



CHAMBERS
Global Practice Guides

International Arbitration

Oman – Law & Practice

Contributed by

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Jamal & Co

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OMAN

LAW AND PRACTICE:

p.3

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The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

Law and Practice

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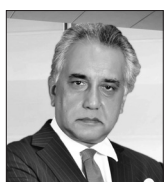
OMAN LAW AND PRACTICE

Contributed by Al Busaidy, Mansoor Jamal & Co **Author:** Mansoor Jamal Malik

Al Busaidy, Mansoor Jamal & Co Our eight-strong team of experienced arbitrators is led by founding partners, Mansoor Jamal Malik and Dr Said Hilall Al Busaidy, a former Supreme Court of Oman judge. The firm's key practice areas are construction and engineering, commercial contracts, banking and finance. The team includes international lawyers with multi-jurisdictional experience as well as senior Omani advocates. Team members draft and negotiate arbitration agreements, enforce arbitral awards and act as

counsel and expert witnesses in regional and international arbitrations. The team has experience in conducting arbitration proceedings under all of the major institutional and procedural rules in centres such as the London Court of International Arbitration (LCIA), ICC International Court of Arbitration, GCC Commercial Arbitration Centre and Dubai International Arbitration Centre. The team has a specialist focus in construction and engineering, power and water, trade, and finance and insurance sectors.

Authors



Mansoor Jamal Malik is the founder and managing partner of leading Oman law firm Al Busaidy, Mansoor Jamal & Co. He is head of the Arbitration Team. A UK-qualified barrister, Mansoor has significant expertise in prosecuting and defending high-value domestic and international arbitration of both public and private law disputes under ICSID and UNCITRAL rules before the ICC International Court of Arbitration and the London Court of International

Arbitration (LCIA). In Oman, Mansoor is licensed by the Ministry of Justice to appear before the Supreme Court, where he handles complex commercial litigation claims across a wide span of industry sectors including banking, power, water, agencies, insurance, employment and oil and gas. He is registered as a Court of Appeal panel arbitrator. Mansoor is a door tenant of the leading London Chambers of Stephen Tromans QC and Neil Block QC at Thirty Nine Essex Street. He has contributed to numerous publications relating to arbitration.

1. General

1.1 Prevalence of Arbitration

Increasingly over the years with the development and implementation of large infrastructure projects, with foreign participation in such projects by developers and financiers, it has been found that project and finance agreements have provided for disputes arising in them to be resolved through arbitration. Any such arbitrations, whether taking place in Oman or overseas and subject to Omani law, would be construed as international arbitrations.

Oman's Law of Arbitration in Civil and Commercial Disputes, RD 47 of 1997 (ACCD), regulates arbitration proceedings in relation to civil and commercial disputes and is applicable to international as well as domestic arbitration proceedings. Arbitration under ACCD is considered international if the disputed matter relates to international commerce as provided for by Article 3 of ACCD. The principal distinction to be drawn between domestic and international arbitration arises from the primary court having jurisdiction to consider all matters relating to domestic arbitrations and the appellate court having jurisdiction over matters relating to international arbitrations, whether taking place in Oman or abroad.

1.2 Trends

There were no noteworthy trends in or current issues affecting the use of arbitration in the Sultanate of Oman in 2017.

1.3 Key Industries

The disputes most commonly referred to arbitration are in the construction and engineering sectors.

1.4 Arbitral Institutions

International Chamber of Commerce (ICC) rules, Dubai International Financial Centre-London Court of International Arbitration (DIFC-LCIA), United Nations Commission on International Trade Law (UNCITRAL), and International Centre for Settlement of Investment Disputes (ICSID). and

2. Governing Law

2.1 Governing Law

The ACCD governs the conduct of international arbitration and is broadly based on the UNCITRAL Model Law. If the parties have provided for the governing law of their dispute to be Omani Law then in addition to the ACCD, other laws that may apply to their intended arbitration in Oman will be as follows:

- Civil and Commercial Procedure Law (RD 29/2002) (CCPL);

- The Law of Evidence in Civil and Commercial Transactions (Royal Decree 68/2008). (Evidence Law);
- Electronic Transaction Law (Royal Decree 69/2008 (ETL)
- Civil Transactions Law (Royal Decree 29/2013) (CTL);
- Commercial Code (Royal Decree 55/1990) (CC);
- Basic Law of Oman (Royal Decree 101/1996) (Basic Law); and
- The Advocacy Law (Royal Decree 108/96).

Articles 352 and 353 of the CCPL dealing with the enforcement of foreign arbitral awards are broadly based on the New York Convention.

2.2 Changes to National Law

There have been no significant changes to national arbitration law in the past year.

3. Arbitration Agreement

3.1 Enforceability

Under Omani law, an arbitration agreement must comply with the following in order to be valid and binding:

- A reference to arbitration with respect to a commercial dispute based on a legal relationship arising out of an economic activity, and the subject matter must be permissible by law (contractual or not) (Article 2 of the ACCD).
- A clear and express agreement to arbitrate (Article 10 of the ACCD).
- Parties must have the legal capacity to contract (Article 11 of the ACCD).
- The agreement must be in writing duly signed by both parties or contained in written correspondence exchanged by both parties (Article 12 of the ACCD)

Arbitration agreements satisfying the requirements of the ACCD are generally upheld and enforced strictly by the Omani courts, and the courts will invariably decline jurisdiction should the defendant in litigation adduce evidence of an arbitration agreement between the parties.

3.2 Arbitrability

Non-commercial disputes involving criminal allegations and personal matters may not be referred for arbitration.

The general approach used in determining whether or not a dispute is arbitrable is based on the legal relationship arising out of an economic activity and does not concern matters in respect of which arbitration is not permitted by law, eg personal matters, family disputes or allegations of criminality.

3.3 National Courts' Approach

Arbitration agreements satisfying the requirements of the ACCD are generally upheld and enforced strictly by the

Omani courts, and the courts will invariably decline jurisdiction should the defendant in litigation adduce evidence of an arbitration agreement between the parties.

Article 13 of the ACCD provides that the court before which a suit is filed with regard to a dispute in respect of which an arbitration agreement exists must dismiss the suit provided the defendant requests such dismissal prior to submitting any petition or substantive defence in respect of the suit.

3.4 Validity

Notwithstanding the invalidity of the terms of a contract, the arbitration clause contained therein will be treated as being valid, pursuant to which the parties will arbitrate any disputes arising between themselves independent from the other conditions provided for in the agreement. Invalidation of the agreement or its revocation or termination will not affect the arbitration clause provided for in the agreement, provided the arbitration clause itself is valid (Article 23 of the ACCD).

4. The Arbitral Tribunal

4.1 Limits on Selection

The parties are at liberty to seek the arbitrators of their choice subject to Articles 15 to 24 of the ACCD. Article 16 of the ACCD sets out the criteria for the appointment of an arbitrator.

Any person to be appointed as an arbitrator must be impartial and independent and should not be a minor or be placed under the guardianship of another, or have been disqualified from exercising their civil rights on account of having been convicted of a criminal offence of misdemeanour resulting in a breach of honour or trust, or declared bankrupt. It should be someone who has no conflict of interest arising from their appointment as an arbitrator.

4.2 Default Procedures

In case the parties are unable to agree on the appointment of their arbitrator as per the terms of their agreement, then Article 17(1) of the ACCD provides a default mechanism to facilitate the appointment of arbitrators. Pursuant to which, on receipt of an application from an interested contracting party, the president of the Commercial Court will appoint an arbitrator.

4.3 Court Intervention

In circumstances where the parties have not been able to agree on the appointment of a single arbitrator or in the case of a panel of three arbitrators in which the two appointed arbitrators are not able to agree on the appointment of a third arbitrator within 30 days from the date of their appointment, then the competent court may intervene over

the appointment of the arbitrators on an application from the contracting parties (Article 17 of the ACCD). The competent court's decision with regard to the appointment of an arbitrator is binding and is subject to appeal (Article 17(3) of the ACCD).

4.4 Challenge and Removal of Arbitrators

An arbitrator may be removed through an application in writing for recusation pursuant to Articles 18 to 20 of the ACCD if it can be demonstrated that there appear to exist circumstances giving rise to serious doubt and suspicion as to the impartiality of the nominated arbitrator or their ability to function independently.

Parties nominating an arbitrator or who have participated in the nomination of an arbitrator will not be permitted to apply for the recusation of the arbitrator nominated by them or in whose nomination they have participated unless the reasons referred to above have become known to them only after such nomination.

For the recusation of an arbitrator an application may be made in writing to the arbitral tribunal, explaining the grounds for recusation, within 15 days from the date when the applicant became aware of the constitution of the arbitral tribunal or the circumstances which justify the recusation. If the application for recusation is not acceptable to the arbitrator whose appointment has been challenged, the arbitration tribunal must then decide on the application. Such an application may not be repeated by the same applicant in the arbitration proceedings.

On rejection of an application for recusation, the applicant may appeal against the decision of the arbitral tribunal within 30 days from the date of its notification before the competent court. The decision of such a court is binding on the parties.

Notwithstanding an application for recusation or an appeal against the rejection of an application having been filed, arbitration proceedings may continue. If a decision is taken either by the arbitration tribunal or by the competent court directing the recusation of an arbitrator, the arbitration proceedings or any award passed by the arbitration tribunal concerning them will be considered null and void.

4.5 Arbitrator Requirements

Any person nominated to be an arbitrator must be independent and impartial, and they must not have a conflict of interest in respect of the arbitration for which they have been appointed. If any potential conflict of interest exists on the part of the nominated arbitrator, such potential conflict must be disclosed. In the absence of this, if the arbitrator is found to be lacking in independence or impartiality, or has

a conflict of interest, then an application may be made for their recusation.

5. Jurisdiction

5.1 Matters Excluded from Arbitration

Non-commercial disputes involving criminal allegations and personal matters may not be referred for arbitration.

The general approach used in determining whether or not a dispute is arbitrable is based on the legal relationship arising out of an economic activity and does not concern matters in respect of which arbitration is not permitted by law, eg personal matters, family disputes or allegations of criminality.

5.2 Challenges to Jurisdiction

In accordance with Article 22 of the ACCD, the arbitrator may rule on the question of their own jurisdiction.

5.3 Circumstances for Court Intervention

The competent court may address issues of jurisdiction and competence of the arbitration tribunal in circumstances relating to deficiencies in the appointment (Article 17(2) of the ACCD), or the impartiality or independence of the arbitrator (Article 18 of the ACCD), where an arbitrator cannot perform or fails to perform their duty (Article 20 of the ACCD), or due to the termination of an arbitrator (Article 21 of the ACCD). Article 22 of the ACCD gives the arbitral tribunal the right to question the tribunal's jurisdiction in circumstances where the arbitration agreement is challenged due to its non-existence, invalidity or irrelevancy.

5.4 Timing of Challenge

In accordance with Article 53 (1) of ACCD, a suit for nullification of an arbitration award may be filed where an award has been issued in the absence of an agreement in respect of the arbitration or if the agreement was void, voidable or time-barred.

5.5 Standard of Judicial Review for Jurisdiction/ Admissibility

It would be for the court to consider pursuant to Article 53 (1) of ACCD whether or not there existed an agreement to arbitrate. Questions of admissibility and jurisdiction before the Appeal Court may be determined on the basis of administrative records and any additional evidence the parties may present.

5.6 Breach of Arbitration Agreement

In cases filed before the Omani courts where the contract in dispute provides for arbitration, if the defendant raises an objection to the jurisdiction of the Omani courts on the basis that there exists an arbitration agreement, and such an objection is raised prior to the filing of any submissions

with regard to a substantive defence to the case, the court will dismiss the proceedings filed before it (Article 13 of the ACCD).

5.7 Third Parties

An arbitral tribunal may only assume jurisdiction over individuals or entities which are not party to an arbitration agreement if the third party voluntarily agrees to submit to the tribunal's jurisdiction or if there is a separate agreement in place between the third party and one of the arbitrating parties. It would mostly depend on the arbitrating parties and the third party as to whether they wish to have the matter arbitrated before the same tribunal. Where the third party is not a party to the arbitration agreement, the arbitral tribunal will not be empowered to include such a third party as a party to the arbitration proceedings.

6. Preliminary and Interim Relief

6.1 Types of Relief

An arbitral tribunal may issue preliminary relief or orders or make decisions in respect of part of the claims made prior to the issuance of its final award on the disputed matter (Article 42 of the ACCD).

6.2 Role of Courts

Pursuant to Article 14 of the ACCD, the competent court is empowered to grant preliminary or interim relief in proceedings which are subject to arbitration. Parties may apply to the court in circumstances where the arbitrator refuses and/or does not grant a relief to the party seeking such relief. The parties may also apply to the court for relief where an interim order passed by the arbitral tribunal has not been complied with.

6.3 Security for Costs

The CCPL confers general powers on the courts to issue orders on security for costs with regard to payment of third-party costs in advance of the payment being made, eg for court-appointed experts. Although the court would have the power to order security for costs there are no cases in which this is known to have happened.

7. Procedure

7.1 Governing Rules

Except to the extent provided for in the ACCD, there are no set rules or laws governing the procedure of the arbitral proceedings. Most arbitrators and tribunals, along with the parties, will finalise their own procedural rules during the first hearing. Any procedure decided on should not be contrary to the laws of Oman, however.

7.2 Procedural Steps

In accordance with Article 5 of ACCD, the parties to the arbitration are at liberty to select, at their first hearing, the procedural rules to be made applicable to their arbitration, or appoint a third party to make a determination of what procedural rules may be made applicable. Such a third party may be an arbitration organisation centre based in the Sultanate of Oman or overseas. Omani law does not specify any procedural rules required to be followed with regard to the conduct of arbitration.

7.3 Powers and Duties of Arbitrators

In addition to the powers and obligations set out in the laws mentioned above, Article 26 of the ACCD provides that the parties should be treated with equality by the arbitral tribunal and given an adequate and sufficient opportunity to argue their respective case.

It is incumbent on arbitral tribunal to carry out whatever they perceive as suitable for an arbitration proceeding, such as "hearing of parties, inspection of the goods, properties and conducting deliberations between its members etc," and the arbitrators are under a duty to treat all parties equally and to take all steps necessary to do justice between the parties.

The arbitrators must proceed with the arbitration in a diligent and expeditious manner and render an award within the statutory period of 12 months, subject to an extension (Article 28 of the ACCD) for reasons of justice, and decide whether some or all submitted documents need to be translated or not.

An arbitrator is expected to pass a judgment either within a period specified by the parties or within 12 months. Also, an arbitrator has the discretion to accept or decline an arbitration assignment with valid justification (Article 16(3) of the ACCD).

7.4 Legal Representatives

The Advocacy Law Royal Decree 108/96 sets out the rules which govern the conduct of counsel. The Advocacy Law does not specifically ascribe to a code of conduct for counsel from other jurisdictions

In accordance with Articles 2 and 3 of the Advocacy Law of Oman, it is not permissible for advocates to undertake litigation in Oman, including appearing before an arbitration panel or body, unless they are registered on the Register of Advocates maintained in accordance with the Advocacy Law of Oman. Consequently, it may not be permissible for foreign lawyers to appear before arbitration panels or bodies in Oman unless they are registered on the Advocacy Register.

8. Evidence

8.1 Collection and Submission of Evidence

When filing a statement of claim the plaintiff is required to submit all supporting documents with it. The statement of claim is then served on the defendant by the court when it summons the defendant. The plaintiff will not, however, be stopped from filing further documentary evidence in response to any submission filed by the defendant or by way of supplementary evidence during the course of the proceedings.

Parties may call witnesses to provide oral evidence and the court may of its own accord request the calling of oral evidence subject to the rules, restrictions and limitations set out in the Evidence Law.

The Evidence Law, as in the case of the law of evidence in other jurisdictions, places the burden of proof on the party making a particular allegation. The facts intended to be proved are required to be related to the case, relevant and admissible, and each party is required to provide documentary or oral evidence in support of its case. However, if a judge does not find the requisite provision in the Evidence Law they are required under Article 9 of the Evidence Law to rule in accordance with the general principles of the Sharia.

Article 43 of the Evidence Law provides that evidence may be established through testimony of witnesses on matters that should have been established in writing where (i) there is a material or moral obstacle that prevents written evidence from being obtained, (ii) the creditor loses written documents for reasons beyond their control, and (iii) the court is satisfied that evidence may be established through the testimony of witnesses. For the purposes of the ETL (Electronic Transactions Law) and the Evidence Law, Article 43 of the Evidence Law may be relied on by a party endeavouring to prove the existence of a contract through persons who could have witnessed the conclusion of a contract.

Pursuant to the Evidence Law, parties to proceedings may in certain circumstances require their adversaries through court orders to submit any documents in their possession that are relevant to the case. This process is not dissimilar to the process of discovery found in other common law jurisdictions. The right of discovery under the Evidence Law may be exercised when (i) the law requires a party to submit documents, (ii) the documents are common between the parties to the proceedings, or (iii) the adversary uses it as a documentary basis at any stage.

If the applicant substantiates its claim that a document is in the possession of the adversary to the proceedings and the adversary accepts such a claim, then the court will order the production of such a document. If the adversary does not

produce the document on a date set by the court, the copy of the document submitted by the applicant will be treated as valid and compatible with the original.

Omani courts will assess the corroborative value of documents submitted. If the court is of the opinion that the authenticity of a document is in doubt it may summon the person who drafted it to provide evidence. This is important from the perspective of the ETL, since notwithstanding the presumption under the ETL that an electronic transaction relates to fulfilling a contractual undertaking, the court may require the originator or the addressee (as the case may be) to provide verification. The court may also, of its own volition, ask any administrative entity to submit in writing the necessary information and papers available to proceed with the case, unless doing so would contravene the public interest.

Unless otherwise agreed by the parties, arbitrators may only exercise powers to order discovery/disclosure in accordance with the Evidence Law. Scope for third-party disclosure is limited, and the court's intervention may be required.

8.2 Rules of Evidence

The Evidence Law and/or the rules agreed between the parties during the first arbitral procedural hearing apply.

8.3 Powers of Compulsion

The Evidence Law regulates the admission and treatment of documentary evidence in addition to providing rules for admission of oral witness testimony, the swearing in of witnesses and their cross-examination. Chapter VIII of the Evidence Law sets out the rules and regulations applicable to the calling of expert evidence.

Article 33(4) of the ACCD says witnesses and experts may testify without the need to be sworn in before the tribunal, but this provision would in our opinion be superseded by conflicting provisions contained in the Evidence Law.

9. Confidentiality

There is no specific provision on the confidentiality of arbitration proceedings. However, the judicial system treats such proceedings as private and confidential (meaning there is no disclosure or publication, and only the parties concerned receive copies of the award etc). Despite this the courts may rely on other arbitral or court proceedings as precedents between the same parties. The arbitral tribunal may decide whether or not to allow unrelated third parties to attend the proceedings.

10. The Award

10.1 Legal Requirements

Legal requirements of an arbitral award are set out in Articles 43 and 44 of the ACCD, which stipulate the following:

- The award must be in writing and signed by the arbitral tribunal. If the tribunal has more than one member the award may be signed by only a majority of the arbitrators. The reason for the absence of signatures of the minority or the remaining arbitrators should be stated in the award.
- The award must contain the reasoning for the decision and the grounds on which it is made, unless decided otherwise or if the law to be applied to the arbitration proceedings does not require the reasoning and/or the grounds for the award to be expressly set out.
- The names and addresses of the litigants, the arbitral tribunal members' names, addresses, nationalities and capacity/designations, the text of the arbitration clause, a summary of the claims made by the litigants, their statements, documents, the gist of the award, the date and place of its issue, and the reasoning on which it is based (if required) must all be stated in the award.

10.2 Types of Remedies

The arbitral tribunal is empowered to grant all kinds of remedies including, but not limited to, the award of damages, specific performance, rectification, injunctions etc. The tribunal is prevented, however, from imposing any penalties or sanctions that might otherwise be imposed under the Criminal Law or to make any grant of other public law remedies which fall within the exclusive jurisdiction of a court of law. Punitive damages are not recognised under Omani law.

10.3 Recovering Interest and Legal Costs

Interest can be claimed if provided for by the contract or agreement, and it will accrue from the date of default until final settlement. Unless provided for by contract, the current rate of interest approved pursuant to Article 80 of the Commercial Code is applied. For 2016 it was 6.5%.

11. Review of an Award

11.1 Grounds for Appeal

As noted above, there can be no appeal against an arbitral award. However, an application may be filed within 90 days from the date of the passing of the award, before the Appeal Court for nullification of the arbitral award on the basis of any of the grounds for nullification set out in Article 54(1) of the ACCD.

11.2 Excluding/Expanding the Scope of Appeal

Parties may by agreement exclude any basis for challenge of an arbitral award. However, in accordance with Article 54 of

the ACCD, even if the parties waived their rights to seek a nullification of an arbitral award prior to the passing of the award, such a waiver would not prevent the aggrieved party from filing a suit thereafter.

11.3 Standard of Judicial Review

When considering a suit for nullification of an arbitration award, the Appeal Court may consider the facts and applicable law. The court may place reliance on the pre-existing records of the case and allow the parties to submit new evidence.

12. Enforcement of an Award

12.1 New York Convention

Oman is a contracting state of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention). Oman ratified the Convention on 25 February 1999 pursuant to RD 36/98. Oman did not stipulate any reservations when ratifying the Convention.

In addition to the Convention, Oman has signed and is a contracting state to the following regional Conventions:

- The Riyadh Convention on Judicial Cooperation between States of the Arab League (1983);
- The GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications (1987);
- The Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965).

12.2 Enforcement Procedure

Article 28 of the CTL and Article 352 of the CCPL set out a number of conditions which are required to be satisfied before the enforcement of an international arbitral award, such as the principle of reciprocity, public policy, and that the law specified should not be contrary to Sharia, public order or morals in Oman.

Under Articles 352 to 355 of the CCPL, applications may be submitted to courts of first instance in Oman for enforcement of judgments and orders passed by foreign courts. An order for execution of a foreign judgment or order must not be passed by the Primary Commercial Court unless the court is satisfied that:

- (i) the judicial authority which passed the foreign judgment or order had jurisdiction, in accordance with the rules governing international judicial jurisdictions, as provided for in the law of the country where the judgment or order was passed, and the judgment or order was to be treated as final in accordance with such law, and was not passed on the basis of deceit and fraud;

- (ii) the parties to the suit in respect of which the foreign judgment was passed were summoned to appear, and were represented in a proper manner;
- (iii) the judgment or order does not contain any request which is essentially in violation of any of the laws prevailing in the Sultanate of Oman;
- (iv) the judgment or order was neither in conflict with a judgment or order passed earlier by a court in the Sultanate of Oman, nor does it contain anything which is against public order or morals; and
- (v) the country where the judgment was passed accepts, for carrying out in its territory, judgments passed by the courts of the Sultanate of Oman.

12.3 Approach of the Courts

The national courts recognise and enforce domestic awards once the period prescribed for filing a suit for nullification of such an award has lapsed. The courts may not recognise or enforce arbitral awards if the award conflicts with a decision passed earlier by the Omani courts, if the award contains terms which contravene public order, or if the judgment debtor has not been notified of the award in a proper manner (Article 58 of the ACCD).

Article 47 of ACCD stipulates that parties should go to the primary court (enforcement department) for enforcement of an arbitral award.

The recognition and enforcement of international arbitral awards is based on bilateral or multilateral conventions between Oman and the other country concerned. In addition, an international arbitral award is subject to a set of conditions set out in Article 352 of the CCPL with particular emphasis on the principle of reciprocity.

The procedure to enforce an arbitral award requires the following:

- the original award or a copy signed by the applicant;
- a copy of the arbitration agreement/clause;
- a translation into Arabic, duly endorsed by a certified firm;
- a copy of the minutes confirming filing of the award.

In addition, the 90-day period for nullification of the award must have lapsed before an application for enforcement of it can be considered by the courts (Article 58(1) of the ACCD).

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