over the dispute.

#### **Tip No. 6 – Choose the most suitable Tribunal**

It is important to choose the tribunal that is most suitable for determining a particular case. The best tribunal for determining a construction delay dispute is unlikely to be the most appropriate tribunal for determining a complex derivatives dispute. In addition, in this region where the failure to follow local requirements can result in the challenge of an arbitration award, it can be worth having at least one member of the Tribunal who is

very familiar with these requirements. As the UAE arbitration market has developed, the degree of choice available to parties has increased.

#### **Tip No. 5 – Powers of Attorney**

The received wisdom amongst experienced arbitration practitioners in the UAE is that lawyers representing a party in arbitration must have a valid special Power of Attorney. A recent Court of Cassation decision has suggested that is not necessary.<sup>4</sup> However, best practice remains that such a Power of Attorney be provided. Indeed, the DIAC Rules permit an arbitrator to request proof of authority from a party’s legal representative “*in such form as the Tribunal may determine*”, and it is usual practice for arbitrators in the UAE to insist that a Power of Attorney be provided to evidence authority.

#### **Tip No. 4 – Beware Public Policy**

A line of recent cases has cast prominence on the principle that cases involving issues of public policy are not arbitrable. An attempt to refer such cases to arbitration may result in an arbitral award being annulled. For instance in *Baiti Real Estate Development v Dynasty Zarooni Inc*,<sup>5</sup> the Court found that whether the non-registration of a property rendered the sale transaction void was a matter of public policy, and therefore could not be arbitrated.

For this reason it is imperative that any claim referred to arbitration steers clear of matters which might be regarded as falling within the public policy jurisdiction of the Local Courts.

#### **Tip No. 3 – Obtain statements at the earliest opportunity**

The UAE has a transient population. It is not uncommon to encounter a situation where arbitration proceedings are issued in connection with a transaction or project where the key individuals that agreed the contractual terms or lead on the execution phase are no longer with the organisation. It is therefore important that preliminary statements be obtained from key

individuals at an early stage. Not only do memories fade with time, but once an employee has left the organisation he or she may be reluctant to commit the same time and effort to the exercise of putting together a statement.

### Tip No. 2 – It’s all about the documents...

A very eminent High Court Judge once advised that in even the most complex and substantial case, the judgment or award is likely to turn on not more than 50 documents. This is as true in arbitration in the Middle East as it is litigation in common law Courts. The trick of course is to identify those key documents, which is perhaps more easily said than done, especially when a dispute has just arisen. An important stepping stone to this is to ensure that evidence in general, and documents in particular, are preserved. In a digital age, this can mean not just letters, faxes and meeting notes, but also emails, texts and sometimes even messages sent through social media.

The initial documentary exercise should not just be viewed as an internal collection and preservation exercise, although that is of course an important part of it. It is also worth looking externally. In many cases it is much easier to obtain documents from third parties before arbitration has commenced as afterwards such parties can sometimes feel compelled to be partisan. The point applies with even greater force to the opposing party.

Prior to arbitration commencing there may still be sufficient goodwill for the other side to provide documents with a view to resolving the dispute. After proceedings have commenced, often the only way of obtaining documents is by making a formal disclosure application.

### Tip No. 1 – Involve specialist arbitration counsel at an early stage

Finally our top tip – involve specialist arbitration counsel at an early stage. This is perhaps fairly predictable advice. However, it is borne of many years of experience. Having specialist arbitration counsel involved at an early stage, before a dispute

has fully crystallised, usually results in considerable cost savings later on.

Often this is simply due to the fact that by taking the right strategic approach when issues first arise, a full blown dispute can be avoided. An early assessment of the strengths and weaknesses of a party’s position can also enable it to pursue a more informed negotiating strategy. Many of the matters which we have been involved with have been resolved in our clients’ favour without the need for proceedings to be issued for this very reason.

On other occasions, specialist counsel can help to craft a strategy which maximises the prospects of successfully obtaining a favourable arbitration award, by ensuring that the key issues are proactively addressed at the outset, the strengths of the case capitalised upon and any gaps plugged. It is worth noting that sometimes clients fear that having external lawyers involved at an early stage can serve to entrench the position of the parties. Whilst this is a legitimate concern, good external lawyers should have the opposite effect, providing objective assessment and robust guidance.

### About the Authors

Raza Mithani (Counsel) is a member of the firm’s International Arbitration group in the Middle East. The Middle East Dispute Resolution Practice is led by Adrian Cole who is an experienced arbitrator, adjudicator and mediator, and is a Fellow of the Chartered Institute of Arbitrators and a member of the Chartered Institute of Building.

King & Spalding has offices in Riyadh, Abu Dhabi and Dubai, and the team includes many of Chambers’ and Legal 500’s top-ranked Middle East energy, construction and disputes lawyers.

### End Notes:

<sup>1</sup> This article was first published in The Oath magazine

<sup>2</sup> Dubai Court of Cassation Property Appeal No. 282/2012.

<sup>3</sup> Dubai Court of Appeal Case No. 249/2013.

<sup>4</sup> Dubai Court of Cassation Property Appeal No. 216/2012.

<sup>5</sup> Dubai Court of Cassation Property Appeal No. 14/2012.

## Resources & Links

The following is a selection, with links, of recent King & Spalding publications in the Dispute Resolution and Crisis Management space.

### Legal Updates

**Arbitration:** Remedies under International Investment Treaties available to renewable energy investors harmed by retroactive legislative

**Arbitration:** Establishing the Application of the Foreign Sovereign Immunities Act's Arbitration Exception

**UK Litigation:** UK Supreme Court clarifies the Law on Penalties: Cavendish Square Holding BC v Talal El Makdessi

**US Litigation:** Is The "Good Cause" Standard Inadequate to Protect Your Company's Trade Secrets in Discovery Disputes?

**Energy:** Re-examining the Take-or-Pay Obligation in LNG Sale and Purchase Agreements

**Energy:** Steady regulations buyer relationships key successful LNG export projects

**Trade:** Energy in the Transatlantic Trade and Investment Partnership Negotiations: A European Perspective

**Trade:** Dispute Settlement at The WTO: Outlook For 2016

**Data:** Three Things In-House Counsel Needs to Know About Russia's New Data Localization Law

**Investigations:** SEC Behind Times in 'Modernizing' Administrative Proceedings

### King & Spalding News

**Recognition:** Law360 Names K&S Practice Groups of the Year for Energy, Environmental, International Trade and Product Liability

**Recognition:** King & Spalding Earns Multiple Top-Tier Rankings in 2016 Legal 500 Asia Pacific Guide

**Deal News:** King & Spalding Advises Anadarko on Unitization of Massive Gas Resource in Mozambique

**Deal News:** King & Spalding Represents AES on US\$700 Million Power Plant Expansion in the Philippines

**Recognition:** James Castello Joins London Court of International Arbitration's Board of Directors

**Recognition:** King & Spalding Earns Spot Among Top German Law Firms in Legal 500 Deutschland 2016 Rankings

**Recognition:** Daily Report Names King & Spalding Top Insurance Litigation Department

**Case News:** ITC Votes to Continue Orders on Unfair Trade of Magnesia Carbon Bricks from China and Mexico

## Global Contacts (with links to curricula vitae)

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### Select International Arbitration Partners



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Dubai



**John Savage**  
Singapore



**Elodie Dulac**  
Singapore



**Simon Dunbar**  
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**Harry Burnett**  
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**Caline Mouawad**  
New York



**John Bowman**  
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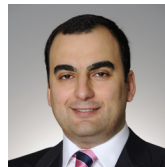
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### Select Other Global Disputes Partners



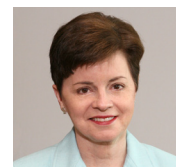
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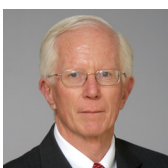
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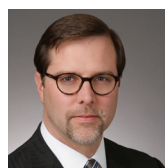
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