Evolution of Construction Arbitration

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Abstract
Arbitration is at the forefront of construction dispute resolution techniques in Palestine. This article critically examines the historical development of arbitration and explains the recent evolution of construction arbitration in Palestine. This research depends on 12 semi-structured interviews with senior arbitrators. It also draws on a thorough examination of relevant documents such as legal instruments, court cases, legislation, and arbitration clauses in standard forms of construction contracts. The study identifies the conditions that assisted the recent growth in the use of construction arbitration, such as the overhaul of legal infrastructure in the form of modern legislation governing arbitration procedure and court proceedings, the provision of contractual infrastructure in the form of widespread incorporation of arbitration clauses in construction contracts, the establishment of institutional infrastructure in the form of arbitration institutions, and the build-up of qualified construction arbitrators. The study also uncovers the barriers that preclude construction arbitration from reaching its next level and thriving, such as lengthy court enforcement proceedings, the reluctance of some international organisations to participate in arbitration seated in Palestine, and the relatively high arbitration costs.
Keywords - construction, dispute resolution, arbitration, litigation, Palestine
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Introduction

The construction industry is a significant contributor to the Palestinian economy and a major employer of the workforce (PCBS, 2016). In accordance with empirical evidence, questionnaire surveys soliciting impressionistic accounts of construction contractors, construction disputes have been on the rise in recent years (Abu Rass, 2006). The available mechanisms to resolve construction disputes are negotiation, expert evaluation, mediation/conciliation, adjudication, arbitration and litigation. Court litigation is rarely sought, adjudication is widely unrecognised and rarely practiced, and mediation is still in its infancy. Arbitration is at the forefront of dispute resolution techniques in the Palestinian construction industry (Besaiso et al., 2016).

Nonetheless, arbitration has received scant attention in the extant literature. The majority of literature concerned with construction arbitration focuses upon the market share of arbitration and other dispute resolution techniques (Tuffaha, 2015, Saqfelhait, 2012, Eed, 2012, Abu Rass, 2006) . These studies find that arbitration is the fundamental dispute resolution technique in case disputants fail to reach an amicable settlement. Besides, Abu Jbara (2012) used a questionnaire survey to examine the parties' satisfaction with the arbitration administered by the Engineering Arbitration Centre. She found that the disputants are dissatisfied with the costs and time of arbitration, the procedure of determining arbitration fees, and the mechanism followed to form arbitral tribunals.

While it is desirable to understand the parties' dispute resolution preferences and their level of satisfaction, these quantitative studies leave many questions unanswered. As a result of this neglect, there is little understanding of how construction arbitration has grown in prominence in Palestine in recent years. Further, there is little known as to the factors promoting arbitration and the factors repressing it from moving forward.

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Therefore, this qualitative research aims to look beyond simple satisfaction and preference surveys and to contribute to our empirical understanding of the practice of construction arbitration at the grassroots level. It also aims to reconstruct the past to explain the recent rise of construction arbitration and the modern-day challenges facing its growth.

Methodology

This research is qualitative in nature. It uses descriptive (what) questions and analytical (why) questions. To do so, it uses a multi-method research design. This involves the use of more than one method of data collection as follows.

First, the researchers undertook a literature review covering journal articles and conference papers. Second, the researchers conducted 12 semi-structured interviews with arbitrators from Gaza and the West Bank. They are nine construction professionals, two lawyers, and one retired judge. The selection of those arbitrators involved purposive sampling in order to access their rich knowledge and experience of the real-world practice of construction arbitration. The interviews were conducted via Skype and then transcribed. The average duration of each interview was 30 minutes. The analysis of the transcript was done manually. The interviews were semi-structured, and hence some questions emerged during the conversation. The participants were informed that the answers and information provided would be used for academic research and publication. Nonetheless, they were assured that the confidentiality of information and anonymity of interviewees and organisations would be preserved. Third, the researchers accessed legislation and court cases available online on Al-Muqtafi to corroborate, support and elaborate on the interviewees' statements or references to such legislation. The researchers searched for available court cases relevant to construction litigation or arbitration awards confirmation or challenge. Al-Muqtafi is the first and leading online legal research database providing access to legislation and courts' judgments in Palestine. Fourth, the researchers examined relevant documents (e.g. arbitration clauses in standard forms of contract, Al-Majjallah) that provide great assistance to our understanding of the whole picture.

Literature Review

Historical Overview of the Development of Arbitration in ancient Palestine (before 20th century)

Arbitration philosophy, as a dispute resolution method, is deeply rooted in the Arab culture. The notion of deferring any dispute (commercial, family, political etc.) to a neutral third party for a solution or decision is well-established in Arab customs and traditions. So, if parties failed to settle their disputes by negotiation, they used to appoint an arbitrator '*Hakam*' (Fakih, 2011, Ahdab et al., 1998). The qualities of the arbitrator were merely his status in the community, his reputation, being from a strong tribe, his wisdom and reasoning skills. The instrument used to ensure enforceability of the arbitration award, as courts did not exist at that time, was that disputants were to put up some sort of securities such as property. Besides this security, the 'social status' of the arbitrator meant it was very unlikely for the losing party to challenge his award (Gemmell, 2007).

Arbitration was the most prominent method of dispute resolution primarily because of the absence of a formal court system during the early days of Islam. Islam legalised, reformed and regulated the arbitration process, resulting in a more organised procedure (Fakih, 2011). This reform handled core conceptual issues such as the 'arbitrability' of disputes, the validity and binding nature of the arbitration agreement, the finality and binding nature of an arbitral award, the form of the arbitral award, and the arbitration law governing the dispute. It also handled procedural issues such as the dismissal of an arbitrator after the commencement of proceedings. Furthermore, the Islamic era witnessed the distinction between reconciliatory settlement (Sulh), arbitration, and court litigation (Gemmell, 2007, Alsheikh, 2011).

Nonetheless, during the early ages of Islam, there was a debate on the concept of arbitration. The first school of thought held that arbitration was close to conciliation. As a result, an arbitral award given by the arbiter was not binding. The second school of thought, representing the majority of Muslim scholars, argued that arbitration was different from conciliation because an arbitral award was binding and enforceable as a court judgement (Alsheikh, 2011, Al-Ramahi, 2008, Rashid, 2008, Ahdab et al., 1998). Other scholars argued that the start of an arbitration process was similar to conciliation but it would gradually move towards being obligatory arbitration. Yet, they do not concur on the milestone after which the process switched from being consensual to being obligatory; is it the arbitration agreement, the actual commencement of procedure, or the issuance of the award? In the opinion of the majority of scholars, arbitration in Islamic philosophy was not obligatory until the issuance of an award (Alsheikh, 2011). This 'majority opinion' is manifested in the 800-year old book 'Al-Hedaya'; one of the most influential and authoritative sources on Islamic

opinion of the majority of scholars, arbitration in Islamic philosophy was not obligatory until the issuance of an award (Alsheikh, 2011). This 'majority opinion' is manifested in the 800-year old book 'Al-Hedaya'; one of the most influential and authoritative sources on Islamic law. In its arbitration chapter, it states that "*either party may retract from the arbitration before the award…the award, however, when given, is binding upon them*"(Hamilton, 1994). The arbitration chapter includes rules on the qualities of an arbitrator that should match those of a judge, the binding nature of arbitration award, the enforcement procedure of arbitration award, the arbitrability of disputes, validity of the arbitral award and ground for its annulment, witness examination, deliberation by the tribunal etc. (Hamilton, 1994). Al-Hedaya also contains a distinct chapter for amicable settlement (Book of Al-Sulh).

This debate means that the lack of consensus also applies to the validity and binding nature of the arbitration agreement itself. While some scholars maintained that an arbitration agreement was valid and binding, others argued it was valid but non-binding as either party could unilaterally revoke it (i.e. revocable agreement). The argument over its validity went down to the division between future disputes and extant disputes. Some authors argue that Islamic philosophy proposes that a contractual clause requiring the parties to submit future disputes to arbitration (arbitration clause) is invalid, and a separate agreement (submission agreement) is the only valid form. The rationale behind this seems to be that the nonexistence of a dispute when an arbitration clause was agreed upon would lead to speculation (Gharar); a principle of Islamic law that strikes down any provision that is subject to an uncertainty. Furthermore, a very long gap may occur between the time of entering into the agreement and an ensuing dispute. In the meantime, either party may lose its enthusiasm for arbitration yet be legally obliged to participate in the process. Then this party may try to create hurdles in the way of the smooth conduct of arbitral proceedings and ultimately in the enforcement of the award with counterproductive consequences (Rashid, 2004). However, Al-Qurashi (2004) disagrees with Rashid's conclusions and argues that arbitration clauses are valid since they do not permit what is explicitly prohibited by the Islamic law.

This intellectual debate took place throughout the centuries up to the 19th century. In the 19th century, expanding trade and commercial transactions brought modern legal challenges to the resolution of commercial disputes. This led to a state of distress among the Ottoman judiciary (the Ottoman Caliphate, the last Islamic Caliphate, ruled over Palestine from 1517-1917). The distress was because at that time, although Islamic law had formed the legal infrastructure of the Ottoman Caliphate, no Islamic civil code existed and the rules governing contracts were scattered (Terris and Inoue-Terris, 2002). Influenced by the French civil code, the Ottomans started the first codification of Islamic law. In 1877, the codification process produced the Ottoman Civil Code known as "Majallat Al-Ahkam Al-Adliya" (in Arabic: مجلة الأحكام العدلية), briefly known as Al-Majallah (Khadduri and Liebesny, 2008). It appears that this codification has delivered "general principles of Islamic contract law" (Bunni, 1997). In Al-Majallah, a complete chapter (articles 1841-1851) has been dedicated to arbitration. These articles address the arbitrability of disputes, the validity and enforceability of an arbitral award, the formation of an arbitral tribunal, the dismissal of arbitrators, time for issuance of award, the tribunal authority to conciliate dispute (Al-Sulh).

In Article 1850, Al-Majallah introduced an "original institution of Arbitration by Conciliation" (Palmer, 2005):

"Legally appointed arbitrators may validly reconcile the parties if the latter have conferred on them that power. Therefore, if each of the parties has given powers to one of the arbitrators to reconcile them and the arbitrators terminate the case by a settlement in accordance with the provisions contained in the Book of Settlements [Aqd Al Sulh], the parties may not reject the arrangement."

This technique resembles the 21st century dispute resolution method of Med-Arb that is a hybrid of mediation and arbitration (Palmer, 2005). Article 1531 in Al-Majallah defines Al-Sulh as a contract settling a dispute by mutual consent and is concluded by offer and acceptance (Rashid, 2004). Al-Sulh is a dispute resolution method that is highly recommended in Islam. It can be interpreted as 'amicable settlement of disputes' which includes various modes of resolution such as assisted negotiation or mediation/conciliation (Rashid, 2004). Al-Sulh concept is very similar but not the exact equivalent to the modern concepts of mediation and conciliation(Palmer, 2005).

Rashid (2008) contends that Al-Majallah has concluded the centuries-old debate on the validity of arbitration clauses. He states that articles 1847-1850 stipulate that an arbitration agreement is valid if it is entered into after a dispute has arisen. The authors disagree with this interpretation and think that Al-Majallah is silent on this issue. The authors believe that this debate has been concluded by the modern arbitration laws of the Arab countries

this interpretation and think that Al-Majallah is silent on this issue. The authors believe that this debate has been concluded by the modern arbitration laws of the Arab countries including Palestine that permit arbitration clauses.

Recent Development of Arbitration in modern Palestine (after 20th century)

Following the collapse of the Ottoman Caliphate, and when Palestine became under the British Mandate in 1917, the 1926 Arbitration Ordinance was passed into law. It was a mirror of the English Arbitration Act of 1889. As an extension to the British Empire, Palestine was a signatory to the Geneva Protocol on Arbitration of 1923 and later the Geneva Convention on Execution of Foreign Arbitral Awards. Then, the 1930 Foreign Arbitration Awards Act and the 1935 Arbitration Procedures Act were passed into law. A further two acts were enacted in 1952 for the Enforcement of Foreign Provisions Act and in the 1953 Arbitration Law, both in effect in the West Bank (Katbeh, 2015, Sarcevic, 2009).

A few years after the establishment of the Palestinian National Authority in 1994, the Arbitration Act No (3) came into force in 2000 based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration of 1986 (the Model Law) besides other Arab and international arbitration laws (Davis et al., 2005). This has been a major reform to modernise, unify and harmonise arbitration practice in Palestine (Katbeh, 2015). This act concludes the centuries-old debate on the validity of arbitration clauses. In line with the international practice, it considers them valid. Besides, in what seems to be an extension to the long-lasting Islamic jurisprudence as manifested in Al-Hedaya and Article 1850 of the Majalla, Articles (36) of the Palestinian Arbitration Act 2000 provides that one of the disputants may authorise the tribunal to undertake Al-Sulh (reconciliation) procedures according to the standards of fairness. The Article provides that the tribunal may, upon request of any of the parties or by its own discretion, suggest an amicable settlement to the dispute. Further, similar to most arbitration acts around the world, specifically those modelled on UNCITRAL Model Law, the Arbitration Act 2000 recognises the separability doctrine, competence-competence principle and the parties' autonomy to form their own arbitral tribunal and choose applicable laws. It also defines the role of state courts, the grounds for challenging arbitral awards and so on.

However, due to some shortcomings in this Act as well as contemporary developments in international arbitration practice, a new reform has become vital. At the very time of writing this paper, a draft for a new arbitration Act is under preparation to produce a more comprehensive Act in line with the recent practices embedded in the Model Law and the New York Convention. The main proposed changes will modernise the definition of arbitration agreement and the concepts underlying the formation of an arbitral tribunal, and will minimise the judges' interventionist powers in the arbitration process (Katbeh, 2015).

In 2015, the State of Palestine joined the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Kluwer Arbitration, 2014, New York Convention Guide, 2015). This has been a significant step to promote international arbitration and to ensure international organisations that a modern mechanism complying with the international best practice to recognise and enforce arbitral awards is in place.

Research Findings

Alternative Dispute Resolution (ADR) institutions

The participants were asked 'what' the institutions offering construction arbitration services, training and certification are. Institutions offering arbitration services for construction, engineering, and technology disputes are the Association of Engineers (AOE), Engineering Arbitration Centre (EAC), the Palestinian Contractors Union (PCU), and the recently established Palestinian International Arbitration Chamber (PIAC). The EAC and the PIAC also offers training, examination and certification schemes in arbitration.

Court Litigation

The interviewees were asked 'how often' construction parties refer their disputes to courts, and if there is any multi-door courthouse in Palestine? Then, they were asked 'how' a judge decides on the dispute.

The respondents stated that the judiciary does not offer a 'multi-door' courthouse (i.e. court-annexed ADR programs). However, according to the Civil and Commercial Procedures Act No (2) - 2000, the High Judicial Council may appoint a judge, with the consent of parties, to attempt to conciliate or amicably settle civil and commercial disputes referred to the courts of first instance and the magistrate. The settlement process shall be accomplished in 60 days from the day of referring the case to the conciliation judge, unless the parties agree otherwise. In the courthouse, this judge administers the settlement process that is a

60 days from the day of referring the case to the conciliation judge, unless the parties agree otherwise. In the courthouse, this judge administers the settlement process that is a perfectly voluntarily process. This means the court has no right to penalise any of the parties for its withdrawal, disregard or refusal of the conciliation option. If one of the parties refuses to participate, or withdraw later on, or the conciliation fails to settle the dispute, the case goes back to litigation without jeopardising any of the parties' rights. Noticeably, the provisions 68-78 of the Act use the terms 'settlement', 'conciliation', and 'Sulh' interchangeably. This role has never been practiced yet, as all the interviewees confirmed. The legal interviewees attributed this to the courts' insufficient resources (judges, administrative staff etc.) to handle the increasing caseload that possibly forces judges to overlook this consensual dispute resolution 'role'.

The respondents stated that when a judge receives a construction or engineering case, he might ask the disputants if they want to attempt to settle the dispute amicably or he may ask them if they want to arbitrate. If they accept the former, either party may make offers and counter-offers to settle the dispute before the judge or they may try to settle out-of-court. As confirmed by 2 interviewees, two construction cases were settled in this way and the court proceedings came to an end. It is worth noting here that the judge does not practice any kind of mediation in this case, simply because mediation is not part of the judiciary system, and not recognised in law. On the other hand, if the parties agree to arbitrate, the judge will refer the dispute to an arbitral tribunal out of the courthouse. The arbitrators are to be selected by the disputants, but if they fail to agree, arbitrators are to be nominated by the court (from its list of arbitrators) or by the arbitral institution the court refers the case to.

If either one of the disputants insists on litigation, the judge who is not knowledgeable in the technicalities of the engineering or construction works will normally refer the case, or part of it depending on its complexity, for expert opinion to evaluate the technical merits of the dispute. An expert can be selected by the parties, or in case the parties fail to agree, an expert will be appointed by the court (from its list of experts) or by the institution the case is referred to. The expert's main job is normally quantification of damages resulting from compensation events, defective works or breach of contract, and measurement and valuation of works done. In addition, the expert's scope of work extends sometimes to the apportionment of liability for the defective works or breach of contract. Often, the judge endorses the expert's findings but he may use his own discretion in legal and contractual matters according to the general principles of law.

The main types of construction disputes that reach courts, in the experience of the interviewees and as per the construction cases retrieved from Al-Muqtafi, are related to requests for confirmation or annulment of arbitral awards, urgent requests to stop construction contract award, urgent requests to stop construction works due to land ownership dispute or to protect artefacts and archaeological assets, insurance, financial claim for additional costs, loss and/or expense claims .

The interviewees concur, and the judge affirms, that few construction cases end in courts. This is because the courts are overburdened with cases and lack technical knowledge to process construction disputes. The backlog of cases, as well as technical incompetence, means that court judgements on construction cases take 3-5 years on average, including two levels of appeals, and sometimes longer. This estimate is in accordance to the experience of an eminent lawyer and has been corroborated by the construction cases retrieved from Al-Muqtafi. Needless to say, this does not seem an appealing option for contractors who are desperate for cash. As an interviewee stated, "*contractors tend to compromise their total entitlement and waive some of what they think they are entitled to in return for immediate cash in hand*". This brings to mind the maxim of "justice delayed is justice denied". The interviewees stated that parties end up in courts if the defendant is not interested to settle the dispute in arbitration or any other ADR method. In this situation, the defendant, who is usually the employer, leaves the contractor with two courses of actions; going to court or giving up its claims. This reflects the employer confidence that courts are not a proper dispute resolution venue. Instead, courts tend to be a "dispute freezing" venue.

Further, parties do not seek court litigation because of the paucity of projects and business opportunities that make contractors very reluctant to sue employers. Furthermore, the national culture plays a role in people's lack of appetite to 'adversarial' litigation. Palestinians prefer amicable settlements to their disputes to protect the social fabric and also to maintain business relationships. Also, the decades of political instability and military occupations made Palestinians distant from courts and closer to alternative dispute resolution methods. These alternative methods, including arbitration, play an important role to overcome overwhelming institutional challenges facing transitioning states such as

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Arbitration

Arbitration Practice

The respondents were asked to describe how the practice of construction arbitration evolved in Palestine. While the literature review provides important insight into the historical development of arbitration in Palestine up to the modern time, the respondents' recollections and available accessible court cases are limited to the last two or three decades.

Commercial arbitration was used before the establishment of the Palestinian National Authority in 1994 but to a very limited extent. For instance, besides anecdotal evidence from interviewees, fossil evidence on this is found in the Court of Cassation Decision No. 214/2005 (Civil Section/ Ramallah). This case shows that the disputants agreed before the court in 1986 to refer their dispute to ad-hoc arbitration. However, based on logic in light of the absence of empirical evidence, the use of commercial arbitration and construction arbitration in particular prior to the nineties was probably relatively rare. Due to an obsolete arbitration law and an inefficient court that would take several years to enforce an arbitral award, disputants seemed to rely heavily on the conciliatory approach or Al-Sulh.

The authors' reconstruction of the evolution of construction arbitration, based on the available empirical evidence, suggests five milestones that pushed construction arbitration forward (the establishment of the Palestinian National Authority, the legal reforms, the widespread incorporation of arbitration clauses in construction contracts, the establishment of arbitration institutions and increasing participation of qualified arbitrators). Nevertheless, considerable challenges still prevent construction arbitration from reaching its full potential. The drivers and barriers for a wider use of construction arbitration are discussed in the following sections.

The transitional period: from liberation to state building

The signing of Oslo peace agreement between the Palestine Liberation Organisation and Israel marked the beginning of the end of the Israeli occupation. The establishment of the Palestinian National Authority in 1994 and the subsequent flood of dollars from donors paved the way for a construction boom (El-namrouty, 2012). As an emerging state, Palestine has been in need of significant investments in infrastructure projects. These projects are funded and/or implemented by the government or by international organisations. Since then, international organisations (international governmental organisations, governmental development organisations or non-governmental organisations) have become important actors in the construction scene.

Beyond the dust caused by the rapidly increasing construction works, a problem was crystallising. Construction contractors, both domestic and international, had a serious problem in having access to justice. Domestic contractors considered court litigation as slow and inefficient and taking many years. Besides this, international contractors would not accept to refer their disputes to Palestinian courts because of the fear of lack of neutrality and political independence. In that period, the respondents confirmed, the "conciliatory approach" was the acceptable alternative dispute resolution technique whereby disputants used to select a conciliator or would ask the Association of Engineers to nominate him. The conciliator, who used to be an Engineer, only made recommendations. In cases where an amicable approach failed to settle the controversy, contractors in many cases appeared to give up their claims. Hence, employers had a duty to provide contractors with access to justice.

To meet this challenge, employers (governmental or international) started to incorporate arbitration clauses in their conditions of contract. For instance, as one respondent stated, the Palestinian Economic Council for Development and Reconstruction (PECDAR) inserted an arbitration clause in their World Bank financed construction contracts designating the Cairo Regional Centre for International Commercial Arbitration as the institution to refer future disputes to. During the transitional period, PECDAR was the main employer responsible for the delivery of construction and infrastructure projects, leaving a minor role for municipalities and ministries (Silverburg, 2002).

Despite the increasing insertion of arbitration clauses in construction contracts, the respondents assert that construction arbitration was rarely practiced in the nineties. Also, Al-Muqtafi has only one court case related to construction arbitration conducted between two private parties in the nineties. The Court of Appeals Decision No. 181/1995 (Civil Section / Ramallah) arose from a request to set aside a construction arbitral award rendered in

Al-Muqtafi has only one court case related to construction arbitration conducted between two private parties in the nineties. The Court of Appeals Decision No. 181/1995 (Civil Section / Ramallah) arose from a request to set aside a construction arbitral award rendered in 1994. Al-Muqtafi has many more commercial arbitration court cases that were lodged to courts in the same time period. This may indicate, but not necessarily, that commercial arbitration was more common than construction arbitration. However, this is not conclusive evidence because not all arbitration cases end in court dockets waiting confirmation or enforcement. Construction disputants may have voluntarily accepted arbitral awards and hence left no evidence in the courts' archives. Also, the available legal material is selective and limited to those that reach the court of appeal or the court of cassation. Regardless of the actual number of construction arbitrations, the fundamental reason for the scarcity of construction arbitration was probably the lack of well-developed arbitration infrastructure (modern legal framework, contractual machinery, arbitration institutions, qualified arbitrators and experienced judiciary).

Deteriorated legal infrastructure and the need for legal reforms

As a transitioning state, Palestine had considerable institutional challenges and lacked a modern and efficient legal infrastructure. In the nineties, arbitration clauses in construction contracts lacked an adequate enforcement regime. Hence, construction contractors had a serious challenge to have access to justice.

In cases where international contractors were the winner of international arbitration, they probably had difficulties to enforce arbitral awards because the Palestinian National Authority was not a state and was not a signatory to New York convention (e.g. Danish Road Contractors v PECDAR) (the World Bank, 1999, Sharon et al., 2010).

Domestic contractors were not more fortunate because of the weak rule of law and the domination of 'clan culture'. As one respondent said: "*domestic contractors sometimes referred their disputes to Yasser Arafat, the head of the Palestinian Liberation Organisation and the President of the Palestinian National Authority who told them 'ain't you willing to give something back to Palestine?*'".

Nonetheless, the respondents stated that a handful of construction arbitrations took place in the nineties. In the few cases processed by tribunals normally appointed by the Association of Engineers, arbitration proceedings were neither formal nor procedurally robust. In other words, arbitrators were not concerned and the parties to the dispute were not cautious about the conduct of the proceedings that seemed to have a "mine" of procedural or substantive legal errors. These errors were a normal outcome of the arbitrator's lack of legal or professional training and would have been the basis for annulment of an award. Such a request to set aside an award probably appeared to be challenging to the judge in certain cases. This difficulty led to a breakdown in the machinery for arbitral award confirmation or annulment. The evidence available on this breakdown is overwhelming. The researcher' review of court cases relevant to request to confirm or set aside arbitral awards reveals intimidating findings. While the average duration of courts proceedings to confirm or set aside commercial arbitration awards was found to be just over 7 years, the duration ranged from three years up to a staggering twelve years.

The examination of all available court cases related to arbitration awards confirmation or annulment reveals a mysterious pattern. The cases that were lodged before 2000 took more than 7 years on average. The cases that were lodged after 2000 took a third that time. The reason for this considerable improvement is probably the legal reforms. The enactment of the Arbitration Act (3)-2000 has provided judges with modern legislation that facilitates the review of arbitral awards. Further, and perhaps more importantly, the enactment of the Civil and Commercial Procedure Act (2)-2001 brought an end to considerably long court proceedings. The old procedural laws generously opened the door for repetitive postponements and adjournments that led to significant delays.

Nevertheless, the current rate of 2-3 years needed by courts to confirm or set aside an arbitral award is still long and defeats one of the fundamental objectives of arbitration in providing a speedy dispute resolution method. Thus, judicial reforms are required to overcome this problem and provide contractors with timely access to justice.

The Contractual Infrastructure for Construction Arbitration

The practice of construction arbitration has been boosted by the general acceptance of the main employers to refer disputes to arbitration. This general acceptance is evident from the incorporation of arbitration clauses in their standard forms of construction contracts. However, the impression that construction arbitration is truly and genuinely accepted may be misleading. To know whether this acceptance is a myth or reality, it is important to dig deep beneath the wording of arbitration clauses and the data available on the repetitive users of arbitration. A critical examination of both reveals a subtle division between two

be misleading. To know whether this acceptance is a myth or reality, it is important to dig deep beneath the wording of arbitration clauses and the data available on the repetitive users of arbitration. A critical examination of both reveals a subtle division between two groups of employers.

The first group is comprised of employers who explicitly accept the seat of arbitration to be in Palestine. They also normally accept the Palestinian law as the governing law of the contract and require arbitration proceedings to be conducted at EAC, AOE or PIAC. A common thread between those employers is their acceptance of the Palestinian Unified Contract to govern their projects. Employers in this group include governmental entities (e.g. ministries, municipalities and water authorities), non-governmental entities or governmental development agencies (e.g. Qatar's Gaza Re-construction Committee, Qatar Red Crescent, etc.) and private enterprises (e.g. Bank of Palestine). However, there are some variances in this group. For instance, American Near East Refugee Aid (ANERA) has its own standard form of contract but it requires that arbitration shall be conducted in accordance with the arbitration procedure of the Association of Engineers in Jerusalem, and in accordance to the Palestinian Arbitration Law. Tracing information on the repetitive users of construction arbitration, from interviews and an arbitration institution's records, reveals that governmental employers are the busiest participants. Usually, general/main contractors initiate arbitration proceedings against governmental employers. To a lesser extent, some arbitration cases took place between employers and their agents (consultants, designers/architects or supervisors/engineers).

The second group is comprised of international employers who have diverse dispute resolution policies as regards the seat of arbitration and the applicable rules and laws to arbitration.

The International Committee of the Red Cross (ICRC) standard form of contract stipulates that the chamber of commerce and industry of Geneva shall be the appointing authority, UNCITRAL rules to govern the arbitration procedure, and Swiss law to govern the contract, the arbitration clause, and the arbitration procedure. This probably implies that the seat of arbitration will be Geneva as well.

The United Nations agencies such as the United Nations Development Programme (UNDP), the United Nations International Children's Emergency Fund (UNICEF) and the Food and Agriculture Organisation (FAO) stipulate UNCITRAL rules to govern the arbitration procedure, but are silent on the seat or arbitration law. The United Nations Relief and Works Agency (UNRWA) standard form of contract, that is silent on the seat of arbitration, stipulates that an arbitrator shall be appointed jointly by the parties in accordance with the Permanent Court of Arbitration Optional Rules for Arbitration between International Organisations and Private Parties. In case the parties fail to agree, the Appointment shall be made by the President of the Court of Arbitration of the International Chamber of Commerce upon request of either party. What is worth mentioning is that UNRWA appears to be the only employer who does not specify a national law as the substantive law governing the contract. Instead, it stipulates "*Any dispute shall be decided according to the provisions of this Contract. To the extent that these provisions do not fully cover the particular matter in dispute recourse may be had to the general principles of commercial law and the Lex Loci Contractus shall only afford evidence of such general principles*".

The dispute resolution policies of major lenders and financiers such as the World Bank and the European Commission, the Agence Française de Développement (AFD) and the Kreditanstalt für Wiederaufbau (KfW) appear to be diverse. However, generally speaking, they have a tendency to stipulate International Chamber of Commerce (ICC) international arbitration or UNCITRAL international arbitration for larger contracts that are likely to be awarded to international contractors and procured through an international competitive bidding procedure. Likewise, they have a tendency to accept arbitration conducted in Palestine for smaller contracts. For instance, in a construction contract financed by the World Bank, the arbitration clause stipulated ICC arbitration with the seat of arbitration to be Paris, but the Palestinian law as the substantive law. This large infrastructure project (>$ 10M) was procured through International Competitive Bidding procedure but awarded to a local contractor. In a construction contract financed by the AFD, the arbitration clause stipulated the seat of arbitration to be in a neutral place and the governing law to be the law of Palestine. This large infrastructure project (>$ 20M) was procured through International Competitive Bidding procedure and awarded to a joint venture between an international contractor and a local contractor. In another construction contract financed by the European Commission, the arbitration clause stipulated the seat of arbitration to be in Palestine and the arbitration rules to be in accordance to the Palestinian arbitration law. This large infrastructure project (>$ 15M) was procured through a decentralised management scheme

Commission, the arbitration clause stipulated the seat of arbitration to be in Palestine and the arbitration rules to be in accordance to the Palestinian arbitration law. This large infrastructure project (>$ 15M) was procured through a decentralised management scheme but awarded to a joint venture between an international contractor and a local contractor. The arbitration clause in KFW- financed small construction contracts requires that arbitration is to be conducted in accordance with the Palestinian Arbitration Law.

This sample of arbitration clauses in standard forms of contract of the main international organisations shows that they may or may not expressly designate an arbitration seat in the arbitration clause. If silent, the decision as to the seat of arbitration will be made by the arbitral tribunal, in accordance to the arbitration rules or to the arbitration law as specified in the arbitration clause. The interview data shows that the participation of international governmental organisations or international agencies in arbitration conducted in Palestine is almost invisible. The question that naturally arises now is why international organisations are 'reluctant' to accept international arbitration with a seat in Palestine?

The Dilemma of the Seat

International organisations, as some interviewees stated, tend to be keener to participate in an amicable settlement procedure such as negotiation, mediation or conciliation. If the parties fail to amicably settle the dispute, then they have to seek a binding and final decision. The most typical venue to obtain such a decision is litigation or arbitration. However, private contractors cannot bring international organisations to national courts. This is because the international organisations enjoy an immunity from the jurisdiction of domestic courts. Individuals and private entities have tried and failed to commence court proceedings against international organisations. For instance, Al-Dar Palestinian Company for Construction and Reconstruction failed to initiate court proceedings against the UNDP. On another case, the court declared that UNRWA is an international organisation and therefore enjoys immunity against judicial prosecution. If international organisations do not provide for alternative mechanisms to settle disputes, private companies would not have any access to justice. From this dilemma a duty arises on the part of international organisations to provide for alternative means of dispute resolution including arbitration when they rely on their immunities (Wickremasinghe, 2003).
However, although international organisations accept recourse to arbitration, they often tend to be reluctant to accept the seat to be in Palestine. In international arbitration, the ‘seat’ or ‘place’ of arbitration is important because its law governs and its courts supervise the arbitration proceedings. The procedural law of the seat provides the mandatory procedural rules that govern the arbitration proceedings. In addition, it affects procedural aspects such as the power of the arbitral tribunal, the quality of state court intervention in the arbitral proceedings and the confirmation and the enforceability of the arbitrators’ award (Webster and Buhler, 2014). Whereas the Palestinian Arbitration Act 2000 is a modern act drafted in accordance to UNCITRAL Model Law, international organisations may have some concerns about the quality of interference or intervention of the Palestinian courts. An arbitrator, who has long experience in one of the UN agencies, attributed this concern to the perceived "linkage" between arbitration and the national court in procedural matters (and more importantly in setting aside or annulling arbitral awards) and enforcement matters. Some international organisations, because of a broad interpretation of the extent of their immunities, may not wish to be subject to the jurisdiction of national courts in matters related to arbitration proceedings or enforcement of award. In this sense, they perceive arbitration as a backdoor to national litigation. However, the immunity defence is very problematic here because it will not be limited to domestic courts but it will extend to all courts around the world. This may result in abuse of privileges and immunities in bad faith. This raises more serious and fundamental questions on the seriousness of the international organisations in providing private parties with means to have access to justice.
Hence, assuming that international organisation will undergo arbitration in good faith, then their concerns in accepting the seat of arbitration to be in Palestine will probably be related to the neutrality and competence of the Palestinian courts.
Further, some interviewees questioned the willingness of some international organisations to provide platforms that will redress the inherent imbalance of power between the contracting parties (opportunism). An acceptance to refer disputes to arbitration conducted in Palestine might place them on equal footing with domestic contractors. Contractors will be more capable, technically and financially, to commence arbitration proceedings at home than abroad. International organisations perhaps want to avoid this. They want to maintain

in Palestine might place them on equal footing with domestic contractors. Contractors will be more capable, technically and financially, to commence arbitration proceedings at home than abroad. International organisations perhaps want to avoid this. They want to maintain the upper hand in negotiations through providing for offshore international arbitration. In the words of a contractor-arbitrator, "*this contractual machinery means contractors who have legitimate rights will spend the awarded money on flights, hotels, and travel expenses and will pay for the arbitration costs from their own pocket. They better not to do so*". This rule of the game leaves the majority of contractors with one course of action; to accept the outcome of negotiation no matter how unfair it can be.

Overall, this situation raises legitimate and fundamental questions on the adequacy of the mechanism international organisations put in place to deal with claims against them and on their commitment to facilitate the proper administration of justice. There is a real concern that what they provide for in their contracts is no more than a dubious move to discharge their duty to provide 'appropriate' alternative means to resolve disputes in light of their immunity from the jurisdiction of domestic courts. This is a real problem because it may amount to 'denial to justice'.

To overcome this problem, there are three conceivable solutions for ensuring an affordable access to justice. These solutions may accommodate any genuine concern the international organisations may have in regard to the neutrality of the seat of arbitration and the quality of its courts interventions.

First, international organisations may keep the seat of arbitration in a neutral place but physically conduct arbitration in Palestine. This is possible by virtue of the concept that that the juridical 'seat' of arbitration is not necessarily the 'venue' where hearings or other proceedings physically take place (Webster and Buhler, 2014). When international employers dictate that the proceedings are to take place at a location distant from the construction project, great inconvenience may result to the parties, witnesses, and arbitrators. Hence, the juridical seat of arbitration can be London or Paris but the arbitration can be physically conducted in Jerusalem, Ramallah or Gaza, taking into account the locations of witnesses and evidence, the needs and convenience of the parties, the availability of hearing facilities and relative costs associated with transportation and accommodation. Second, they might also specify in the arbitration clause that the seat of arbitration will depend on the amount in dispute. So, if the amount is less than let's say $1,000,000 then the seat is to be in Palestine. Otherwise, it will be somewhere else. Third, referring construction disputes to regional arbitration centres may address contractors' interest in 'affordability' and international organisations' interest in 'neutrality'. In particular, selecting Cairo as the seat and/or the venue to physically conduct arbitration has a considerable weight because of two main reasons. Firstly, the Egyptian jurisdiction has a well-developed arbitration law and a judiciary that is familiar with international arbitration. Egypt has a well-developed jurisprudence of international commercial arbitration and the state courts have experience in applying the jurisdiction's international arbitration laws. Secondly, the physical proximity of Cairo, as the arbitral seat, to the place of projects performed in Palestine is an important element to ensure an affordable and convenient venue.

Arbitration is Adversarial and Confrontational

The provision of legal, contractual and institutional infrastructure for arbitration has significantly increased its popularity. However, contractors attempt to avoid this venue because it is perceived as an adversarial process that may lead to negative consequences spanning beyond the current project. Some employers will probably designate contractors seeking arbitration as confrontational and 'claim-oriented' and hence not consider their bids in future projects. Two participants confirmed that a large employer has 'blacklisted' a large contractor by excluding its bids because it considered arbitration to resolve their controversies. In fact, in the pre-qualification stage, some employers request bidders to declare accurate information about any litigation or arbitration arising out of contracts they performed in the last five years. The arbitration record may affect the technical evaluation of bidders. Some employers, state in their standard forms that "A consistent history of litigation or arbitration awards against the Applicant or any partner of a Joint Venture may result in disqualification".

On the other hand, some interviewees state that employers, if they are the party in default, may be blamed by donors for mismanagement that results in inefficient spending of money and therefore they may rethink funding future projects or programmes. Yet, employers could be interested in arbitration as a credible way to justify additional payments for contractors to donors.

Arbitration is Expensive

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Arbitration is Expensive

As most arbitrators affirmed, institutional arbitration tends to be more expensive than litigation. The reasons for this perception, in the authors' opinion, can be related to the mechanism for determining the arbitration fees, the disputants' opportunism, and the tribunal's lack of exercise of its power to decide on arbitration cost.

The authors examined the rules of two arbitral institutions (EAC, PIAC) as regards determining the arbitration fees. Arbitration fees differ according to the arbitral institution and the value of a dispute. In Palestine, the arbitral institutions fix the arbitration fees (arbitrators' fees and administrative fees) according to a sliding scale determined by the value of a dispute, which is the sum of the claims filed by all parties. For disputes that have values less than $500,000 - which is most disputes in accordance to EAC administrative arbitration report (2011-2014) -, the arbitration fees start from around 10% (for small-value disputes) and goes down to slightly more than 1% (for large-value disputes). By simply comparing this to the court fees (normally 1% of the value of a dispute but not more than JOD 500), it becomes evident that arbitration is more expensive than court litigation.

However, it is important to note that this simple comparison excludes litigation/arbitration associated costs such as legal counsels and advocates, expert witnesses etc. For instance, arbitration might save costs because the parties may not need legal representation and because the parties may not need to hire experts on issue related to delay, quantum, defects etc. as the tribunal is normally composed of arbitrators experienced in the engineering and construction matters. On the other hand, the time value of money as manifested in a quick and final arbitral decision - that is one of the typical advantages of arbitration when compared to the three levels of litigation - is questionable for two reasons. First, the current enforcement time of arbitral awards in Palestine is lengthy. Second, if an arbitral award is annulled or set aside, this practically means the entire arbitration procedure was a waste of time and money. Because of these reasons, it is important to acknowledge that it is difficult to firmly conclude whether arbitration or litigation is more expensive.

Further, the authors examined information available on 30 construction arbitration cases processed by an arbitral institution. The value of claims in arbitration requests range from $7,500 to $850,000 and the value of counterclaims range from $0 to $2,370,000. The largest arbitration case referred to this institution has a total value of claims and counterclaims of around $2,760,000. Yet, the largest construction arbitration case conducted in Palestine had a total value of $4,000,000 according to two interviewees. The examination of the values of claims, counterclaims and awards in some of these cases shows that contractors often exaggerate the amounts of claims, and the employers sometimes respond with inflated or pseudo counterclaims in a gesture of reciprocal opportunism. Almost half of the defendants retaliated by counterclaims that are, in many cases, greater than the value of the claimant's claims. Inevitably, this behaviour means higher arbitration fees for both parties because the arbitration centres do not charge the fees based on the time spent but based on the amount in dispute, that is often massively larger than the awarded amounts. It is worth mentioning that the current system for determining arbitration fees based on the amount in dispute should in theory provide incentive for disputants to be realistic in their claim/counterclaim values. However, for some reason, it has not been successful in practice and hence a remedial action by arbitral tribunals is necessary.

Nonetheless, such a remedial action to address disputants' opportunism appears to have escaped the control of the tribunal. The Arbitration Act allows the parties to agree on the cost allocation in arbitration. If the parties have not agreed, the arbitral tribunal has the power to determine the allocation of costs and the party liable for such costs but must state the grounds or reasons for this decision. Typically, the cost are seen to follow the event (i.e. loser pays rule) and it includes the fees of the arbitral tribunal, fees for the administrative institution, and all other costs reasonably incurred by the parties including legal counsels and advocates and expert witnesses. Although the Arbitration Act empowers the tribunal to award arbitration costs against a losing party, which means the winner may become entitled to recover its expenses, this authority is rarely exercised. The common practice, as the interviewees affirmed, is that the parties to the dispute share the arbitration fees equally, and bear their own expenses. Nonetheless, there are few cases in which arbitral tribunals have included in their awards decisions on the apportionment of arbitration costs (that include the arbitration fees and the reasonable expenses incurred by the winner in pursuing its claim or defence).

Overall, the current approach in the allocation of arbitration cost is problematic for the whole arbitration community. It fails to make disputants 'realistic' in their claim/counterclaim values which escalates the cost of arbitration. Also, it fails to stop

Overall, the current approach in the allocation of arbitration cost is problematic for the whole arbitration community. It fails to make disputants 'realistic' in their claim/counterclaim values which escalates the cost of arbitration. Also, it fails to stop 'guerrilla tactics' that prolong arbitration procedures. Lengthy arbitration does not only mean a 'delayed justice' for the disputants but it also results in 'unworthy job' for arbitrators. Arbitrators may have to work much longer hours than anticipated leading to 'inadequate' financial return from arbitration appointments. This dissatisfaction, as one arbitrator stated, also stems from the practice of an arbitral institution (EAC) to automatically appoint three arbitrators no matter how small a dispute might be. The degradation of arbitration efficiency will probably reduce its attractiveness for disputants and arbitrators.

Hence, managing the costs of arbitration is necessary in the light of this criticism. The management of arbitration costs has two components.

The first component, at the commencement of arbitration, is about determining the arbitration fees. There are basically two systems to determine the arbitration fees; based on time spent or amounts in dispute. The time-based system has the advantage of determining the fees based on the actual work done. This system is fair from the arbitrator's point of view but it does not provide incentive for arbitrators to be efficient. Yet, the system is probably able to correct itself as arbitrators still have to be efficient due to market competition and to receive future appointments. The amount in dispute-based system may be unfair from the arbitrator's point of view. It has; however, the advantage of transparency and predictability of the overall cost of arbitration, from the parties' point of view. It provides incentive for arbitrators to be efficient, but it does not provide the same incentive for disputants to not prolong the case. It seems that both systems might not be sufficient to provide incentive for the parties to be realistic in the amount they claim and to be efficient in the conduct of arbitration at the same time. Therefore, it becomes necessary for tribunals to exercise their power to control arbitration cost.

The second component, at the end of arbitration, is the allocation of arbitration cost. Arbitrators should exercise their authority to make an award allocating the costs of the arbitration taking into account the time spent in dealing with unmeritorious claims or counterclaims, grossly exaggerated claims, unsatisfactory conduct by a party in the course of the arbitration and so on. This may lead to a process that is fair for all; the disputants and the arbitrators.

Users of Construction Arbitration

Summarising the current state of affairs, a contractor-arbitrator stated *"Palestinian contractors have become ready to fight only recently. This is certainly by virtue of the significant improvements to arbitration infrastructure. Before, they would settle… Now arbitration is well-established in the construction industry*".

In regard to the current usage of arbitration, the researchers have not managed to find complete or even semi-complete data on the extent of construction arbitration in Palestine. However, the researchers received statistics of arbitration cases referred to two arbitral institutions that attract the vast majority of construction arbitration. The first (based in Gaza) processes 4 arbitration cases on average per annum while the second (based in the West Bank) processes 24 arbitration cases on average per annum. This evidence corroborates the available empirical evidence suggesting that construction arbitration is more common in the West Bank than in Gaza (Besaiso et al., 2016). The difference in the pattern of construction dispute resolution between Gaza and the West Bank can be attributed to variations in 'legal culture' and the perception of arbitration, the size of construction business, number of projects etc. The number of international construction arbitration cases that were conducted aboard, as stated by most respondents, are a handful of cases. Keeping in mind the small size of the construction industry in Palestine ~ $ 2.3 billion (Office of the Quartet Representative, 2014), the number of arbitration cases appears to be proportionally high.

Although the main users of arbitration are governmental employers, there is anecdotal evidence that two international governmental organisations or international agencies have recently participated in international arbitration conducted in Palestine. This may be a promising start to bring a change in the attitude and dispute resolution policy of international organisations. Such a change is important because the stipulation of international employers that international arbitration is to be seated abroad (e.g. in Paris or Geneva) hinders many contractors from seeking their rights as the majority of their claims are of small values. Contractors end up with negotiation or waiving their claims. All in all, international employers should rethink their policy towards tiered-dispute resolution clauses in their standard forms of contract because the current system prevents contractors from economic access to justice.

Conclusion

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Conclusion

This paper is a timely contribution to knowledge given the recent increasing interest in construction arbitration in Palestine. It shows that arbitration has been in use in Palestine for a long time. It did not suddenly come into being because of the passage of a modern arbitration act in 2000. This paper addresses the considerable changes that popularised what used to be rare, institutionalised what used to be ad-hoc and formalised what used to be procedurally poor. Since 2000, a remarkable improvement to construction arbitration infrastructure has taken place. This includes legislative reforms (e.g. Arbitration Act 3/2000; Civil and Commercial Procedure Act 2/2001), establishment of new arbitration institutions and emergence of qualified construction arbitrators.

However, some challenges still hinder arbitration from reaching its full potential. First, despite the considerable improvements in the legal infrastructure, the current time a court takes to confirm or annul an arbitral award is still long enough to defeat the very purpose of arbitration in providing a quick resolution to disputes. Second, costly arbitration is probably a result of the disputants' opportunism in grossly exaggerating their claims and counterclaims, the arbitration institutions' mechanism in determining arbitration fees based on the sum of dispute which is often inflated, and the arbitrators' lack of exercise of their discretion to make award on costs which is expected to restrain opportunism and hence arbitration costs. Third, the reluctance of some international organisations to participate in arbitration seated in Palestine is problematic. If they wish to fulfil their development goals, they should discharge their duty to facilitate access to justice and make arbitration work for domestic contractors. International organisation will probably be more willing to accept an arbitration seat in Palestine in light of Palestine's recent ratification of the New York convention in 2015 and in light of its prospective arbitration act. The ratification of the New York Convention assures the contracting parties that the Palestinians' courts will follow international practice in the recognition and enforcement of arbitral awards. The proposed changes to the Arbitration Act are expected to detach the arbitration process more from the national courts and hence will create a more arbitration-friendly environment.

If these problems linger, construction arbitration may have a recession. The users may question its remaining value if it is not only more expensive but also takes years from commencement of arbitration proceedings to enforcement of arbitration awards. The very purpose of arbitration is to provide a relatively cheap and quick resolution of disputes. Although the parties might be more tolerant with regards to cost, as long as it is affordable, they might not have the same tolerance towards time.

Nevertheless, on balance, it seems arbitration will stay at the forefront of dispute resolution techniques. This is not because arbitration is not without limitations, but because of the absence of any real competition from any other dispute resolution mechanism. While court litigation appears to be a hard option to swallow, adjudication is considerably ignored and almost non-existent. Mediation or conciliation also has many more socio-cultural challenges. Therefore, construction arbitration is expected to continue to gain new territories.

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Endnotes

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