



Webinar:

“Construction Arbitration in the MENA Region” Yonsoo Kim

“Pet Peeves of Counsel and Arbitrators”
Richard Wilmot-Smith QC

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Richard Wilmot-Smith-QC



Yonsoo Kim



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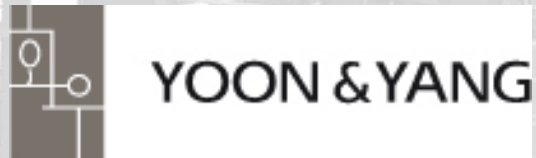
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“Construction Arbitration in the MENA Region”



Yonsoo Kim



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Construction Arbitration in the MENA Region

Yonsoo Kim



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INTRODUCTION



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INTRODUCTION



MENA Region : the **M**iddle **E**ast and **N**orth **A**frica,
which corresponds to the Greater Middle East

- **Islamic shariah** forms the basis for legislation in the region.

▶ [샤리아 법을 기초로 발달](#)

- **Civil Law Principles**

- The French Civil Code has influenced the civil codes of many MENA countries including Egypt, which in turn is viewed as the source and model on the basis of which many Arab countries have modelled their laws.

▶ [이집트를 중심으로, 대륙법계인 프랑스 법의 전파](#)

- Egypt has impacted and influenced the laws of other civil law Arab countries.

▶ [이집트 법의 아랍 국가로의 전파와 영향](#)



Introduction

- The MENA region has witnessed **progression and development in the construction industry and infrastructure projects** over the past two decades.
 - ▶ [MENA의 건설 및 인프라 프로젝트의 활성화](#)
- **Construction disputes** commonly **rank at the top of disputes arbitrated** before institutions in the MENA region. ▶ [MENA 지역 내 건설 중재 건수 상위](#)
- The construction industry is **dispute-rich** and **claims-oriented**; thus, such disputes usually revolve around time, costs, variations, liability or quality issues. ▶ [클레임/분쟁의 높은 발생 가능성](#)
- Construction disputes also **involve multiple parties** (employers, contractors, subcontractors, suppliers, insurers, funders, etc.)
 - ▶ [다자간의 계약을 포함](#)



1 Legal Principles in the MENA region



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1. Legal Principle – Good Faith

- **Good Faith** is a sacrosanct principle of law recognised all throughout the MENA region and a prevailing principle in the laws of Arab states. ▶ [신의칙의 기본 원리](#)



[Example] Article 246 of UAE Civil Code:

*“ (1) The contract must be performed in accordance with its contents, and in a manner consistent with the requirements of **good faith**.*

(2) The contract shall not be restricted to an obligation upon the contracting party to do that which is (expressly) contained in it, but shall also embrace that which is appurtenant to it by virtue of the law, custom, and the nature of the transaction. ”



[Example] Article 172 of Qatar Civil Code:

*“ (1) A contract shall be performed in accordance with its provisions and in such manner consistent with the requirements of **good faith**.*

(2) A contract shall not be limited only to binding a party to its provisions but shall also cover whatever is required by law, customary practice and justice in accordance with the nature of the obligations contained in the contract. ”

1. Legal Principle – Good Faith

- The **importance** of the principle of good faith **lies in the consequences of the breach** thereof, where a party's liability is usually aggravated whenever it is established that its acts or omissions were not undertaken in good faith or were proven to be undertaken in bad faith.
 - ▶ 계약의 위반 시, 신의칙 적용이 중요하게 작용
- Good faith is generally **not limited to the performance of contracts** but **extends to the pre-contractual negotiations**. The duty of negotiation in good faith has several variants including, an obligation to negotiate transparently, as well as an obligation not unilaterally revoke what has been agreed.
 - ▶ 계약의 수행 뿐만 아니라 협상 단계에도 신의칙 적용
- A person is presumed to be acting in good faith unless proven otherwise, hence the rebuttable presumption of innocence and good faith performance. Nevertheless, **establishing gross fault or negligence is sufficient to evidence bad faith** and **shift the burden of proof** to the party claiming good faith performance.
 - ▶ 중과실을 증명할 경우, Bad Faith로 간주되며 Good Faith가 있음을 주장하는 사람에게 입증 책임이 있음

1. Legal Principle – L/D & Equitable Compensation

- Liquidated damages are an area where common law and civil law principles collide, and where administrative law principles intervene to distinguish penalties from delay damages. ▶ [영미법과 대륙법이 충돌하는 영역에 존재](#)
- Generally, in civil law contracts, a party may avoid damages by proving:
 - ▶ [대륙법에서 L/D 면책이 가능한 사유](#)
 - It committed no breach ▶ [계약 위반 사항이 없음](#)
 - The breach is attributable to an alien cause or the other party's acts or omissions
 - ▶ [계약 위반이 당사자와 관련 없는 이유로 발생](#)
 - The inexistence of a causal link ▶ [인과 관계가 없음](#)
 - No loss or harm was suffered or sustained by the aggrieved party
 - ▶ [실제 부담하는 손해가 없음](#)

1. Legal Principle – L/D & Equitable Compensation

- In addressing damages or harm in general, some legislation empowers courts and tribunals to quantify compensation, through the mechanism set out:

▶ [다수 법률에서, 법원/재판부에 보상의 범위를 판단하는 권한 부여](#)



[Example] Articles 390(2) of UAE Civil Code:

“ The judge may in all cases, upon the application of either of the parties, vary such agreement so as to make the compensation equal to the harm, and any agreement to the contrary shall be void ”



[Example] Articles 266 and 267 of Qatar Civil Code:

“ Article 266

The agreed compensation will not be payable if the debtor shows that the creditor has not incurred a loss. The court may reduce the compensation from what is agreed if the debtor shows that the determination is grossly excessive or that the obligation has been partially fulfilled. Any agreement to the contrary will be void.

Article 267

If the loss exceeds the value of the agreed compensation, the creditor may not demand more than this amount, unless he shows that the debtor has committed deception or gross mistake.”

2 Arbitration in the MENA region



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Arbitration in the MENA region

- Arbitration legislation in Arab countries: ▶ [아랍 국가의 중재법 사례](#)



[UAE]

- The new **UAE Federal Arbitration Law** (No. 6 of 2018) (“**Arbitration Law**”) was issued on 3 May 2018 and came into effect on 15 June 2018.
 - It **repeals** Articles 203 to 218 of the UAE Civil Procedure Code (No. 11 of 1992) (“**Arbitration Chapter**”).
 - It is largely based on **UNCITRAL Model Law** (with some departures).
 - It is highly anticipated and could have a significant impact on the conduct of arbitrations in the UAE.
- Positive improvements of arbitration in the UAE, including: ▶ [긍정적인 발전 방향](#)
 - Measures to improve efficiency and efficacy of arbitration procedures including interim and provisional powers granted to tribunals (e.g. Articles 2(1)-(3) (regarding parties’ option to chose other system), Article 28(2) & 33(3) (regarding hearing to take place via ‘modern communication technologies’ such as ‘skype’), etc.) ▶ [효율적인 중재 진행 도입](#)
 - Appointment of court of Appeal as primary court responsible for arbitration matters
▶ [항소 법원의 중심적인 역할](#)

Arbitration in the MENA region



[Qatar]

- **Civil and Commercial Arbitration Law** (No. 2 of 2017)



[Saudi Arabia]

- New Arbitration regulations (the **Executive Regulations of the Arbitration law**) came into force on 9 June 2012
- Royal Decree No. M/34 dated 24 May 1433H (corresponding to 16 April 2012 in the Gregorian calendar) ("**Arbitration law**")



[Kuwait]

- **Articles 173-188 of Civil Procedure Law** (No. 38 of 1980)
 - The **Judicial Arbitration Law** – in Civil and Commercial Matters (No. 11 of 1995)
-

Arbitration in the MENA region

- The International Chamber of Commerce (“**ICC**”) and the London Court of International Arbitration (“**LCIA**”) remain the leading arbitral institutions that administer, *inter alia*, large-scale construction disputes and arbitrations in the MENA region. ▶ [국제상공회의소\(ICC\) 및 런던중재재판소의 중요한 역할](#)
- Arbitration institutions in the MENA region: ▶ [MENA 지역의 주요 중재 기관](#)
 - Dubai International Financial Centre-London Court of International Arbitration (“**DIFC-LCIA**”)
 - Dubai International Arbitration Centre (“**DIAC**”)
 - Abu Dhabi Commercial Conciliation and Arbitration Centre (“**ADCCAC**”)
 - Qatar International Centre for Conciliation and Arbitration (“**QICCA**”)
 - Saudi Centre for Commercial Arbitration (“**SCCA**”)
 - Bahrain Chamber for Dispute Resolution (“**BCDR**”)
 - Cairo Regional Centre for International Commercial Arbitration (“**CRCICA**”)

Arbitration in the MENA region

- Common causes for dispute in the construction arbitration (1/2)

- ▶ 주요 건설 중재 이유

- Owner-related: ▶ 발주자 관련

- Variations initiated by the owner
- Excessive change of scope
- Late giving of possession
- Acceleration or suspension of works
- Payment delays
- Decision-making delays
- Financial Failure
- Site conditions

- Contractor-related: ▶ 계약자 관련

- Delay in work progress
- Time extensions
- Financial failure of the contractor
- Technical inadequacy of the contractor
- Excessive change orders
- Defects in maintenance
- Incompetency
- Defective construction and quality of works
- Subcontractor's inefficiency
- Ambiguities in contract documents
- Different interpretations of the contract provisions
- Risk allocation

Arbitration in the MENA region

- Common causes for dispute in the construction arbitration (2/2)

- ▶ 주요 건설 중재 이유

- Consultant-related: ▶ 감리 관련

- Errors and omission in design
- Differing site conditions
- Defective design
- Excessive quantity variations
- Inadequate or incomplete specifications

- Human behaviour-related: ▶ 인적 요인

- Adversarial or controversial culture
- Lack of communication
- Lack of team spirit
- Unrealistic expectations

- External factors: ▶ 외부 요인

- Environmental hazards
- Market inflation
- Unforeseen changes
- Labour disputes
- Legal and economic factors
- Fragmented structure of the sector

3 Enforcement in the MENA region



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Enforcement in the MENA region

- **Generally speaking**, the process of enforcing foreign arbitration awards in the Middle East has improved considerably over the past few years.

- ▶ [외국 중재 판정의 중동 국가에서의 집행 절차의 발전](#)

- Recent changes in legislation **have simplified** the procedure for **recognition** and **enforcement** in the region.

- ▶ [외국 중재 판정의 확정 및 집행](#)

- [절차의 간소화](#)



Enforcement in the MENA region

[UAE Courts]



- Enforcement – governed under the **Civil Procedure Code** (Federal Law No. 11 of 1992)
- **Cabinet Decision No. 57 of 2018** – provides for specific articles relating to the enforcement of foreign judgments, orders and awards.



[UAE Courts – New York Convention]

- The UAE became a signatory of the New York Convention in November 2006 which was ratified without reservation. ▶ [뉴욕 컨벤션의 가입](#)
- The Convention requires courts of contracting states to give effect to private agreements to arbitrate and to **recognise** and **enforce arbitration award made in other contracting states**. ▶ [뉴욕컨벤션 회원국 내 중재 판정의 집행 가능](#)
- The New York Convention conditions **take precedent** over the Cabinet Decision No. 57 of 2018 ▶ [뉴욕 컨벤션이 UAE 중재법에 우선하여 적용](#)

Enforcement in the MENA region

[DIFC Courts]



- Enforcement – governed by Articles 42 to 44 of the DIFC Arbitration Law 2008 (“**DIFC Arbitration Law**”)
- The enforcement of foreign arbitral awards in the DIFC courts will also be **subject to** the provisions of the **New York Convention**. ▶ [뉴욕 컨벤션 적용](#)

[Saudi Arabia]



- The Kingdom of Saudi Arabia has been a signatory to the **Riyadh Convention** since 1983, and to the **New York Convention** since 1994.
▶ [리야드 컨벤션 및 뉴욕 컨벤션의 가입](#)
- The **Enforcement Law** came into force on 27 February 2013
 - **Article 6** provides that all decisions taken by the Enforcement Judge are final.
▶ [집행 판사의 결정이 최종 적용](#)

THANK YOU-SHUKRAN

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QUESTIONS



NEXT WEBINAR

26 August 2021 | 11:00 AM BST

20 Brilliant Construction & Engineering Questions

With Industry Leaders- including FIDIC, Building Magazine, 39 Essex Street Chambers and Atkin Chambers



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Thank You



| zoom |





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