

Transportation Disputes: Can Arbitration Deliver the Goods?

by John Gaffney - j.gaffney@tamimi.com - Abu Dhabi
Malak Nasreddine - m.nasreddine@tamimi.com - Abu Dhabi, UAE

October 2017

The transport sector has witnessed a great deal of growth across the MENA region. Following such growth, transport disputes are naturally expected to increase. Transport contracts and/or cases often involve a complex and specialised set of laws and rules. Given the complex nature of transport disputes, such disputes can be caught up in litigation for years, with possible stages of appeal.

Introduction

Arbitration provides certain advantages in the resolution of transport disputes. Parties can appoint an arbitrator who is specialised and knowledgeable in the relevant transport field. Moreover, the arbitral procedure is usually private and confidential (on which, please see our colleagues' article in this edition of the Law Update), and is more suitable for sensitive commercial transport matters. Arbitration can also be cost effective and faster than litigation, since there is usually no appeal. In addition, an arbitration award can be enforced in multiple jurisdictions, pursuant to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention") and/or regional or bilateral treaties. Recognising the advantages offered by arbitration, parties are encouraged to consider arbitration as a forum to resolve transport disputes.

This note reviews the extent to which arbitration is utilized in resolving disputes across different modes of transport, namely maritime, aviation, and land sectors (the interesting area of space transport is not considered here).

Maritime

The United Kingdom has a long history of maritime transport and has been viewed as a key jurisdiction for resolving maritime disputes. The London Maritime Arbitrators Association ("LMAA") is considered to be a prominent association of maritime arbitrators. The LMAA aims to support maritime arbitrations, but does not administer or supervise the arbitration proceedings. Unlike other organisations (such as the Chambre Arbitrale Maritime in Paris, which is discussed below), the LMAA will only appoint arbitrators when the arbitration agreement provides for it. The LMAA Terms (2012) govern the majority of London maritime arbitrations.

The Chambre Arbitrale Maritime in Paris ("CAMP") is another prominent and leading arbitration centre. The CAMP supports international maritime arbitrations and supervises arbitration proceedings. The CAMP offers Arbitration Rules (2014) which govern the arbitration proceedings.

The LMAA and CAMP have been popular venues for maritime arbitration and attract disputing parties from the MENA region to resolve their disputes pursuant to its Rules.

Until recently, there were no specialised maritime arbitration institutions in the MENA region. Parties would usually opt to arbitrate their international maritime disputes in the LMAA or CAMP (or to a lesser extent with the Hong Kong Maritime Arbitration Group or the Transport and Maritime Arbitration Rotterdam-Amsterdam foundation). However, in 2016, the Emirates Maritime Arbitration Centre ("EMAC") launched in the United Arab Emirates ("UAE"), becoming the only specialised

arbitration centre in the MENA region. EMAC thus filled a gap in the international maritime arbitration market by establishing the first regional maritime arbitration centre.

EMAC is based in the Dubai International Financial Centre (“DIFC”), a financial free zone in the emirate of Dubai. The DIFC is the default seat of EMAC arbitration and the DIFC Courts will have supervisory jurisdiction (unless parties agree otherwise). The DIFC Courts and the Dubai Courts entered into a Memorandum of Guidance which, together with the Dubai Law No 12 of 2014, provides for the reciprocal enforcement of judgements and awards without the review of their merits. An EMAC award ought to be enforceable in the emirate of Dubai, and subsequently throughout the UAE.

Moreover, MENA parties opting into EMAC arbitration will enjoy the advantage of an internationally enforceable award, as any final award rendered in the DIFC Court ought to be enforceable in any New York Convention state pursuant to the New York Convention (subject to the limited grounds for challenge under the New York Convention).

Aviation

Aviation disputes occur at different levels, namely interstate, business-to-business and business-to-consumer disputes.

Aviation transport is largely governed by the Convention on International Civil Aviation (“Chicago Convention”). The Chicago Convention developed a unified mechanism for technical and economical regulation of international air transport. It also developed the International Civil Aviation Organization (“ICAO”), a United Nations agency specialised in managing and administering the Convention. ICAO works with the member states of the Chicago Convention and industry groups to reach consensus on international civil aviation Standards and Recommended Practices (“SARP”) in support of the civil aviation sector. The International Air Transport Association (“IATA”) is the trade association for the world’s airlines; it supports many areas of aviation activities and helps formulate industry policies on critical aviation issues. However, these bodies are not usually considered in the resolution of account disputes.

In relation to interstate disputes, the leading international dispute resolution forums for resolving international aviation disputes are the ICAO Council and the Dispute Settlement Body (“DSB”) in the World Trade Organization. The World Trade Organisation may have jurisdiction over certain aviation disputes pursuant to the General Agreement on Trade in Services (“GATS”), which governs air transport services excluding traffic rights and services directly related to traffic. While private parties have no right to directly access proceedings before the DSB (much of whose procedures resembles a court or arbitral tribunal), they may enjoy indirect access through established complaint mechanisms (e.g., private complainants may raise WTO-based objections about the regulations of other countries pursuant to the European Trade Barriers Regulation).

Aviation disputes require specialised knowledge of technology, science, and air law. Scholars have identified the trend of choosing arbitration in bilateral agreements since 1962. For instance, the Open Skies Agreement between the US and the EU has stipulated that arbitration is the sole dispute resolution mechanism to resolve any dispute.

In the case of business-to-business and business-to-consumer disputes in the MENA region, parties involved in an aviation dispute tend predominantly to resolve their cases through litigation. Aviation disputes, specifically disputes arising out of airport operations and liability claims (such as claims related to loss and destruction of cargo or baggage, injury and death, and delays in transport), are often resolved through the courts of competent jurisdiction (the courts of England & Wales tend to be a popular jurisdiction for aviation disputes); in instances of death or injury (or any case that relates to the jurisdiction’s public policy), parties will tend resolve their dispute in the

court/jurisdiction where the incident occurred.

In relation to business-to-business transactional disputes, parties can choose to include an arbitration clause in their agreements. For the reasons stated earlier, parties may be well-served to resolve their aviation disputes arising out of transactional agreements (such as leasing and financing) through arbitration. Unlike the maritime sector, there is no specialised arbitration centre for resolving aviation disputes in the MENA region. Parties can resolve their disputes through ad hoc or institutional arbitration (e.g., before leading arbitration centres such as the London Court of International Arbitration (“LCIA”), International Chamber of Commerce (“ICC”), and Dubai International Arbitration Centre (“DIAC”).

Land Transport

Similar to the aviation sector, there is no specialised arbitration centre for resolving land transport disputes in the MENA region. While arbitration (both ad hoc and institutional) remains a popular choice for resolving transport disputes, the parties often opt in to other foreign jurisdictions with specialised arbitration centres (or settle for ad hoc arbitrations in their jurisdiction). Parties also often choose to arbitrate their land transport disputes in local non-specialized MENA arbitration centres, such as DIAC.

In the Netherlands, the Transport and Maritime Arbitration Rotterdam-Amsterdam foundation (“TAMARA”) provides a platform for arbitration in the areas of shipping, shipbuilding, transport, storage, logistics and international trade. It is also a popular forum for the resolution of maritime disputes. The TAMARA offers parties the possibility of e-arbitration, where parties conduct the arbitration proceedings on an online platform.

In addition, the International Arbitration Court for Transport Justice (“IACTJ”) in Romania is another independent body specialised in arbitration in the area of transport and other related activities such as customs brokers’ and freight forwarders’ activities, storage and handling of goods, postal and courier services. The IACTJ is operating at the Romanian Association of International Road Transport according to the rules applicable to all the disputes submitted to its jurisdiction pursuant to a given arbitration agreement.

Investment Treaty Arbitration

With the advent of bilateral investment treaties (“BITs”) (and free trade agreements (“FTAs”)), there has been an explosion in dispute settlement arrangements creating direct access for private investors in investment-related disputes with host States (unlike, say, interstate WTO disputes). Hence, foreign investors who have invested in the transport sector of a given host State may have direct access to international arbitration against the relevant host State where it violates the terms of the applicable BIT or FTA in its treatment of the transport-related investment.

Conclusion

In concluding this brief review, we observe that arbitration generally offers an attractive forum for resolving many types of transport-related disputes at various levels, especially at the business-to-business level. However, the precise choice of forum for the resolution of disputes must be considered with specialized external or in-house counsel on a case-by-case basis, having regard to all relevant factors. EMAC is to be congratulated on setting a wonderful precedent by providing MENA-based parties in the maritime transport sector with a specialized arbitration centre in the UAE; it remains to be seen whether similar developments will follow in other transport sectors in the MENA region.