Arbitrating in Times of Crisis: A Perspective from the MENA Region

It is a pleasure to submit the second in the series of LCIA Perspectives which are contributing to mark the 125th anniversary of the LCIA.

The LCIA Arab Users’ Council recently held a one day symposium on “In-crisis and post-crisis dispute management and resolution” in Beirut, which addressed notably legal and financial considerations in the management of disputes and their aftermaths.

Beirut seemed to be a very appropriate choice of venue to host the Symposium. Lebanon indeed stands as the stark example of a country that has been through and over crises and that has survived them with a sense of resoluteness and resilience. Perhaps its position, at a crossroads of civilisations and as a religious and cultural melting pot, can explain its history—tumultuous yet rich and its society—immersed in tradition, while focused on building a better future with creativity and innovation. The diversity in the Lebanese society is as much an invitation to tolerance and understanding, as sometimes, a source of dissention with the potential of tearing apart the bonds created over the years between the different communities.

The MENA region more generally, has not been spared from crises, particularly over the last years, with 26% of the population in the Arab world being affected by war according to latest statistics. The Arab “Spring” uprisings in Egypt, Syria, Libya, and Yemen, combined with the uncertainties as to political developments which followed and escalating wars, significantly impacted both the number and nature of disputes in the region. More recently, the Gulf was also impacted by a crisis, when on 5 June 2017, several Arab countries severed their diplomatic ties with Qatar.

Acting as counsel or dispute resolver in such circumstances, whether in Lebanon or elsewhere in the MENA region, requires taking into account financial and legal considerations which were addressed in the Beirut Symposium.

Our guest speaker Dr. Georges Corm, a distinguished Lebanese economist, discussed the economic background in the MENA and its relation to crises. He described the huge disparity in wealth and education across the Arab region, which he grouped into four: the Gulf States; the Mashrek countries (Iraq, Jordan, Lebanon, Palestine and Syria); the Maghreb countries and the deprived poor countries (Sudan, Yemen, Mauritania, Somali, Comoros and Djibouti).
Interestingly, Dr. Corm underlined the contrasts and disparities in the economic situation of Arab countries. He noted that while the Gulf States constitute only 13% of the Arab population, they concentrate 55% of the GDP in the Arab region and the highest level of foreign direct investment. By contrast, the deprived group constitutes 23% of the Arab population and only 6% of the GDP in the Arab world. Further, he noted that the deprived group has very high levels of illiteracy (29% in Yemen for example), and so does Egypt (24.8%) and Morocco (27.6%), as compared with Lebanon (6.1%) or Jordan (3.3%).

Dr. Corm considered that these elements created an environment fermenting conflict, which must be broken by reconstruction and investment. He notably invoked the necessity for provision of “decent work”, as a pre-condition to a stable society. I personally do hope that the legal profession can play a constructive role, upholding the rule of law, which provides a conducive environment for prosperity.

The speakers at the LCIA Symposium addressed some of the legal and practical issues that arise during and after a crisis. I had the pleasure of chairing the Conference’s first panel on “In-Crisis Management and Arbitration in the MENA Region: Financial and Legal Considerations”, followed by panel on “Post-Crisis Disputes: Strategic Considerations and Business Expectations” and a Tylney Hall Style session, co-chaired by Prof. Dr. Mohamed Abdel Wahab and Dr. Jacomijn van Haersolte-van Hof, which closed the Symposium.

The speakers looked at the effect of a crisis on contractual performance and the concepts of force majeure, frustration, change of circumstances, material adverse change, and hardship.

Other topics tackled included international sanctions, imposed by the US, the EU and/or the UN, and how those affected can effectively obtain legal representation; or whether the existence of a national crisis impacts the role and duty of counsel and of the arbitral Tribunal.

In the context of investor-state arbitrations, the practical difficulties of arbitrating against a State and enforcing an award against a State were also touched upon. One interesting point addressed were the practical difficulties arising when competing groups assert that they represent the legitimate government. In such circumstances, who has power to issue instructions and if no communication is forthcoming, should the lawyer keep acting and do whatever he/she thinks best?

Beyond the financial and legal considerations, I would add that managing disputes in conflict-prone regions such as the MENA requires human skills and a certain mindset. It is about accepting risks and uncertainty and about dealing with a large information gap, which entails speculation as to what is likely to happen and the adoption of the most appropriate course of action in consequence. Managing disputes in times of crisis is also about being able to constantly adapt to a changed set of circumstances and to renew one’s approach repeatedly, whether as a lawyer, an advisor to clients or a dispute resolver.

To conclude, I am proud, especially as a Member of the LCIA Court, that the LCIA was the forum for this very thought provoking discussion.