How do Construction Arbitrators make their decisions? A Perspective from Palestine

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About me ...

Education

• PhD candidate at the University of Manchester
  – International construction arbitration
• MSc. Engineering Project Management - the University of Manchester
• BSc. Civil Engineering – the Islamic University of Gaza

Experience:

• Academic : LJMU, UoM, DBS, IUG
• Industry: contracts manager
Construction Dispute Resolution in Palestine

– negotiation
– mediation/conciliation
– adjudication
– arbitration
– litigation
Literature Review

Research on construction/commercial arbitration

• From a thematic perspective, in stark contrast to the abundance of scholarly writings on procedural and conceptual matters, scholars have paid limited theoretical and empirical attention to the decision making of arbitrators.

• From an epistemological perspective, there is vast theoretical scholarship, but a few empirical research on commercial arbitration. The same goes to construction arbitration, that has even very thinner scholarship.
“Most studies of arbitration are devoted to discussions about the applicable law or the various procedural rules. It seems far more important to try to analyse how and why arbitrators make up their minds.”

Robert Coulson, President
American Arbitration Association, 1990
“...The question of how arbitral tribunals’ decisions are reached – the process itself – is shrouded in darkness. The little that is known about arbitral decision-making remains anecdotal”

Michael Schneider
Swiss Arbitration Association, 2012

“... in all that is written and said about arbitration – and nowadays a great deal is written and said – there is very little about how a tribunal of arbitrators goes about reaching its decision”

(Redfern and Hunter, 2009)
Literature Review

Four empirical studies related to construction arbitration decision making:

• Do arbitrators follow the law and the contract?
  - American Arbitration Association (AAA) construction arbitrators questionnaire survey (1994) – USA
  - Pepperdine’s Straus Institute for Dispute Resolution in cooperation with the College of Commercial Arbitrators (CCA) undertook a recent survey on Arbitration Practice in 2013 – USA

• Do arbitrators render consistent and predictable awards?
  - Consistency and Reliability of Construction Arbitration Decisions: Empirical Study” (2009) - Chip Ossman, USA
  - Meadowsweet v Bindweed (2000) empirical study - Andrew Bartlett, CIArb Journal
Research Question and Method

• Research question is ‘how’ do construction arbitrators decide on the substance or on the merit of a dispute

• Method: 12 semi-structured interviews with senior arbitrators (Engineer, Contractor, lawyer) arbitrator
Findings
The Construction of Contract

1. Interpretation
2. Implications

The research findings suggest that construction arbitrators rely heavily on the contract terms and conditions to determine a dispute, with little consideration given to the governing law.
The Construction of Contracts

The arbitral approach in contract interpretation

• "no interpretation in the presence of a text
  لا مَسَاعٍ لِلِلِاجْتِهادِ فِي مَوْرِدِ النَّصّ
• "words are presumed true "
  الأَلْسَنُ فِي الْكَلَامِ الْحَقِيقَةُ

• "in contracts, effect is given to intentions and meanings and not to words and phrases
  الْعَبْرَةُ فِي الْعُقُودِ لِلْمَقَاصِدِ وَالْمَعْانِي لَا لِلْأَلْفَاظِ وَالْمَبَانِي

• "the literal meaning of a word can be altered by custom
  الْحَقِيقَةُ تُنْتَزَكَ بِدَلاَلَةِ الْعَادَةِ
The Construction of Contracts

The Unified Contract
The Construction of Contracts

**Customs**

To a considerable degree, and particularly when arbitrators are drawn from the construction industry, their decisions are influenced by the industry’s norms (trade *usages*, business *customs* and commercial practice).
# The Construction of Contracts

## Customs: the 'supremacy' of customs

<table>
<thead>
<tr>
<th>Article no.</th>
<th>English translation of the article</th>
<th>Original version of the article in Arabic</th>
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<tbody>
<tr>
<td>Article 36</td>
<td><em>Usage is an arbitrator; that is to say, usage, whether general or specific, may be invoked to justify a judgement</em></td>
<td><strong>العادة محكمة. يعني أن العادة عامة كانت أو خاصة تجعل حكما لإجراءات حكم شرعى</strong></td>
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<tr>
<td>Article 37</td>
<td><em>People's practice is an authority that shall be applied</em></td>
<td><strong>استعمال الناس حَكَم يِجْبَ العَمَلُ بها</strong></td>
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<tr>
<td>Article 40</td>
<td><em>The literal meaning can be disregarded in light of the customarily meaning</em></td>
<td><strong>الحقيقة تتزكى بدلالة العادة</strong></td>
</tr>
<tr>
<td>Article 43</td>
<td><em>What is known as a custom is like what is stipulated as a condition</em></td>
<td><strong>المُعْرَفُ عَرَفًا كالمَشْرَوْطٍ شرُطاً</strong></td>
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<tr>
<td>Article 44</td>
<td><em>What is known amongst merchants is like what is stipulated between them.</em></td>
<td><strong>المُعْرَفُ بَيْن النِّجَار كالمَشْرَوْطٍ بينهم</strong></td>
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<tr>
<td>Article 45</td>
<td><em>A matter regulated by a custom is like a matter regulated</em></td>
<td><strong>المَعْرَفُ بِالمَعْرَفُ كالتأريِ بِالمَعْرَفُ بالنصَ</strong></td>
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Arbitrator Background

1. Industry’s in-group bias
   - Engineers: pacta sunt servanda
   - Contractors: contracts are often biased, unfair and unreasonable terms, duty of good faith

2. Ideology/Value:
   - "interest" or "financing charges" clause

3. Incomplete contract (contradiction, silent)
   - Customs vs. law
Thank you