

# The Evolution of Arbitration in the Arab World

## **Kluwer Arbitration Blog**

July 1, 2015

Cherine Foty (Jones Day)

Please refer to this post as: Cherine Foty, 'The Evolution of Arbitration in the Arab World', Kluwer Arbitration Blog, July 1 2015,  
<http://arbitrationblog.kluwerarbitration.com/2015/07/01/the-evolution-of-arbitration-in-the-arab-world/>

---

*The views expressed in this article are those of the author alone and should not be regarded as representative of, or binding upon ArbitralWomen and/or the author's law firm.*

Arbitration in the Arab World is a hot topic these days. Over the past few decades the Arab World has become a region at the forefront of international arbitration expansion. With increasing numbers of commercial actors coming out of the Arab World and with regional arbitration centers being established in many Arab states, large numbers of international arbitration cases are now linked to the Arab World.

The increased use of arbitration in the Arab World has often been attributed to foreign investment and the presence of foreign business in the region. However, many scholars and practitioners have failed properly to contextualize arbitration's strongly rooted presence in the Arab World.

In fact, arbitration, or "*tahkeem* – تحكيم " in Arabic, is deeply rooted in Arab and Muslim history. It was the method of dispute resolution preferred by the Prophet Mohammed, who favored mediation and the finding of a just result over strong argumentative skills. Modern Islamic Law also encourages the arbitration and mediation of disputes through direct settlement or conciliation via third-party intervention, with the aim of reaching a compromise between the parties in private proceedings.

Such justifications, including the confidentiality of proceedings, the use of a neutral third party arbiter of disputes, and the finding of a balanced, equitable solution between the parties, certainly sound quite familiar, as they are often the same arguments used to promote arbitration in other jurisdictions. It is certainly not surprising then that Arab states were some of the earliest states to ratify the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1959 (Egypt, Syria, Morocco) and many other Arab states followed suit, so much so that today only four Arab states are not signatories (Iraq, Libya, Yemen, Sudan).

Despite this history, the application of modern international arbitration in the Arab World has not proceeded in an entirely positive manner. International arbitration was initially perceived negatively by many Arab states which viewed arbitration proceedings as unfairly biased towards colonial powers and their companies. In the 1950's, a series of early arbitration cases involving oil concessions reinforced the notion that international arbitration was unfair and existed solely as a means to allow Western actors to avoid the application of Arab national laws.

One of the early cases, *Petroleum Development Ltd. v. The Ruler of Abu Dhabi* (1952), arbitrated by the British arbitrator Lord Asquith, served to illustrate the manner in which such proceedings were

cloaked in an inherent power differential and substantive bias. In that case, Lord Asquith dismissed the application of Abu Dhabi law as “primitive,” “a purely discretionary justice” for which it would be “fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments.” Instead, he applied principles rooted in the “good sense and common practice of civilized nations”: that is, of course, English Law principles.

Other international arbitration cases of the 1950’s and 1960’s similarly held that Qatari and Saudi Law among others, did not contain “any principles which would be sufficient to interpret” the contracts at hand and therefore would be insufficient to apply to the arbitration of the disputes. These cases and their decisions to sideline clearly applicable national Arab law in favor of Western legal principles served to bolster Arab suspicion and cast a long shadow on international commercial arbitration, lasting into the 60’s and 70’s.

However, as the benefits of international arbitration began to touch not only Western actors, but Arab states and commercial entities, the trend began to reverse itself, continuing into the present day. Beginning in the 1970’s, Arab states began to receive sizeable awards in international arbitrations and Arab commercial actors began initiating arbitration as claimants, utilizing arbitration as a tool for their benefit. This resulted in a more nuanced role of Arab actors in the international arbitration context, as both Arab State respondents and Arab commercial claimants came onto the scene.

It was during this period that important regional treaties for the enforcement of arbitral awards were concluded in the Arab World, and many Arab states signed several bilateral investment treaties with other states around the world. In addition, many Arab states began adopting national legislation in favor of arbitration, often times based on UNCITRAL Model Law or on the 1981 French Law of Arbitration.

In 1979, the first regional arbitration center was created in the Arab World: the Cairo Regional Center for Commercial Arbitration (“CRCICA”), which was followed in the 1990’s by a large number of additional regional centers, currently handling hundreds of cases.

In addition, a number of multilateral investment treaties have been concluded between Arab nations, most notably the Agreement on the Promotion, Protection and Guarantee of Investments of the Organisation of Islamic Cooperation (“OIC”), which provides that investors of one of its 57 member states will receive certain protections when making investments in another signatory state.

An arbitral tribunal in *Hesham T. M. Al Warraq v. Republic of Indonesia*, analyzed Articles 16 and 17 of the OIC Agreement to determine whether it had jurisdiction over a dispute submitted to ad hoc arbitration under the UNCITRAL Rules. It held that in the context of modern investment treaty arbitration, the language of Article 17 of the OIC Agreement should be interpreted in the same manner as similar clauses in bilateral investment treaties: that is, as an open offer to arbitrate disputes, made by member states at the time of ratification, which could be accepted by investors at any point in time without an additional express agreement to arbitrate.

This interpretation was hotly contested by the government of Indonesia which argued that the member states not only did not contemplate such an interpretation at the time of drafting, but expressly rejected the possibility of investors being able to initiate arbitration proceedings against a member state under the treaty, unless that state had so agreed in a separate contract. This case opens up the possibility for any investor in an OIC member state to initiate arbitration proceedings against such a state, potentially threatening the very sustainability of the OIC system itself. It remains to be seen how subsequent arbitral tribunals will address such issues.

In addition to the significant impact of the *Hesham Al Warraq* decision upon the future of arbitration in the Arab World, the recent Arab uprisings have also significantly affected the legal landscape in which arbitration operates. Questions abound as to whether the very foundations of arbitration in the Arab World have been shaken by the political events of the past few years. In the aftermath of these resistance movements, throughout the streets of the Arab World, demanding “bread, jobs and social justice,” many question whether the Arab uprisings will serve to reverse the trend of increased use of international arbitration in the Arab World. The critics cite decreased foreign investment, increased politicization of international disputes, and increased difficulty in enforcing international arbitration awards in post-Arab uprising national courts. TDM dedicated an entire issue to these very questions. Whatever way you look at it, the manner in which the Arab World proceeds will crucially impact the forthcoming era of international arbitration.

As an example of the types of disputes arising out of the Arab uprisings, one can look to the case brought by the Israeli-American company East Mediterranean Gas S.A.E. (“EMG”) against the state-owned Egyptian Natural Gas Holding Company (“EGAS”) and the Egyptian General Petroleum Company (“EGPC”). That case arose out of a 20-year contract signed in 2005 for the exclusive sale of Egyptian natural gas to Israel, significantly below-market price. At the time EMG was co-owned by a close friend of Mubarak’s and a former Israeli Mossad agent, who allegedly sold the gas to Israel at higher prices, pocketing the difference, causing a corruption scandal that dominated the Egyptian press. After Mubarak’s overthrow, the protest movement called for an end to that deal and EGAS and EGPC informed EMG that they were terminating the contract. EMG initiated arbitration proceedings in October 2011 which are still underway.

In the period commencing about a year after the beginning of the Arab uprisings (July 1st, 2013 to June 30th, 2014), 15% of new ICSID cases involved Arab states. Many announced that this marked increase, surpassing Latin America’s mere 7% for the same period, was due to the hostility of the new Arab governments to the respect of previously concluded agreements with non-Arab actors. Many states that witnessed uprisings, such as Egypt and Tunisia, found claims brought against them. In the nine months following the Egyptian uprisings, four requests for arbitration were brought against the Egyptian state at ICSID, versus two in the five previous years.

However, a closer examination reveals that although there was an initial increase, the final statistics for 2014 have shown that only 5% of new ICSID cases were from the Arab World, in relative proportion to what they had previously been. This may be due to the fact that many Arab states have made efforts at engaging in amicable settlement, with Egypt, Tunisia and Libya forming amicable dispute settlement committees to attempt to resolve such disputes. Furthermore, these statistics do not include international commercial arbitration cases which seem to continue to show a constant presence in various commercial arbitration institutions such as the ICC, CRCICA and DIAC among others.

It is unclear what lies in the future of arbitration in the Arab World. However, given its history, it will be important to ensure that arbitration continues to be representative of the combined interests of Arab commercial actors and Arab states, as well as those of the Western world involved in commercial and investment transactions in the Arab World. The greater presence of Arab actors not just as respondent states, but also as claimants and investors, and hopefully in the future increasingly as arbitrators and counsel, will result in the continuing confidence of the Arab World in the system of international arbitration as a mechanism for dispute resolution that is closely connected to its historical roots in the region.