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MIDDLE EAST COMMERCIAL LAW DEVELOPMENTS

-- YEAR IN REVIEW (1997)

The Middle East has been a region of contrasts in recent years, and 1997 was no exception. Much U.S. attention seemed focused on political issues, particularly the stalled Middle East peace process, as well as diplomatic measures against "unfriendly" states such as Iran, Iraq, Libya, Sudan and Syria. In contrast, many Middle Eastern countries seemed to focus on economic issues this past year, with important initiatives occurring in privatization, deregulation, trade liberalization and financial sector restructuring. In that context, an International Monetary Fund official was prompted to observe:

> Remarkable changes are taking place in economic attitudes and policies in many Middle Eastern ... countries. These changes reflect a switch to a strategy that, instead of trying to protect economies from the rest of the world, seeks to take advantage of opportunities offered by participating in the global economy.

In the following brief review, we summarize some of the more significant commercial law developments which took place in the Middle East during 1997.

1. Sanctions

(a) U.S. Sanctions

President Clinton signed Executive Order 13059 on 19 August 1997, clarifying and tightening earlier executive orders imposing sanctions on trade with Iran. Among other things, Order 13059 confirmed that the sanctions apply to goods, technology or services supplied to Iran through third countries. Subsequently last year (3 November), President Clinton signed Executive Order 13067, imposing a trade embargo against Sudan and a total asset freeze against the Sudanese government. According to the preamble of that order, the sanctions were imposed because of Sudan's "continued support for international terrorism; ongoing efforts to destabilize neighboring governments; and the prevalence of human rights violations".

On a brighter note, in July, Secretary of State Madeleine Albright lifted the ban on travel to Lebanon by U.S. citizens. The U.S. government imposed the ban in 1987, after radical groups in Lebanon kidnapped a number of Americans and other foreigners. Although U.S. business groups had sought a lifting of the ban for a number of years, Secretary Albright cautioned U.S. citizens that travel to Lebanon remained dangerous.

(b) Arab Boycott

Most Arab countries continue to enforce a primary boycott of Israel, e.g., no goods of Israeli manufacture may be imported into those boycotting countries. A few years ago, however, a number of Arab Gulf countries suspended their secondary and tertiary boycott of Israel, following the peace accords between Israel, Jordan and the Palestinian Authority. Nonetheless, some "hard-line" Arab countries (e.g., Syria, Lebanon, Iraq) continue to maintain a full -- primary, secondary and tertiary -- boycott of Israel. Moreover, with recent set-backs in the peace process between Israel and the Palestinian Authority, some Arab Gulf countries are considering a reinstatement of their secondary and tertiary boycott of Israel.

In any event, boycott-related documents, requests and legal issues continue to emanate from the Middle East, and the U.S. Department of Commerce continues to enforce its anti-boycott regulations. In 1997, charges of anti-boycott violations were not only levelled at private U.S. businesses, but also on departments of the U.S. government: the Department of Justice and Air Force signed a settlement agreement with the Commerce Department to dispose of allegations that they (and three of their employees) had agreed to discriminate against Jewish Americans in staffing a project in the Middle East.

2. Trading/Distribution

(a) Free Trade Zones

In recent years, the Middle East has not lacked for free trade zone initiatives. For example, Lebanon has proposed seven new free zones, to be developed on a Build, Operate and Transfer (BOT) basis, in addition to existing zones at Beirut and Tripoli port. This past summer, the Kuwaiti Council of Ministers approved the establishment of a free zone at Shuwaikh port, based upon Kuwaiti Law No. 26 (1995). And the U.A.E. plans to add to its existing free trade zones -- the largest and most successful being the Jebel Ali Free Trade Zone in Dubai. For example, investors are anticipating the up-coming share offering in the Saadiyat Free Zone Authority, recently established to develop an island off Abu Dhabi in a free trade area, expected to house a stock exchange (and perhaps a futures and options exchange).

Meanwhile, Yemen and Oman are each seeking to establish its own free trade zone as an entrepot center for the Near and Far East. Oman plans to transform the village of Raysut near Salalah into a major container port, combining elements of both public and private finance. The Omani government has already signed a formal concession agreement with the founding shareholders of the local Salalah Port Services Company, which includes local investors and Sealand of the U.S. Yemen is moving forward with its own free zone plans in Aden, through the international private-sector consortium Yemen Investment and Development International (Yeminvest). Yeminvest is responsible for the development of the major transportation, distribution and infrastructure projects within Aden, including a planned international container terminal and industrial/warehouse facilities.

Finally, and in a somewhat different free trade development, President Clinton signed a proclamation in late 1997 to modify the Harmonized Tariff Schedule in order to implement duty-free treatment of all qualified products from the West Bank, Gaza Strip, and qualifying industrial zones. The proclamation extending duty-free status became effective 13 November 1996, and contains no time limits or renewal requirements -- it will remain in effect at the President's discretion.

(b) <u>Omani Commercial Agency</u>

Many Middle East countries have enacted so-called "dealer protection" laws. These laws provide various extra-contractual rights in favor of qualified commercial agents (and distributors). Under many such laws, for example, a commercial agent is deemed exclusive for the products and territory relating to the appointment. In addition, such laws entitle a commercial agent to compensation upon the foreign principal's termination or non-renewal of the relationship without just cause. Under some of these "dealer protection" laws, terminated commercial agents may also be entitled to block the foreign principal's imports into the relevant country, pending an amicable settlement or court judgment.

Middle East "dealer protection" laws have come under increased scrutiny in recent years -- particularly the requirement of exclusive commercial agency appointments -- as Middle East countries liberalize their markets to comply with WTO rules, bilateral trade treaties or otherwise.

Perhaps in that context, and as part of the Omani government's efforts to liberalize the local economy, Sultani Decree 73/96 amended the Omani Commercial Agency Law. Most importantly, Sultani Decree 73/96 permits the appointment of more than one commercial agent for the same product in the same territory. In addition, Sultani Decree 73/96 helps clarify a foreign principal's right to de-register the parties' agreement (at the Ministry of Commerce and Industry) upon expiration or cancellation of the commercial agency. Although these amendments are expected to have significant effect over time, other factors may temper their impact. For example, Sultani Decree 73/96 does not alter an Omani commercial agent's existing <u>contractual</u> rights (including exclusivity), nor its rights (unaffected under Omani law) to claim compensation from its foreign principal for unjustified cancellation or non-renewal of their relationship.

(c) Toys'R'Us Arbitration

In light of the dealer protection laws mentioned above, some U.S. companies may assume that their disputes with Middle East commercial agents might best be resolved by U.S. courts or arbitral tribunals, applying U.S. (state) law. Such an assumption should be reconsidered in light of a recent American Arbitration Association (AAA) award (subsequently confirmed by the Second Circuit), ordering Toys'R'Us to pay $46 million damages to a Kuwaiti trading company. The Kuwaiti company had claimed that Toys'R'Us wrongly terminated a 1982 agreement entitling the Kuwaiti company to operate franchise stores in 14 Middle Eastern countries.

The arbitration took place in New York City, and applied New York law in interpreting whether Toys'R'Us had the right to terminate the agreement, as well as in assessing the measure of damages. Kuwaiti "dealer protection" law did not appear to have been considered relevant to the dispute.

3. Investment and Privatization

(a) Investment Law

Last May, President Hosni Mubarak signed Egypt's new Investment Incentives and Guarantees Law, Law No. 8 (1997), cancelling most of the prior investment law, Law No. 230 (1989). The new law is designed to clarify the guarantees and incentives for investment in Egypt, and simplify the procedures for establishing new projects. In order to eliminate some bureaucratic procedures, Law No. 8 (1997) specifies 16 sectors in which projects will automatically benefit with guarantees and incentives. However, Law No. 8 (1997) was the subject of heated debate both before and after its enactment. For example, some local businesses complain that the new law fails to provide adequate tax and other incentives for newly privatized companies or expansion to existing projects. On the other hand, some opponents charge that the new law provides excessive benefits to private business interests (including foreign investors) at the expense of the Egyptian public.

Saudi Arabia also revised its foreign investment regulations in 1997, permitting foreign investment in electric power generation facilities to qualify as an "industrial development project". As a result, private power plants will be eligible for various incentives offered under Saudi investment law, including a ten year holiday from Saudi income taxation.

(b) Privatization

Middle East governments used various methods to privatize existing government-owned companies in 1997, including the Kuwait Investment Authority's sale (to local investors) of shares it had held in various Kuwaiti companies. In Jordan, privatization took a necessary step through the "corporatization" of existing state enterprises, with the intention of ultimately selling their shares. The Jordan Electricity Authority was the first state enterprise to be corporatized (re-named the National Electric Power Company). As of 1 January 1997, the Jordanian Telecommunications Corporation was also corporatized.

Similar corporatization was planned in Egypt for the GSM (global standard for mobiles) telephone system, currently run by the state telephone agency Arento. Egypt has made more progress with privatization than seemed likely when the process began in the early 1990s. From one perspective, however, Egypt's current privatization program might be viewed as a re-privatization of companies nationalized following the 1952 Revolution and the subsequent evolution of its socialist and statist policies. In their time, these policies sparked a strong nationalism and unity among the Egyptian people -- and continue to resonate during the current Egyptian government's efforts on privatization.

(c) Stock Markets

Many Middle East governments in 1997 provided foreign investors with greater access to local stock markets. For example, Emirates Bank International launched the Emirates Equity Fund, with non-UAE nationals being permitted for the first time to invest (albeit indirectly) in the local equities market. (The UAE Central Bank initially permitted Emirates Bank to allocate 20% to non-nationals; due to strong interest, Emirates Bank was subsequently permitted to increase that level to 49%.) Similarly, Saudi Arabian Bank launched a new equity fund, the Saudi Arabia Investment Fund, representing the first opportunity for overseas portfolio ("emerging market") investors to access securities quoted on the Saudi stock market. And Solidere, the publicly-held Lebanese company that is rebuilding downtown Beirut, surprised some observers by revising ownership restrictions to permit foreign investors.

Egypt's privatization program gained additional momentum when the government began emphasizing privatization of public companies through offerings on the local stock exchange.

Oman presents an interesting example of government policy towards stock market liberalization, from the development stage to implementation. In June 1995, Oman held a "brainstorming" conference attended by government ministers, senior officials and foreign experts, in order to begin identifying ways to build on the progress of the Omani economy, and to achieve sustainable development by the year 2020. One of the central themes of that conference, which has subsequently guided many of the Omani government's plans and initiatives, was involvement of the private sector (and foreign investment) as a principal engine of economic growth.

Among important recent incentives for foreign investment, the Omani government revamped commercial laws to: relieve many companies with foreign ownership of the higher tax rates previously applicable; allow five year renewable tax exemptions to companies for a wider range of commercial activities; and extend customs duties exemptions. In an effort to further encourage foreign investment, the Omani Ministry of Commerce and Industry in early 1997 also issued an internal directive requiring all new Omani public joint stock companies to have articles of association permitting at least 49% non-Omani ownership.

Jordan also took significant steps in 1997 to attract both local and foreign investors. For example, the new securities Law (1997) established a Securities Commission to license and monitor brokers, investors, issuers and other market participants. Moreover, the new Companies Act (1997) was designed to simplify the process of establishing and registering companies in Jordan. Also strengthening investor confidence: the Jordanian Central Bank approved new foreign currency regulations in 1997, removing restrictions on the transfer of foreign and local currency.

Despite these salutary developments, some observers believe that transparency and integrity of Middle East stock markets have not kept pace with liberalizations. Many of the leading businesses in the region are closely-held (often family-run) enterprises, and there is considerable reluctance to publicly disclose the type of financial and commercial information customarily required under U.S. securities laws. Similarly, in some cases (like in Egypt) an established local stock market may have been relatively inactive for many years -- consequently, the laws against insider trading have not been seriously tested until now. In this context, provisions of the new Jordanian Securities Law are specifically designed to combat false or misleading statements in the offer/sale of securities, insider trading, and other harmful activities of market participants.

(d) <u>BOO, BOT, BOOT</u>

Following Oman's enactment of Sultani Decree No. 42/96, "Ratifying Privatization Policies and Controls", a number of private infrastructure projects moved closer to reality in 1997. In addition to the up-and-running Manah power project, for example, Oman has plans for a private power project in Salalah, and wastewater projects in Muscat and Salalah were under serious consideration on a BOOT (Build, Own, Operate and Transfer) basis.

Jordan laid the groundwork for some similar projects, recently enacting legislation to license private investments in the telecommunications and electricity sectors. Likewise, in May 1997, the Abu Dhabi government issued a decree establishing the permanent Committee for the Privatization of the Electricity and Water Sectors in Abu Dhabi. (The decree gave that committee broad responsibility in Abu Dhabi for policies, planning and regulating both local and international private sectors investment in production and distribution of water and electricity.) The Abu Dhabi government moved quickly thereafter, selecting bidders for the Taweelah A2 power and desalination project.

Also, the emirates of Ras al-Khaimah, Ajman, Sharjah and Umm al-Qawain reportedly either have signed or are negotiating agreements with private firms for concessions in power, water, wastewater and desalination projects.

Recent Egyptian legislative reforms also permit private investors to pursue, build and operate projects, most notably the Mersa Alam airport on the Red Sea, the Sidi Krier power plant west of Alexandria, and private construction and operation of selected highways.

4. Intellectual Property

Many Middle East countries have enacted and/or supplemented their intellectual property laws in recent years. Nonetheless, a number of these countries continue to receive attention under Special 301 annual review by the Office of the U.S. Trade Representative (USTR). For example, Egypt was included on the USTR's 1997 "priority watch list". The USTR acknowledged that Egypt had taken steps to improve its legal framework for protection of copyright works but, due to insufficient enforcement and inadequate penalties, there had not been a significant reduction in piracy, particularly with respect to video, books and software. The USTR also expressed serious concern about ineffective patent protection in Egypt.

Middle East countries placed on the USTR's "watch list" in 1997 were Bahrain, Jordan, Kuwait, Oman, Saudi Arabia and the UAE. (As in 1996, the USTR also made a special observation concerning copyright piracy in Lebanon.) In most cases, the USTR noted that local authorities had made progress in improving intellectual property protection, but that additional measures -- often more effective enforcement of existing laws -- were required.

5. Dispute Resolution Issues

(a) Regional Arbitration

Lebanese Law No. 629 (1997), issued in April last year, authorized Lebanon to adhere to the 1958 (New York) Convention for the Recognition and Enforcement of Foreign Arbitral Awards. However, Lebanon did not immediately notify the treaty departments at either the United Nations or U.S. Department of State, to confirm its formal adherence to the New York Convention.

Over the past few years, many Middle East countries have established and/or strengthened local arbitral bodies to facilitate the resolution of disputes. In addition to the relatively well-known Cairo Regional Arbitral Center (established approximately 20 years ago), arbitral bodies and rules have been created in the past few years in Lebanon, Kuwait, and through the Abu Dhabi and Dubai chambers of commerce. The Gulf Cooperation Council (GCC) Commercial Arbitration Center, based in Bahrain, has also received some attention, following its establishment (in 1993-94).

(b) Omani Judicial System

The Omani judicial system underwent significant restructuring, as a result of the Commercial Court Law, Sultani Decree No. 13/97, effective 1 July 1997. Under Sultani Decree No. 13/97, the existing Authority for the Settlement of Commercial Disputes (under the Ministry of Commerce and Industry) is converted into a commercial court (under the Ministry of Justice, Awqaf and Islamic Affairs). Sultani Decree No. 13/97 also makes important changes to the court's composition and jurisdiction. For example, the commercial court is now granted jurisdiction over tax appeals, as well as cases involving Omani government entities in commercial disputes -- with Omani government entities apparently no longer having the option to accept or refuse jurisdiction. Equally significant, Sultani Decree No. 13/97 provides (for the first time in Oman) rules for the enforcement of foreign court judgments and arbitral awards.

Although not yet a signatory to the 1958 (New York) Convention for the Recognition and Enforcement of Foreign Arbitral Awards, the Omani government appears increasingly aware of the importance of international arbitration. Following enactment of Sultani Decree No. 13/97, for example, Oman enacted Sultani Decree No. 48/97, the Law on Arbitration of Civil and Commercial Disputes. Sultani Decree No. 48/97 appears inspired, in part, by the UNCITRAL Model Arbitration Law of 1985. Sultani Decree No. 48/97 permits disputants to agree upon most of the rules and procedures for their arbitration. However, the Omani commercial court is given express authority to intervene in certain circumstances, e.g., if a party refuses to elect its arbiter, or if temporary protective measures are necessary during the arbitral proceedings.

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For many years, international economists wondered whether Middle East governments would make the changes necessary to integrate their economies into the global market. As this brief review has shown, commercial law developments in 1997 suggest that many Middle East countries are moving in the right direction.

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