

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

An updated version of the essay awarded the Society of Construction Arbitrators' Norman Royce Prize 2017

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## **Abstract**

The intent of this research is to explore arbitral decision-making in construction disputes. The main research question is 'how' construction arbitrators decide on the substance or on the merit of a dispute. This research relies on 12 semi-structured interviews with senior arbitrators. 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. 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 research findings also suggest that arbitrators lack a consistent approach to resolve disputes arising out of incomplete contracts. The background of an arbitrator emerges as a factor that influences arbitral decision making particularly when contracts are silent on the matter in dispute

**Keywords** arbitration, construction, disputes, decision-making

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## 1.0 Introduction

The construction industry is one of the largest contributors to the economy<sup>2</sup> and employment<sup>3</sup> in Palestine. The construction industry is plagued with disputes. Given the minor role judges play in adjudicating construction disputes in Palestine, and while arbitration is the fundamental quasi-judicial dispute resolution method<sup>45</sup>, it becomes of vital importance to understand how arbitrators make their decisions.

The lack of understanding comes primarily from the doctrine of confidentiality. As a result of this confidentiality, the vast majority of commercial arbitration awards are locked inside a black box. The confidentiality of commercial arbitration is generally-accepted worldwide and considered as one of its intrinsic features<sup>6</sup>. Palestine is no exception. The Palestinian Arbitration Act 2000 stipulates in Article 41 that the arbitration award is confidential unless the parties or the competent court agree otherwise.

The lack of empirical knowledge of construction arbitration decision making also comes from the shortage of empirical evidence. Few empiricists, from other jurisdictions, took the initiative to compensate for this lack of knowledge through empirical research. However, a review of this thin literature reveals inconclusive answer on how construction arbitrators make their decisions<sup>7</sup>. The positivistic approach associated with most of these studies fails to account for a deeper understanding of the decision making process.

To compensate for the shortage of scholarly articles on the subject, this research uses an interpretivist approach to explore ‘how’ arbitrators decide on the merits of construction disputes.

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<sup>2</sup> PCBS (Palestinian Central Bureau of Statistics). (2017a). Annual national accounts variables in Palestine for the years 1994 - 2015 at constant prices: 2015 is the base year. Downloadable from [http://www.pcbs.gov.ps/Portals/\\_Rainbow/Documents/E-CNA-1994-2015.html](http://www.pcbs.gov.ps/Portals/_Rainbow/Documents/E-CNA-1994-2015.html). Accessed on 2nd April 2017.

<sup>3</sup> PCBS (Palestinian Central Bureau of Statistics). (2017b). Percentage Distribution of Employed Persons Aged 15 Years and Above from Palestine by Sex and Economic Activity, 2000-2015. Available at [http://www.pcbs.gov.ps/Portals/\\_Rainbow/Documents/employment-2015-01e.htm](http://www.pcbs.gov.ps/Portals/_Rainbow/Documents/employment-2015-01e.htm). Accessed on 2nd April 2017.

<sup>4</sup> Besaiso, H., Fenn, P. and Emsley, M. (2016) Alternative dispute resolution in Palestine: the myth and dilemma of construction mediation. *International Journal of Law in the Built Environment*, **8** (3), 269-286.

<sup>5</sup> Besaiso, H., Fenn, P. and Emsley, M. (2017). Evolution of Construction Arbitration. *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction* - accepted for publication

<sup>6</sup> Smeureanu, I. M. (2011) Confidentiality in international commercial arbitration, Kluwer Law International.

<sup>7</sup> Besaiso, H., Fenn, P. and Emsley, M. (2017) International Construction Arbitration: a need for decoding the black box of decision making. *International Construction Law Review*, **34**(3), 288-308

## 2.0 Methodology

This research relies heavily on the results of 12 semi-structured interviews conducted with construction arbitrators from Palestine. They are nine construction professionals, two lawyers, and one retired judge. The arbitrators were selected in accordance to purposive sampling technique to make sure that the participants have rich experience in the real-world practice of construction arbitration. The interviews were conducted via Skype - the average duration was 30 minutes - and then transcribed. The analysis of the transcripts has been done manually. The participants were informed that the interview data would be used for academic research and publication and that anonymous quotes may be used. Nevertheless, they were assured that the confidentiality of information and anonymity of participants and organisations will be preserved.

Besides the interviews data, the author consulted two supplementary sources that were referred to by the participants. The first is Al-Majalla, or Majallat Al-Ahkam Al-Adliya<sup>8</sup> that represents the first codification of Islamic law. Influenced by the French Civil Code of 1807, the Ottomans started the codification process that produced the Ottoman Civil Code representing the "general principles of Islamic contract law". The second is the Unified Contract, also known as the Unified Muqawala Contract, which is basically FIDIC 1999 general conditions of contract for construction "the new Red Book" that has an annex of standardised particular conditions. It has been ratified by the Palestinian cabinet since 2006 to represent the Palestinian Unified Conditions of Contract for Construction<sup>9</sup>.

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<sup>8</sup> Majallat Al-Ahkam Al-Adliya (Journal of Juridical Rules).(1876). Available at "Al-Muqtafi" online legal database <http://muqtafi.birzeit.edu/Legislation/LegCard.aspx?id=3905>

<sup>9</sup> Decree 131/2006 published in the Palestinian Official Gazette (Al-Waqa'e Al-Filastinyya) Issue No. 69, on 27 April 2007, available at "Al-Muqtafi" online legal database (<http://muqtafi.birzeit.edu/Legislation/LegCard.aspx?id=15503>). The Palestinian legislation is published in the Official Gazette. (Birzeit University Institute of Law web page). Accessed on 2nd April 2017

### **3.0 Research findings**

The participants were asked to outline the main types of construction disputes that reach arbitration. They stated that the most frequent construction disputes that reach arbitration are related to interpretation of contract, force majeure, variations, delays, suspensions and contract termination. The busiest participants in construction arbitration appear to be general contractors and government entities (e.g. ministries, municipalities).

Then the participants were asked to describe how they make their decisions on construction disputes and how they decide when the contract is incomplete (silent or ambiguous or contradictory). The following paragraphs present a thematic analysis and synthesis of unstructured data generated from the interviews. This data is linked to relevant legal principles.

#### **3.1 Applying the contract terms and conditions**

Almost all participants stated that they depend entirely on the facts and the terms of the contract to make their decisions. The arbitrators stated that in nearly all cases they arbitrated there was no need to go beyond the contract at hand to ascertain the content of the law. Construction contracts, that tend to be comprehensive and detailed, are sufficient.

The arbitrators stressed the importance of the fundamental legal principle of "pacta sunt servanda" or "العقد شريعة المتعاقدين" "the contract is the law of the parties". An engineer-arbitrator said that regardless of how harsh contractual terms might appear, the tribunal would enforce them. This is because that is part of the contractual risk allocation the parties have agreed on, and the contractor has signed on. He asserted that it is up to the parties themselves, and not to the tribunal, to satisfy themselves of the contract terms before contract signature. Another engineer-arbitrator said that as long as there was no force majeure, he would enforce the contractual provisions regardless of the fairness of risk allocation.

On the other hand, a contractor-arbitrator stated that construction contracts are often biased towards its author who is normally the employer. Hence, although his starting point is that a contract should be

observed, he probably would not enforce unfair and unreasonable terms in limited circumstances. He gave this example:-

*“Some construction contracts that are delivered through the traditional design-bid-build route held the contractor responsible for the integrity and correctness of design. Some of these contracts are for the construction of sophisticated facilities that take a considerable period of time and expenditure to prepare and check the design. Therefore, it is unreasonable to transfer the design risk to the contractor and I would probably not enforce the clause. If the employer needs to transfer the design risk to the contractor, this is fine, he should procure the project through a design and build route.”*

Another type of clauses that appears to be susceptible to non-enforcement is "financing charges" clause. One engineer-arbitrator said that he would strike down an express term in the contract or disregard a term implied from the general law providing interest or financing charges as remedies of late payments. He argued that notwithstanding any legislation or contract clause to the contrary, he would not award interest payments because usury or 'Riba' is forbidden in Islamic law. It is worth mentioning that the Unified Contract, in its standardised particular conditions, provides for 9% financing charges subject to any restriction by the code of civil and commercial procedure. Further, the Council of Ministers decision 12/02/16 for the year 2013 affirm the duty of compliance with the Unified Contract clause 8/14 as regards late payments<sup>10</sup>. The legislative instrument considers that this remedy represents compensation for all damages incurred by the contractor because of delayed payments in breach of an obligation. It does not refer to it as "interest" probably to avoid any inconsistency with the principles of Islamic law. While interest accrues automatically, financing charges are compensatory in nature and hence the burden of proof is different in the two cases.

While the majority of participants disagree with the arbitrator's stance in not giving effect to "interest" or "financing charges" clause, doubts remain over their enforceability in arbitration settings. One tool to minimise this risk will probably be the track record and the ideology of an arbitrator. In any case, if employers are granted this relief and comfort, what would oblige them to make timely payments for contractors, and what would the entire effect on the cash-driven construction industry be?

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<sup>10</sup> Retrieved from "Al-Muqtafi" online legal database

### 3.2 The interpretation of construction contracts

The arbitrators asserted that they do not normally seek guidance from the law to make their awards. It appears that this also extends to the interpretation of contracts. Throughout the interviews, the arbitrators did not explicate if they rely on principles of interpretation set out in Palestinian law. However, the author finds that their approach in contract interpretation generally complies with Islamic jurisprudence as abstracted in a handful of articles in Al-Majalla.

For instance, as the arbitrators suggest, the starting point is to give effect to and enforce the plain meaning as long as the contract wording is clear. They justified this in accordance with the Islamic legal maxim "no interpretation in the presence of a text *لَا مَسَاحَ لِّلْإِجْتِهَادِ فِي مَوْجِدِ النَّصِّ*". This maxim is codified in Article 14. It also agrees with Article 12 "words are presumed true *أَلْأَصْلُ فِي الْكَلَامِ الْحَقِيقَةُ*" which means words are presumed to have their true and direct meaning. According to the eminent Egyptian legal jurist Al-Sanhuri, the main source to ascertain the intent and mutual understanding of the parties in Islamic law is the expressions and statements the parties used in their contract<sup>11</sup>. This may give the impression that Islamic law favours objective interpretation of contracts that goes no further than the intention as expressed in the contract.

However, contract interpretation does not seem to be a straightforward exercise. There are other legal maxims that appear to prefer subjective interpretation. For example, Article 2 and Article 3 seem to favour intention. In particular, Article 3 provides that "in contracts, effect is given to intentions and meanings and not to words and phrases *الْعَبْرَةُ فِي الْعُقُودِ لِلْمَقَاصِدِ وَالْمَعَانِي لَا لِلْأَلْفَافِ وَالْمَبَانِي*". In addition, Article 40 provides that custom has precedence over literal meaning "the literal meaning of a word can be altered by custom *الْحَقِيقَةُ تُتْرَكُ بِدَلَالَةِ الْعَادَةِ*".

These legal maxims are challenging to reconcile. Nonetheless, on balance, it appears that the interpretation of contracts in Islamic jurisprudence favours contextualist or subjective approach over textualist or objective approach. It follows that the starting point in contract interpretation is to give

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<sup>11</sup> AL-SANHURI, A. 1954. *Masader al-Haq fil Fiqh al-Islami (Sources of Right in the Islamic Jurisprudence)*, Beirut Dar Ehia Al-Tourath Al-Arabi دار إحياء التراث العربي.

words their direct and literal meaning assuming this is the true meaning the parties intended. However, if there is room for interpretation, the common intention of the parties is to be derived from the context (surrounding circumstances, course of dealings, customs etc.). The author finds that this is manifested in the arbitrators' approach in their interpretation of contracts<sup>12</sup>.

When they interpret construction contracts, arbitrators expressed their attempt to reach a 'mutually explanatory' interpretation based on an initial assumption that a contract is integral, complimentary, consistent and self-explanatory and should somewhere provide for its own interpretation<sup>13</sup>. In other words, the textual context dictates that various parts of the construction contract shall not be treated as independent.

Then, if the controversy remains unanswered by the contract itself, arbitrators may seek extrinsic evidence to understand the intention of the parties or the intention a reasonable person would have had. This extrinsic evidence on the relevant circumstances of a case may include pre-contract negotiations, subsequent conduct of the parties, course of dealings etc. If the intent of the parties is still unascertainable, from the contextual nexus of parties' relationship, the interpretation direction becomes more controversial. At this point, arbitrators may seek aid from general customs and usages in the construction industry.

If the contract contains a contradiction or a discrepancy that entails two equally reasonable interpretations, arbitrators will try to read the contract as a whole to reconcile the contradictory provisions. Whenever they find that the contradiction is irreconcilable, then they will enforce the precedence clause. If the contract does not have such a hierarchy clause, the outcome of the case becomes highly uncertain and speculative. The arbitrators appear to have no common ground. Some arbitrators may decide against the author/drafter of the contract as it is the party responsible for the problem at the first place. Other arbitrators said that in case of contradiction between contract

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<sup>12</sup> One arbitrator also linked contract interpretation under Islamic law with Islamic sacred texts (Quran and Hadith) interpretation which is contextual in nature.

<sup>13</sup> An arbitrator said that in many cases there are clues and indicators in various parts of the contract, and your role as an arbitrator is to connect the dots and try to understand where the contract intent is going and to read the multiple documents together to determine the full requirements.

documents, they may give more weight to the bill of quantities (BOQ) as it most probably represents the parties' intention. This is because, in their opinion, both parties on the demand side and on the supply side put more emphasis on this document than other documents. Employers and Engineers tend to invest more time and effort in drafting the BOQ while preparing the tender documents. Contractors tend to depend to a large extent on the description provided in the BOQ to price their bids. Another justification for the tendency to give more weight to the BOQ, as some arbitrators suggest, is based on customs. They think the industry's practice, as manifested in some of the domestic contracts, is to insert a contractual clause giving a higher priority to the BOQ than for example the specifications or the drawings. Yet, other arbitrators said they would refer to the Unified Contract as a representation of the general law and imply the 'precedence' or the 'priority of documents' clause into the parties' contract.

In case the contract is silent on the issue in controversy, arbitrators' approaches towards supplementing or filling gaps in contracts reflect a lack of consensus. The arbitrators do not concur on the hierarchy between the constructs of general law, customs and standards of fairness. Generally speaking, arbitrators with an engineering/construction background show a preference for the industry's norms and customs, then standards of fairness, then the general law. While two of them maintain that 'fairness' is the overarching aim and takes precedence over customs, they all agree that the general law is of little relevance. In contrast, arbitrators with a legal background favour the general law over the industry's norms and customs and consider the standards of fairness as the last resort. Yet, at the same time, eight participants acknowledged that building a universal hierarchy of authority from the three constructs of standards of fairness, industry's norms and the general law to govern any dispute the contract is silent on is unrealistic. They assert that it is difficult to have one-size-fit-all hierarchy for all disputes. They argue that a technical dispute is different by nature from a contractual or commercial dispute, and not all technical disputes or contractual disputes have the same substance. In addition, some arbitrators stated that they might supplement or incorporate provisions from the Unified Contract to fill gaps in the parties' contract. The role of the Unified Contract besides the roles of law and customs are discussed in the following sections.



### **3.3 The construction of construction contracts**

#### **3.3.1 Where is the law in construction arbitration decision making?**

The arbitrators' decision making shows a lack of consideration given to the law in the construction of contracts.

A reason for this neglect, as one lawyer-arbitrator suggests, is that arbitrators have no obligation to follow the law. They are relatively free to decide according to what they perceive as fair and equitable decision based on their good conscience untrammelled by constraints of law. The interviewee suggested that although the Arbitration Act 2000 requires arbitrators to give reasoned awards in Article (39), this requirement does not oblige arbitrators to give law-based reasons.

However, a series of articles (Art.17, Art.19, Art.36) in the Arbitration Act 2000 indicate that arbitrators shall apply the law to decide the issues in dispute. In addition, arbitrators should not subject their awards for the risk of challenge on the ground of improper application of the law. The author's review of the Arbitration Act finds that substantive or legal errors in the award may be sufficient grounds for challenge. Article (43) of the Act states *"All of the parties of arbitration shall have the right to challenge the decision of arbitration before the competent court for any of the following reasons....5- Misconduct by the arbitration panel or violation of what the parties had agreed on regarding [application of legal rules on the issues in dispute] ..."*

A further reason for the neglect of the law in decision making, in the opinion of one legally-qualified arbitrator, is due to the representation of the parties and the background of arbitral tribunals. In most of the cases, the parties are not legally represented but rather they are professionally represented by individuals with no sufficient legal knowledge. Construction arbitration tribunals in Palestine are overwhelmingly comprised of construction professionals (engineers, contractors) and this makes them less attentive or concerned to ascertain and apply the law. He added that the Arbitration Act 2000, reflecting the basic philosophy of arbitration, does not require an arbitrator to have legal qualification or legal training to practice arbitration. The following is a quote from the arbitrator's words:-

*“In the engineering and construction arbitration, the essence is the contract. After that, arbitrators depend tremendously on the industry’s norms, trade usages and customs, technical standards and commercial practice... this is because they are engineers unlearned in law ... I, as a lawyer, try to bring the general law to the arbitration decision making ...Nevertheless, there is little guidance provided by the general law”*

Furthermore, the shortage in state-supplied construction law is certainly a fundamental reason for the marginalisation of law in arbitral decision making. All respondents except the judge concur that there is little guidance provided by the general law. The judge declines that there is a legal vacuum because of the absence of specific legislation. He asserts that judges always manage to find a legal ground for their decisions from the available legislation or general principles of law. All other respondents state that the general principles of contract law (expressed in Al-Majallah) are inadequate to handle construction disputes. They mentioned that there is no specific legislation or statute to regulate or to govern construction contracts. Besides, there is limited case law because most of construction disputes are settled amicably or determined by arbitration tribunals. The out-of-court resolution of construction disputes leaves no opportunity for construction case law to develop. A lawyer-arbitrator described this state of affairs as

*“We do not have law of contracts; we are still reliant on Al-Majalla which is kind of a general civil law... Construction law as a whole is ruled by statutory instruments and case law. We still lack such statutory instruments to govern construction and contracting contracts. Case law related to construction is sparse and leaves many questions open ...”*

When disputes arise, construction parties might find themselves in a legal vacuum due to the lack of special rules governing construction and contracting contracts. The pressing need for a statute pushed the Palestinian legislator to incorporate legal provisions for contracting agreements in the draft Palestinian Civil Code, which has not been approved yet by the Legislative Council<sup>14</sup>. In addition, the Palestinian cabinet introduced a standardised contract system, the Unified Contract, to address the industry's concerns regarding this legal vacuum and the proliferation of multiple standard forms of contract.

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<sup>14</sup> Fayyad, M. (2013) Small Construction and Contracting Contracts in Palestine between Deficiency in Theory and Difficulties in Application.

### 3.3.2 The Unified Contract

In case the contract is silent on the substance of disputes, as discussed in the previous section, some arbitrators confirm that they would probably imply terms from the Unified Contract into a construction contract should the parties fail to include express terms. They maintain that this incorporation or supplementation should follow a careful examination of the fundamental risk allocation expressed in the parties' contract. In so doing, arbitrators make sure the incorporation is lined to, and not disruptive to, the overall risk allocation philosophy expressed in the parties' contract. Thus, this may indicate that the incorporation of provisions from the Unified Contract is not, and should not, be a straightforward exercise but rather an intellectual endeavour to develop the most conceivable solution to the dispute at hand. If a provision of the Unified Contract distorts or does not fit in, by analogy and logic, the overall risk allocation approach expressed in the parties' contract, it should be disregarded.

The arbitrators who propose this approach to imply terms from the Unified Contract justify it based on two grounds. First, they argue that the Unified Contract represents a consensus between main players in the construction industry. This contract came after long campaigns by the contractors' union demanding a harmonisation and unification to the conditions of contract governing construction projects. Also, the arbitrators argue that the Unified Contract has been introduced, since 2006, in order to counter the discretionary power of public employers during tender procedure and contract negotiation. They assert that the Unified Contract represents a standard form of construction contract through which the contractual rights of the parties are embedded in a balanced risk allocation framework. Second, some arbitrators grant the Unified Contract a much higher status. They maintain that the Unified Contract has the status of general law, and hence it applies regardless of whether or not the parties agree on its applicability.

The author does not quite agree with this proposition. There is nothing to indicate that it was the intention of the cabinet ratification to accord the Unified Contract the status of general law or a statute governing construction contracts. The wording of the decree goes as "*...the contract is to be used for*

*all tenders in the Palestinian territories...*". There is no further explanation or commentary if this is limited to governmental contracts in which the government or a government entity is the contracting authority or if it also includes public projects procured by foreign or multinational employers. There is also no mention at all if it extends to govern private construction contracts. The author's interpretation of the decree is that it is the legislator's intention to limit the applicability of the Unified Contract to public works. In other words, the Unified Contract automatically governs all construction works and infrastructure projects contracted by the government, unless the financier (a donor or a lender) stipulates otherwise. This is because some financiers dictate the use of their standard forms of contract to govern the projects they finance.

Therefore, the author argues that the Unified Contract shall neither be qualified as law, nor has the character of law or even the status of non-mandatory customary law. The Unified Contract, or FIDIC, is not designed to be in the status of a law. This is why it has a choice of law clause. The Unified Contract, in article 1.1.6.5 of its particular conditions, states that the contract is to be governed by the applicable laws in Palestine. Similarly, article 1.4 in the particular conditions stipulates that the law governing the contract is the applicable law of Palestine. Hence, it is essentially a standard form of contract that becomes applicable subject to contractual agreement.

It follows that the incorporation or supplementation of terms from the Unified Contract may be surprising and contrary to the expectation of some parties. Nevertheless, the de facto 'non-mandatory law' status accorded to the Unified Contract by some arbitrators appears to be a reaction to legal vacuum left by the legislator. Construction arbitrators, who are left in a jurisdiction where no regulatory law exists to govern construction contracts, may find themselves with no option but to resort to the Unified Contract, at least as a frame of reference, for a solution to the dispute at hand.

Although the author asserts that the Unified Contract has in no way the status of a legal source, it is undeniable that it still has a privileged status. This status is a derivative from the government endorsement of its use in public projects, the widespread use and general familiarity with its clauses and provisions, and the fact that it represents a balanced compromise between the interests of the

construction community reached after negotiations between organisations representing both contractors and main employers. It can be argued that the popularity and the familiarity of the Unified Contract will bring about a normative authority. This is because the extent of usage of a standard form of contract might shape the industry's norms. An arbitration tribunal might deem these norms to be customs and usages widely recognised in the construction industry and hence indicative of the subjective intention of the parties when they entered into a contract. However, it is also possible that an arbitration tribunal might find that a clause in the Unified Contract does not qualify to constitute a custom or usage in the strict sense and is not conceivable to be applicable. It is unclear if an arbitration tribunal may also refer to the Unified Contract, because of its normative authority, to interpret the meaning or to examine the reasonableness of terms of the parties' contract.

Overall, whether the Unified Contract has the quality of law is in dispute. However, arbitral jurisprudence represented by the majority opinion of arbitrators tends to hold that at least certain clauses of the Unified Contract should be seen as equivalent to general principles of law. These arbitrators argue that this flows naturally from the principle of good faith or the principle of binding customs in the construction industry. However, an arbitrator stressed that the solution should be compatible with the overall risk allocation in the parties' contract. Further, another arbitrator asserted that the area of influence of the Unified Contract is limited because it cannot be relevant to small-value or short-duration projects or projects procured by variant procurement routes. That being said, it is worth to mention that arbitrators said they almost always find the solution in the parties' contracts that tend to be comprehensive. Hence, this discussion is mostly academic and does not reflect a common practice.

### **3.3.3. Where are the industry's norms (trade usages and customs, commercial practices) in construction arbitration decision making?**

The construction arbitrators state that they rely on customs, usages and practices to interpret the meaning of a contract or to supplement a contract. This is because a custom, by definition, is a practice which has achieved a high degree of prevalence and acceptance within the construction

community. Hence, a custom may indicate what the parties probably meant or intended when they entered into a contract.

They state that customs can be applicable for the industry at large (general custom) or for particular groups within the industry e.g. a large Employer (specific custom). In either case, a custom is binding on the parties unless they have agreed otherwise in their contract or have formed another practice between themselves (course of dealings). In other words, a custom is considered a main source of non-mandatory law or implied terms.

Of course, the claimant relying on a custom in his argument has the burden of proof to establish that it exists. The proof that a custom exists, and most importantly uncodified custom, can be challenging. It is not clear what evidence will be a satisfactory discharge of the burden of proof. Yet, it is ultimately the task of the tribunal to determine whether a custom exists. The definition of a custom, as articulated by the arbitrators above and written in Al-Majalla below, is undeniably sufficiently open to afford an arbitrator a high degree of discretion. As a guide, an arbitrator proposed a simple test to discharge the burden of proof that a custom exists. He said that if three construction professionals concur on 'the common way of how something is usually done around here', then this is custom. The construction professionals might be expert witnesses. However, some arbitrators stated that they may invoke a custom by their own initiative when it is well-established in their opinion. They asserted that they are appointed because of their technical and commercial expertise in the construction industry. It is true that the virtue of having a tribunal comprised of construction professionals is that they will need less detailed submissions on the custom. Nonetheless, the unilateral application of a custom by a tribunal is problematic as it may jeopardise its neutrality. To address this concern, the tribunal should put its opinion before the parties and invite them to comment on it.

Customs appear to constitute an important part of the obligations nexus between parties to a construction contract in Palestine. This is apparent from the arbitrators' reliance on these codified and uncodified usages and practices in the industry. The codified usages, as proposed by an engineer arbitrator, come from the technical standards published by Palestine Standards Institution (PSI). So, if

the parties fail to express the specification or the quality requirement of a certain item or deliverable, material or work, such as the strength of concrete for a structural element, arbitrators refer to the national requirements of the PSI and imply it into the contract. Departing from the principle of good faith, construction arbitrators assume that parties acquaint themselves to the trade usages and practices. The requirements of the PSI are considered to be the reasonable expectation and intention of the parties.

The Arbitration Act 2000 does not explicate how arbitrators should make their decisions, and in nowhere does it point out to the place of customs or usages. However, the rules of the Palestinian International Arbitration Chamber PIAC, for instance, dictate that it is the duty of the tribunal to take trade usages into account in determining the rights and liabilities of the disputants. In Article 3 it states:

*“The Arbitral Tribunal shall decide on the merits of the dispute in accordance with the rules of law unless the parties expressly provided that the Tribunal decide ex aequo et bono.... [In any case], the Arbitral Tribunal shall take into account [trade usages]”.*

In addition, the author finds that Al-Majalla gives significant consideration to the commercial customs and trade usages as evident in a set of principles (Art. 36 to 45) listed in the ninety-nine ‘general principles of jurisprudence’ or ‘legal maxims’. These articles are listed in table (1) below:-

Table (1): Custom’s authority in Al-Majalla

Article no.	English translation of the article	Original version of the article in Arabic
Article 36	<i>Usage is an arbitrator; that is to say, usage, whether general or specific, may be invoked to justify a judgement</i>	الْعَادَةُ مُحَكِّمَةٌ، يَغْنِي أَنَّ الْعَادَةَ عَامَّةً كَانَتْ أَوْ خَاصَّةً تُجْعَلُ حَكْمًا لِإِثْبَاتِ حُكْمٍ شَرْعِيٍّ
Article 37	<i>People's practice is an authority that shall be applied</i>	اسْتِعْمَالُ النَّاسِ حُجَّةٌ يَجِبُ الْعَمَلُ بِهَا
Article 40	<i>The literal meaning can be disregarded in light of the customarily meaning</i>	الْحَقِيقَةُ تَزُولُ بِدَلَالَةِ الْعَادَةِ
Article 43	<i>What is known as a custom is like what is stipulated as a condition</i>	الْمَعْرُوفُ عُرْفًا كَالْمَشْرُوطِ شَرْطًا
Article 44	<i>What is known amongst merchants is like what is stipulated between them.</i>	الْمَعْرُوفُ بَيْنَ التَّجَّارِ كَالْمَشْرُوطِ بَيْنَهُمْ
Article 45	<i>A matter regulated by a custom is like a matter regulated by a text</i>	الْمُتَعَيَّنُ بِالْعُرْفِ كَالْمُتَعَيَّنِ بِالنَّصِّ

The 'supremacy' of customs, collectively manifested in these legal maxims, means that customs are as binding as contracts. The definition of what accounts as custom could be problematic particularly when it is uncoded. Al-Majalla, in two articles, provides guidance for what is to be considered as custom. These articles are listed in table (2) below:-

Table (2): Custom's definition in Al-Majalla

Article no.	English translation of the article	Original version of the article in Arabic
Article 41	<i>Effect is given to usage only if it is of a regular occurrence or when universally prevailing.</i>	إِنَّمَا تُعْتَبَرُ الْعَادَةُ إِذَا اطَّرَدَتْ أَوْ عَلَبَتْ
Article 42	<i>Effect is given to the common and the prevailing; not to the rare.</i>	الْعَبْرَةُ لِلْعَالِبِ الشَّائِعِ لَا لِلنَّادِرِ

#### 4.0 Conclusion

The majority of construction disputes referred to arbitration in Palestine are resolvable on the facts of the dispute and the terms of the contract alone. Construction arbitrators tend to put great emphasis on the terms of the contract. They give little consideration to the law.

As regards the contract, construction arbitrators' approach in the interpretation of contracts appears to be based on their industry's experience and commercial common sense. They tend to not get involved in legal analysis in accordance to legal principles of contract interpretation. Construction arbitrators demonstrate general consistency in the way they interpret contracts. However, the research outcomes indicate a lack of consensus between arbitrators on the way to approach disputes arising out of incomplete contracts (i.e. contracts that are silent or contain ambiguity or discrepancy). In this case, the arbitrator's background may play a role in supplementing incomplete contracts. In addition, the arbitrator's background might influence his/her opinion on the reasonableness or validity of contract terms and conditions.

As regards the law, in construction arbitrations, the award is minimally, if any, influenced by the stipulations of substantive law. This is probably because of two main reasons. First, construction professionals, rather than legal professionals, dominate arbitration settings. Hence, they have a natural



tendency to apply standards they are competent in rather than legal standards. Second, there is a lack of case law and legislation to regulate construction contracts. This means that construction law is largely dependent on a contract system, such as the Unified Contract, and non-mandatory construction law that is developed through customs and usages.

The status of customs and usages is disputed. Arbitrators expressed variant preferences on the priority between customs and law, a division that appears to be rooted in the distinction between professional backgrounds (construction vs. legal). Engineers and contractors appear to bring construction knowledge (technical standards, contract management practice, commercial practice, customs and usages etc.) to the decision making process, while lawyers tend to rely more on the general principles of law.