

LEX PETROLEA & INTERNATIONAL COMMERCIAL ARBITRATION**Gist of the news**

According to *Shana.ir* on October 15, 2014:

Managing director of the National Iranian Oil Company (NIOC) Roknoddin Javadi has said that he thinks an independent arbitration and supervisory body should be established to oversee oil industry contracts.

Speaking at the third national conference on upgrading contractual frameworks in oil industry, Javadi said Tuesday that it was necessary for the congress to prepare a contractual roadmap through sharing views between outsourcers and contractors.

He said the roadmap should include an independent arbitration and supervisory body as an indispensable component for settlement of disputes in oil industry contracts.

Javadi noted that the tasks of the arbitration body should be defined clearly, adding oil industry should help the upgrading of contractual frameworks in the country through drafting a roadmap with an unbiased supervisory body at its core.

As usual, we try to delve into the idea of establishing a special Petroleum Disputes Arbitration Center (PDAC) by responding to few relevant questions:

- 1) Do we need a special arbitration center for oil and gas disputes?
- 2) What would be the best structure for a special arbitration center for oil and gas disputes?
- 3) Would it be necessary for the Parliament of Iran (the *Majlis*) to approve the Articles of Association of the PDAC?
- 4) Is it advisable to establish the PDAC as an independent affiliate of the Ministry of Petroleum?
- 5) What would be the positive and negative impacts of authorizing the PDAC to handle both domestic and international arbitration cases?
- 6) What are the similarities and differences between the PDAC and the Energy Arbitration Court (EAVB) of Hungary?
- 7) What is the level of arbitrability of oil and gas disputes?

After responding to the above questions, we will return to the interview of Mr. Javadi to explain that the idea of establishing a special arbitration center for petroleum disputes is a very positive initiative. That is why it must be studied and applied carefully.

Is the Petroleum Disputes Arbitration Center indispensable?

In general, arbitration centers, tribunals or even courts handle all the cases referred to them without limiting the scope of the subjects handled by them. The following 15 entities, on the other hand, only arbitrate specific and more technical subjects:

- 1) Arab **Intellectual Property** Mediation and Arbitration Society (AIPMAS) - Amman, Jordan;
- 2) Court of Arbitration for **Sport** - Lausanne, Switzerland;
- 3) **Energy** Arbitration Court (EAVB) - Budapest, Hungary;
- 4) European Centre for **Financial** Dispute Resolution (EUROARBITRATION) - Paris, France;
- 5) **Foreign Trade** Court of Arbitration at the Serbian Chamber of Commerce - Belgrade, Serbia;
- 6) **Insurance and Reinsurance** Arbitration Society (ARIAS) - London, England;
- 7) **Muslim** Arbitration Tribunal (MAT) - London, England;
- 8) World **Intellectual Property** Organisation Arbitration and Mediation Centre (WIPO) - Geneva, Switzerland;
- 9) Dispute Resolution Center of the Federal Association of **Engineers and Architects** of Costa Rica - San José, Costa Rica;
- 10) General Arbitration Tribunal of the Buenos Aires **Stock Exchange** (BCBA) - Buenos Aires, Argentina;
- 11) **Equine** Dispute Resolution (EqADR) - Lexington, USA;
- 12) China **Maritime** Arbitration Commission (CMAC) - Beijing, China;
- 13) Singapore Chamber of **Maritime** Arbitration (SCMA) - Singapore, Singapore;
- 14) Tokyo **Maritime** Arbitration Commission of the Japan Shipping Exchange (JSE) - Tokyo, Japan; and
- 15) **Maritime** Arbitrators Association of Nigeria (MANN) - Lagos, Nigeria.

These 15 arbitration entities can be divided into ten categories as far as their subjective jurisdictions are concerned: Maritime (four entities), sports (two entities), stock exchange (one), engineering and architecture (one), intellectual property (two), and finally Muslim disputes, insurance and reinsurance, foreign trade, financial and energy disputes each have only one arbitration entity. It is difficult to find a common *raison d'être* for all of these 15 entities but it can be argued that complexity of technical subject may have something to do with establishing these entities. In the next two parts of this report, we will focus on the structure and legal basis of the Energy Arbitration Court (EAVB) without forgetting that other arbitration entities may also provide us with detailed and useful information about the proposed structure and legal basis of the PDAC.

What is the proper structure for the PDAC?

Since we have never had an arbitration center for petroleum disputes in Iran, it would be useful to study the structure of the Energy Arbitration Court (EVAB) of Hungary in order to emulate positive aspects of it. According to the website of *evab.hu*:

On 15 December 2008 the Hungarian Energy Office (HEO) established the Energy Arbitration Court ("Arbitration Court") in accordance with the provisions of Act LXXI of 1994 on Arbitration, section 169 of Act LXXXVI of 2007 on Electricity and section 131 of Act XL of 2008 on Natural Gas Supply. The Arbitration Court is a legal entity, and its registered seat is in Budapest.

The first issue to consider is that whether the PDAC also needs to be established under a specific law of the Iranian Parliament (*the Majlis*)? To compare the PDAC with the Arbitration Center of Iran Chamber (ACIC) in this respect, it is necessary to have a look at the legal basis of the ACIC which according to the website of *arbitration.ir*.

Arbitration Center of Iran Chamber (ACIC) was established in 3 February 2002 by virtue of a specific piece of law called "The Law on Articles of Association of ACIC" as approved by the parliament of Iran. ACIC is organized as an affiliate to the Iran Chamber of Commerce but enjoys independent legal personality. ACIC is the first Iranian independent arbitration institution established for the purpose of settlement of both domestic and international disputes through arbitration or conciliation.

Three more questions call for answer:

- 1) What happens when the *Majlis* approves Articles of Association of an arbitration center?
- 2) Is it advisable to establish the PDAC as an affiliate to the Ministry of Petroleum without depriving it of enjoying "independent legal personality"?
- 3) Would it practically be useful to establish the PDAC "for the purpose of settlement of both domestic and international disputes through arbitration or conciliation"?

Articles of Association of the PDAC and approval of the Majlis

Would it be advisable to make the PDAC as similar as possible to the ACIC by copying its Articles of Association? It may be argued that the ACIC has been a successful arbitration entity during its 12 years of activity. If we accept that success must be emulated, it would be reasonable to make the PDAC look like its successful predecessor. The counterargument is that the ACIC enjoys a comprehensive jurisdiction while the PDAC must just focus on petroleum law disputes. Furthermore, due to its affiliation to the Chamber of Commerce of Iran, the ACIC has tried to assimilate itself to the ICC arbitration centers around the world. The PDAC has nothing to do with the ICC and therefore it is not required to look like or to function like its international sister entities.

It is difficult to tend completely towards any of the above arguments. The more reasonable option, perhaps, is to start the drafting process with the ACIC Articles of Association and then to adapt the final draft to the needs and requirements of the PDAC by taking stock of the experiences of similar entities around the world.

The AoA of the ACIC establishes the following structure:

A – Composition

The ACIC is composed of three parts:

a) Board of Directors - The Board is composed of the Chairman and the Vice-Chairman of the Chamber of Iran, the Chairman or the Vice-Chairman of the Chamber of Tehran, the Secretary General of the Chamber of Iran, and three reputable merchants and industry and mining managers.

The tenure of the Board of Directors is three years and its chairman is the Head of the Chamber of Tehran. The functions and authorities of the Board include the following:

- Drafting and proposing the internal byelaws of the ACIC in relation to the way of offering services and the arbitration fees as well as the financial and employment aspects of the ACIC;
- Preparation and proposing the annual budget of the ACIC to the Board of Representatives of the Chamber of Iran in order to be approved by the Board;
- Appointing to and removal of the Secretary General from his post.

b) Secretary General - Selection of the Secretary General of the ACIC shall be from amongst the Iranian lawyers who are experienced and familiar with the domestic and international commercial matters. The Secretary General shall function under the decrees to be approved by the Board of Directors according to the Articles of Association of the ACIC. The Secretariat of the ACIC shall be managed by the Secretary General. Functions of the Secretariat shall be determined and proposed by the Secretary General and approved by the Board of Directors.

c) *Arbitrators* – The list of competent arbitrators shall include names of lawyers, tradespersons and other informed and well-know and experienced persons who have sufficient knowledge about the inbound and outbound business law and custom, based on the proposition of the Secretary General and approval of the Board of Directors.

B – Jurisdiction of the ACIC – Both domestic and international disputes shall fall in the scope of jurisdiction of the ACIC.

C – Arbitration procedure – In international commercial disputes, the ACIC must apply the International Commercial Arbitration Act (1997). According to this Act, the arbitration procedure shall include the following phases:

1. *Referral to arbitration by courts*: A court coming to the handling of any legal proceedings being the subject of an arbitration agreement, shall refer the litigating parties to arbitration, if so demanded by any one of the parties. Such demand may be made up to the end of the first court session unless the court holds that the arbitration agreement is null and void or cannot be executed. Raising litigation in court shall not prevent commencement or continuation of arbitration procedure and issuance of arbitration award.

2. *Service of the Process and Notices*: Arbitration shall commence when the arbitration application will be notified to the arbitration respondent according to the provisions of Article 3 of the Act, unless the parties to the arbitration agree otherwise. Arbitration notice (application) may contain information about the number of arbitrators and the method of their election as stipulated in Chapter 3 of the Act and also about agreements, contracts and events which have caused eruption of disputes.

3. *Determining the number of arbitrators*: This shall be the responsibility of the parties to the dispute. If not determined, the board of arbitrators shall comprise three members.

4. *Appointment of arbitrators*: The parties to a dispute shall agree on the method of appointment of arbitrators. The Iranian party cannot, as long as a dispute does not occur, bind himself in any manner whatsoever that in case of occurrence of a dispute it shall be resolved by way of arbitration of one or more arbitrators or by a board of arbitrators, having the same nationality as that of the party to the transaction. Where a party fails to comply with the mutually agreed method for appointment of the arbitrator and/or the parties or the elected arbitrators do not come to an agreement and/or a third party, whether legal entity or natural person, fails to fulfill the responsibility entrusted to him in this respect, each of the parties shall be authorized to refer to the authority mentioned in Article 6 of the Act, to make a decision unless another method has been agreed upon by the parties.

5. *Objecting to Appointment of an Arbitrator*: Appointment of an arbitrator may be objected to if the existing circumstances and conditions cause justified doubt regarding his impartiality and independence, and/or in case the arbitrator does not possess the

qualifications agreed upon by the parties. Each party shall be allowed to replace his arbitrator due to any reasons he may come to know after appointment of his arbitrator.

6. Arbitrators unable to fulfil their responsibilities: Should an arbitrator become unable, in practice or by virtue of law, to fulfill his responsibilities and/or fails to carry out his obligations due to any other reasons, his assignment shall be terminated. In case of dispute between the parties on removal of arbitrators, each party may call on the authority described in Article (6) of the Act to decide about the termination of the assignment of such “arbitrator”.

7. Appointment of substitute arbitrator: Where the office of an “arbitrator” is terminated by virtue of Articles (13) and (14) or due to resignation or agreement of the parties to terminate his services or due to any other reasons, a substitute “arbitrator” shall be appointed in accordance with the regulations governing the appointment of the arbitrator which has been substituted.

8. Determining the competence of the arbitrator: An arbiter may decide about his own competence and also about the existence and/or validity of the arbitration agreement. An arbitration clause being part of a contract shall be considered an independent agreement for the purposes of this Law. The decision of the “arbitrator” concerning cancellation and annulment of such agreement, in itself, may not be construed as the annulment of the arbitration provided under a contract.

9. Issuance of injunction by arbitrator: An “Arbitrator” may issue injunction upon a request by a party in matters related to the dispute which require immediate suggestion on the proper course to pursue unless the parties have agreed otherwise. In such case, the “arbitrator” may prescribe that the party applying for injunction shall deposit a proper guarantee. In both cases, should the other party deposit a guarantee compatible with the subject of the injunction, the “arbitrator” shall nullify the injunction.

10. Submission of petition and defense: A plaintiff shall render, within the period agreed upon by the parties or determined by the “arbitrator”, the obligations and other circumstances by virtue of which he considers himself as deserving, and also the points of dispute and petition or the damages he claims. The defendant shall also submit his plea regarding the said matters within the period agreed upon by the parties or determined by the “arbitrator”. The parties may present all the related documents and evidences or a list of the documents and evidences they intend to submit later together with their petition or plea.

11. Holding hearing sessions: Holding a hearing shall be obligatory if a party requests convening of a meeting at an appropriate time, unless the parties have agreed otherwise. The “arbitrator” shall notify the parties with an adequate time-limit of the date and venue of any hearing sessions or investigation meetings for inspection of goods and/or other properties and/or examination of the documents of the parties. All pleas, documents or other information presented to the “arbitrator” by a party as well as the experts opinions and any other reports or evidences that the “arbitrator” may refer to

while making a decision, shall be notified to both parties.

12. *Issuance of awards:* The “arbitrator” shall issue his award according to regulatory laws adopted by the parties for investigation of the merits of the dispute. Determination of the Laws or the legal system of a certain country, set in whatever way, shall be considered as referring to the substantive laws of that country. The rules for resolution of conflicts shall not be governed by the provisions of this Article unless the parties have agreed otherwise.

PDAC as an independent affiliate of the Ministry of Petroleum

Two interrelated issues need to be discussed here:

- 1) What is the real meaning of “independence” in the context of an arbitration center and/or arbitration process?
- 2) What would be the positive or negative implications of affiliation of the PDAC to the Ministry of Petroleum?

Independence of an arbitration center can be viewed first as “financial independence”. ACIC enjoys a reasonable degree of financial independence because the arbitration fees paid by the disputants and also the incomes of the Chamber of Iran are two main sources of the ACIC financial support. Another type of independence is “administrative independence”. This term means that the arbitration center must not receive “instructions” from any entity outside itself because such instructions normally are in favor of one of the disputants and against the interests of the other one. The third type of independence is “arbitrator’s independence”. Under this title we study the freedom of the arbitrator, not the arbitration center, from any interference in the decision-making process.

Returning back to the question of affiliation of the PDAC to the Ministry of Petroleum and based on the above explanations, it can be argued that if the affiliation reduces or endangers independence of the PDAC or its arbitrators in any possible way, then it would be advisable to avoid such affiliation.

PDAC handling both domestic and international disputes

The ACIC handles both the domestic and international disputes of the disputants. Has it been a successful experience as far as handling both types of the disputes is concerned? Even if it has been, would it be advisable to combine two different capacities or functions in an arbitration center whose main objective is to handle international disputes?

As to the experience of the ACIC, it is appropriate to put the functions of the ACIC in the historic functions of the Iranian dispute settlement entities, including courts and arbitration centers. Almost 80 years ago, special courts were established to handle commercial disputes. Unfortunately, the experience was not a successful one. Instead

of reviewing the experience in the light of the lessons learned from the short experience of commercial courts, the idea was completely put aside. Since then until establishment of the ACIC, the commercial disputes had to be handled by public courts that had general jurisdiction to cover all possible subjects simultaneously. Later, under the instructions received from the higher levels, some branches of the general courts were determined to handle technical commercial issues but they could not be called commercial courts because they lacked the required expertise, knowledge and management.

Establishing the ACIC was a positive step forward. It seems to us that the Ministry of Petroleum has learned few lessons from this positive experience. That is why the Ministry tries to establish its own arbitration center to avoid lodging cases before the courts. For the same reason, the Ministry prefers to take utmost advantage of its own arbitration center by expanding its jurisdiction to both domestic and international disputes.

Comparing the PDAC with the EAVB

What are the lessons that the Ministry of Petroleum can learn from the Energy Arbitration Court (EAVB) established by the Hungarian Energy Office (HEO) in December 2008?

Establishing the Court – According to the website of the Court:

On 15 December 2008 the Hungarian Energy Office (“HEO”) established the Energy Arbitration Court (“Arbitration Court”) in accordance with the provisions of Act LXXI of 1994 on Arbitration, section 169 of Act LXXXVI of 2007 on Electricity and section 131 of Act XL of 2008 on Natural Gas Supply. The Arbitration Court is a legal entity, and its registered seat is in Budapest.

As discussed before, it is strongly possible, and even highly advisable, that the Ministry of Petroleum establish the PDAC by submitting a bill to the Parliament of Iran on establishing this arbitration center for petroleum disputes.

Composition of the Court – The website of the Court also adds that:

The members of the Panel of Arbitrators are appointed by the Chairman of the HEO for a definite period of time. The Chairman and other employees of the HEO may not be members of the Panel of Arbitrators.

The fact that the members of the Panel of Arbitrators are appointed by the Chairman of the Hungarian Energy Office (HEO) may cause some unrest in the mind of the parties who want to lodge a case before the Court against Hungarian parties. This is a lesson to learn for the Ministry of Petroleum. It is advisable to keep the Ministry and its officials away from the process of selection of the arbitrators to enhance the level of their independence.

Further explanations provided by the website of the Court shed more light on the composition of the Court:

The organization of the Arbitration Court:

1. Panel of Arbitrators;
2. Presidential Board consisting of three to five members appointed from among the members of the Panel of Arbitrators;
3. Secretariat of the Arbitration Court; and
4. Accounting Department.

The existing similarities between the composition of the Court and the ACIC encourage us to reiterate that composition of the PDAC and the ACIC can be very close to each other. The Hungarian law states that the arbitrators must have these qualifications:

- (1) Any Hungarian or foreign national, whether or not included in the list of arbitrators, may be appointed as an arbitrator provided that he/she
- furnishes the Arbitration Court with a written declaration whereby he/she undertakes to arbitrate in line with the present Rules of Proceedings;
 - is independent and unbiased and furnishes the Arbitration Court with a written declaration providing so;
 - has the legal, economic, energy related and other skills required to arbitrate the dispute falling within the jurisdiction of the Arbitration Court;
 - has the required command of the languages of the given case.

The similarities between these requirements and those stated in the Articles of Association of the ACIC are so evident that we do not feel the need to add any explanations to this part of the report.

Proceedings of the Court – According to the same website:

The proceedings of the Arbitration Court may take place to decide on legal disputes between the licence holders engaged in activities falling under the scope of the electricity act and the natural gas supply act relating to rights and obligations set out in legal regulations pertaining to activities governed in the aforesaid acts, or set out in contracts under such legal regulations, provided that the parties have submitted their dispute to arbitration in an arbitration clause in their contract and they are entitled to freely dispose over the subject matter of the proceedings (*emphasis added*).

The jurisdictional scope of the Court covers cases that meet one of the following four conditions:

- 1) *One of the disputants is a license holder.* This means that the Ministry of Petroleum can limit the scope of domestic and international disputes by arranging for an statement in the Act on Establishing the Petroleum Dispute Arbitration Center that at least one of the disputants must hold a license issued by the Ministry or its subsidiary or affiliated corporations.

2) *Dispute falls in the scope of an act*: The Act may also include a provision under which the second requirement for lodging a case before the PDAC is that the subject of the arbitration case must fall in the scope of the Act.

3) *Dispute is set out in a contract*: The third possible requirement could be that the dispute must have been set out in the contract concluded between the parties to the dispute.

4) *An arbitration clause authorizes the dispute*: The last condition is that an arbitration clause must authorize the parties to take their dispute before the PDAC.

Arbitrability of oil and gas disputes

The last issue to be analysed in this report is that whether oil and gas disputes are arbitrable or not. In other words, the question is that whether there is a legal barrier in the laws of Iran that stops public authorities, including the Ministry of Petroleum and its subsidiary or affiliated corporations, from referring oil and gas disputes to an arbitration tribunal.

The Administrative Justice Tribunal in its decision of the case number 90/376, 954 issued in 2012 stated that according to Article 139 of the Constitution of Iran: “The settlement of claims relating to public and state property or the referral thereof to arbitration is in every case dependent on the approval of the Council of Ministers, and the Assembly must be informed of these matters. In cases where one party to the dispute is a foreigner, as well as in important cases that are purely domestic, the approval of the *Majlis* must also be obtained.” Therefore, if before issuing an investment license in which an arbitration clause is inserted, the Iranian public entity has not obtained approval of the Parliament of Iran, the arbitration clause would be of no legal value and effect.

Briefly put, arbitrability of oil and gas disputes depends on obtaining approval of the *Majlis* before the Iranian public entity puts its signature on an arbitration agreement.

Conclusion

Arbitration is one of the best methods of settling oil and gas disputes. However, due to technical complexity of the subject, oil and gas arbitration process requires that the arbitrators have deep and vast legal and technical experience in this field. Recently, oil and gas law courses are offered at Iranian universities. Iran is also proud of having sufficient number of arbitrators who have moved to highest levels of knowledge and expertise during almost three decades of being involved in the cases of Algiers Declaration. For all of these reasons, apparently the Ministry of Petroleum of Iran believes that the time is ripe for establishing a Petroleum Disputes Arbitration Center so that all of the experts could come together in one place to put their expertise into practice in the framework of an Iranian petroleum arbitration center. Our News & Analysis report agrees with this general understanding if, and only if, the Ministry of

Petroleum takes stock of the experience of other similar centers, both inside and outside the country.

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