

Challenges of Arbitration in Arab Countries

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Abstract:

This article examines the challenges facing the arbitration system in Arab countries, despite its effectiveness as a means of resolving commercial disputes. Key challenges include the weak negotiating position of Arab parties, insufficient legal and technical preparedness in complex cases, issues in selecting governing law and language, high costs, and the proliferation of arbitration centers without coordination.

The article emphasizes the need to develop Arab legislation in areas such as civil liability, technology transfer, and consumer protection, while also training arbitrators and experts with specialized skills and foreign language proficiency. Additionally, it calls for unifying the efforts of Arab arbitration centers and establishing standardized professional rules to enhance efficiency and reduce costs.

The article concludes that building a robust arbitration system requires shared political and legislative will, competency development, and support for specialized scientific research. All of these elements are essential to strengthening Arab countries' ability to negotiate and protect their interests in international contracts.

Keywords: Arbitration, challenges, negotiation, language of arbitration, contracts.

Introduction:

Arbitration has become an almost inevitable necessity in commercial contracts generally, and in international trade contracts particularly. Contracting parties in this field prefer to explicitly stipulate arbitration as the means to resolve any disputes that may arise, whether related to the interpretation or execution of the contract in question.

Developing countries, including Arab states, are among the most frequent contracting parties with developed countries, especially in commercial agency contracts, distribution agreements, franchising, import export contracts, construction and contracting agreements, as well as technology transfer contracts across all their stages and levels. These range from technical training contracts and its methods, through technical know-how transfer agreements, turnkey contracts, production handover agreements, and ending with product marketing contracts. These contracts carry their own profound problems, whether in terms of interpretation or ensuring non-performance when failing to achieve the contract's desired outcomes.

Undoubtedly, arbitration, despite its widespread use and the regulation of its provisions through national legislations and international conventions, the existence of European, American and Arab arbitration chambers and centers, and the organization of numerous seminars and conferences about it, still faces practical problems as we observe in actual arbitration cases.

These problems intensify in many respects for Arab countries, which are among the most frequent contracting parties with developed states, whether the contracting entity is the state itself or a national company. The reasons for this intensification lie in the magnitude and nature of the contracts and in the seriousness of their consequences, particularly with respect to public safety, the

security of citizens, and environmental risks, matters that developed countries have in most cases if not always settled in their favor through contractual provisions.

In this paper, reference will be made, based on practical reality, to the most significant arbitration issues affecting Arab countries in particular.

First: Negotiation in Contracts of Particular Economic Importance

1. Imbalance in Negotiating Power in Economically Significant Contracts

In economically significant contracts concluded by Arab states in particular, and developing countries in general, with developed nations that possess advanced technology in vital economic sectors, it is observed that the latter impose arbitrary and unbalanced terms. This is based on their dominant bargaining position, their control over technical knowledge in modern fields, and the weak bargaining position of the Arab contracting state due to its urgent needs, lack of experience, or absence of prior engagement with such technical knowledge, in addition to its desire to keep pace with technological progress regardless of the financial or practical cost.

2. The Need to Prepare Qualified Negotiation Teams

It is essential for Arab states to train negotiation teams before concluding contracts of significant economic importance to society. This training should enable them to acquire experience that strengthens mutual positions during negotiations and informs them of prevailing practices, whether in terms of negotiation maneuvers or the methods commonly used by those entrusted with negotiation.

Such preparation has a major impact not only during the negotiation phase but also throughout the conclusion and full implementation of the contract. A successful negotiator is one who can precisely define objectives and support them with arguments and evidence that strengthen the bargaining position. The prior experience of the negotiating party in Arab states can greatly influence achieving

the intended purpose of the contract, especially since the contracting party from the developed country is often a monopolist and highly skilled in concluding such contracts with developing countries, including Arab states or countries in the process of development.

It is advisable during negotiations for the contracting party from an Arab state to be well informed about the profile of its counterpart, including qualifications, team size, and areas of expertise, in order to form an equally capable team for negotiating and responding to that counterpart's views, proposals, and conditions. It is also essential to ensure strong legal representation within the negotiation team, rather than relying solely on technical staff, to avoid problems such as the imposition of excessive obligations and liabilities on the contracting party from the developing country, including Arab states, or the loss of legal advantages that could otherwise have been secured.

During the negotiation stage, it is essential to require the contracting party from the developed country, whether supplier or manufacturer of the contract's subject matter, to disclose all information that clarifies its nature, particularly any risks arising from its use, manufacture, or packaging, with special emphasis on environmental, health, and safety hazards. The party should also be obliged to disclose the means of preventing and addressing such risks.

3. Developing Nations' Recognition of Their Negotiating Power Against Developed States

Perhaps the most important point to emphasize in this context is that the contracting party from developing countries, including Arab states, should clearly understand that it is not the weaker party when contracting with developed countries, particularly in industrial licensing agreements and in the transfer of technical knowledge in sectors such as transportation, telecommunications, aircraft

manufacturing, shipbuilding, armaments, and others. Arab and developing countries represent essential markets for developed states; without these markets, they would not be able to expand their industries, operate their factories, identify defects in these industries, determine areas for their development, or increase research activities and profits in these sectors.

Second: On the Choice of the Law Applicable to the Dispute

One of the most significant problems encountered by parties of arbitration, particularly when the Arab state is a party to the dispute, is the selection of the law governing the arbitration. The following points address this matter:

1. The Importance of Knowing the Proposed Applicable Law with Great Care

The foreign party may prefer the application of its own law to the dispute. In such a case, the national party must study the provisions of the proposed foreign law with great care and must not rely for this purpose on foreign individuals, whether lawyers or others. The basis for assessing the proposed law should be an understanding of the solutions it provides and the standard of safeguards in cases of breach of contractual terms or non-performance, particularly with regard to considering the obligation of the supplier of technology or technical knowledge as an obligation to achieve a result rather than an obligation of means. This requires explicit stipulation in such contracts, since the default rule is that the obligation is one of means unless the law or the agreement provides otherwise.

2. Understanding the Legal Effects of the Contract Under Foreign Law

It is equally essential to comprehend the duration of legal protection for the contractual rights, the statute of limitations and expiration periods for the contractual obligations, as well as the position of the procedural law in that country and its relationship with arbitration provisions when needing to activate arbitration

procedures, take interim measures or precautionary attachments, and enforce the arbitral award. This includes all other detailed and procedural provisions of such law, to the extent of achieving complete mastery and comprehensive knowledge of its rules.

3- Insisting on National Law is Not Always in the National Party's Favor

It is worth noting in this regard that insisting on applying national law to govern the dispute is not always in the national party's interest. This is particularly true in matters of compensation in technology transfer contracts of all types and levels, environmental breach compensation, risks related to contracted products and methods of avoidance and remediation, as well as material and physical damages and fatalities resulting from breaches of such contracts. This is due to the fact that Arab national legislations are still in the early stages of development in these areas.

In this context, we refer to the provisions of Algerian legislation in the Civil Code regarding producer liability, under the third section titled "Liability Arising from Things." Article 140 bis stipulates: "The producer shall be liable for damage resulting from a defect in their product, even if no contractual relationship exists between the producer and the injured party."

The legislator further clarified in Paragraph 2 of Article 140 bis that a product shall be considered as any movable property, even if attached to real estate, particularly agricultural products, industrial goods, livestock, food products, terrestrial and marine hunting products, and electrical energy.

This definition aligns precisely with Article 1386-3² of the French Civil Code, which states:

"Any movable good constitutes a product, even when incorporated into real property, including products of the soil, livestock, hunting and fishing. Electricity shall be considered a product."

However, the difference between the two legislators lies in the fact that the French legislator made it a condition for liability to arise that the product must have been placed on the market, in accordance with the provision of Article 1386-11/2 of the French Civil Code. The product is deemed to be placed on the market when the producer voluntarily relinquishes possession of it, as stipulated in Article 1386-5/1 of the French Civil Code.

The legislator also referred to the concept of "product" in Article 3 of Law No. 09-03, as amended and supplemented by Law No. 18-09 on Consumer Protection and the Suppression of Fraud, defining it as: "Product: any good or service that may be the subject of transfer for consideration or free of charge."

For civil liability to arise in this context, there must be a defect in the product. Article 3 of Law No. 09-03 on Consumer Protection and the Suppression of Fraud, as amended and supplemented by Law No. 18-09, specifies this as: the total absence of, or the presence at acceptable and risk-free levels of, any contaminant, adulterated substance, natural toxin, or any other substance that could make the product harmful to health, either acutely or chronically.

Article 1386-1 of the French Civil Code provides: *"The producer is liable for damage caused by a defect in his product, whether or not he is bound by a contract with the victim."*

Article 1386-3 of the French Civil Code states: *"A product is any movable property, even if it is incorporated into an immovable property, including products of the soil, of animal husbandry, of hunting, and of fishing. Electricity is considered a product."*

See in this regard: Zahra Ben Abdelkader, p. 273.

The law further defines a sound, honest, and marketable product as one free from any defect and/or hidden flaw, ensuring that it does not harm the consumer's health and safety and/or his material and moral interests.

A "guaranteed product" is defined as any product which, under its normal or reasonably foreseeable conditions of use, including its duration, presents no risk or only minimal risks at the lowest level compatible with the product's use, and which are considered acceptable while ensuring a high level of protection for the health and safety of individuals.

A "dangerous product" is any product that does not meet the definition of a guaranteed product set out above.

Article 19 of Law No. 18-09 provides: "The product offered to the consumer must not affect his material interest and must not cause him moral harm."

The legislator did not define the term "producer" on which civil liability is based. Referring to comparative law reveals two approaches to determining the producer.

The first relates to cases where several persons are involved in the production process. Jurisprudence defines the producer as any natural or legal person who, in the course of their usual activity, produces movable property intended for marketing, whether in the form of a final product, components, or any other work, by means of manufacture or assembly. In this regard, Article 140 bis, paragraph 2, mentioned above, provides that the producer may be a farmer, livestock breeder, manufacturer, pharmacist, and so forth.

The French legislator, however, refers in Article 1386-6 of the French Civil Code to the producer as the manufacturer of the final product, the producer of a raw material, or the manufacturer of a component incorporated into the final product. Under the French legislator's approach, the producer is thus the manufacturer of an industrial product, whether intended for incorporation into another product or not, as well as the producer of raw materials.

Ali Filali, *Theory of Obligations: The Act Giving Rise to Compensation*, Algeria, 2007, p. 271.
Article 1386-6 of the French Civil Code: "The producer, when acting in a professional capacity, is the manufacturer of a finished product, the producer of a raw material, or the manufacturer of a component part. For the purposes of this Title, any person acting in a professional capacity is considered to be a producer: (1) who presents himself as a producer by affixing to the product his name, trademark, or other distinctive sign."

The second approach concerns determining the status of producer in relation to a product marketed by a person other than the actual manufacturer. In such cases, this person places the product on the market and may affix to it his name, trademark, or any sign attributing the product to him. Production may also occur in one country, with the product then imported by a person under the label of that country. This gives rise to the question of who bears liability.

Certain products may require special conditions during transportation, storage, or display (such as foodstuffs or medicines), which makes the trader or importer—rather than the original producer—responsible for these operations. Consequently, the product may become defective at the distribution or storage stage, not due to a defect in its manufacture but as a result of improper distribution or preservation.

Referring to Article 1386 of the French Civil Code, a “producer” is considered to be anyone who presents himself as such, whether by affixing his name or trademark to the product, or by importing it from outside the European Union for the purpose of sale, rental, or distribution, even if he is not the one who carried out the manufacturing process.

Doctrine considers that this approach is based on the principle of trust granted by the consumer to the apparent producer through the trademark or trade name, which are presumed to guarantee the quality and safety of the product. Consequently, the legal designation of “producer” extends to anyone who appears in this capacity before the consumer, thereby obliging them to take all necessary measures to ensure the product’s safety before it is placed on the market.

In the same context, the importer is also considered a producer, even if the products he imports do not bear his name or trademark, in line with the principle of protecting the weaker party and facilitating avenues for claiming compensation.

2° Who imports a product into the European Community for the purpose of sale, rental—with or without an option to purchase—or any other form of distribution.

3° Who supplies a product sold under a distributor’s brand as a manufacturer linked to a company or a group of companies, within the meaning of Article L.112-6 of the Consumer Code. Zahra Ben Abdelkader, Product Liability – A Comparative Study between Algerian and French Legislation, Sharia and Economics Journal, Issue 1, Volume 1, Emir Abdelkader University, Constantine, 2012, p. 238.

- Ali Filali, op. cit., p. 274.
 - Ali Filali, op. cit., p. 274; Zahra Ben Abdelkader, op. cit., p. 239.
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The expansion of the concept of “producer” to include distributors, importers, and agents is not limited to the allocation of responsibilities; it is also grounded in the need to enhance the protection of the injured party. In practice, it may be difficult for the injured party to trace the identity of the actual producer, especially when production takes place outside the country, which may give rise to legal issues relating to conflict of laws or difficulties in establishing proof.

In light of this, the Algerian Consumer Protection Law likewise adopts a flexible approach, allowing the injured party to seek recourse against any participant in the chain of distribution of the product. This reinforces the view that a broad concept of the producer should be adopted, so as to ensure the highest possible level of protection and to achieve the essential aim of facilitating access to compensation.

To protect parties operating in these high-risk sectors, which generally involve contracting with developed countries, the Egyptian legislator has included in Article 67/4a provision allowing compensation claims to be brought in Egypt if the producer or distributor is located outside the country. The Algerian legislator has not adopted such a provision; in such cases, the general rules on filing compensation claims under the Code of Civil and Administrative Procedure would apply.

Given the seriousness of producer and distributor liability for defective and dangerous products and goods, and their impact on human and animal health as well as on facilities, the Algerian legislator, unlike the Egyptian legislator, has not addressed the matter by providing for the nullity of any clause or agreement that would exempt the producer or distributor from liability, limit it, or shorten its limitation period.

Our purpose in clarifying the position of the Algerian legislative framework in this field is to demonstrate its concern for protecting the public in contracts that have implications for health, the environment, and society at large. Prior to the introduction of this relatively recent framework, the injured party did not enjoy any special protection, relying solely on the general rules of civil liability, which allow for the possibility of agreeing to exemption from or limitation of liability. In addition, there was no definition of the producer or distributor, nor of manufacturing, design, or assembly defects, or other faults that may affect a product or good. Developed countries had, by several stages, preceded us in legislating such provisions to protect their citizens.

On the other hand, criticism may be directed at the approach adopted by certain legislations in developing countries, including the Egyptian legislation, which, in Article 87 of the Arbitration Law, stipulates the mandatory application of Egyptian law to disputes arising from technology transfer contracts. It further requires that arbitration or the hearing of the dispute take place before the Egyptian judiciary, and classifies these provisions as matters of public policy, thereby preventing the parties from agreeing on any arrangement to the contrary.

The Algerian legislator takes a different approach in this regard, granting the parties the freedom to choose the law applicable to the dispute as well as the freedom to determine the place of arbitration.

This criticism is based on the fact that practical experience has shown that the constant insistence on applying national law is not necessarily in the interest of Arab countries in matters relating to technology, the environment, and resulting incidents, particularly given the shortcomings of national legislation in these states in establishing a comprehensive and effective framework for such issues, or the complete absence of such regulation in some cases.

Third: On the Choice of Arbitration Language

A review of most arbitration cases involving an Arab state or one of its nationals shows that the language stipulated in the arbitration agreement is English, and the national party is, in most cases, unable to impose its own national language.

The national party is bound by this choice despite the problems it entails, which affect the conduct of the arbitration, the defense, the costs, and even the procedures for challenging the award.

The use of a foreign language presents several difficulties for the national party, including:

- The need to appoint foreign arbitrators proficient in that language, which imposes significant costs on the national party.
- The need to retain foreign lawyers fluent in that language, which likewise entails considerable expense.
- Complete reliance on translation to and from the national language when translating documents, conducting arbitration proceedings, challenging the award before national courts, or enforcing it, given that national legislation requires all case documents to be in their language, a process that is financially burdensome.
- Difficulty in controlling the conduct of the arbitration, whether procedurally or substantively, by national lawyers when monitoring the proceedings.

Perhaps the most significant shortcoming in arbitration cases involving the national party is the failure of stakeholders, whether the state, the claimant company, or the respondent, to follow up on their case when it is heard outside the country, as well as to monitor the lawyers appointed to defend them. As a result, national states are often surprised to lose their arbitration cases abroad, and it is rare for the award to be in their favor.

Fourth: Seminars and Conferences as a Means of Raising Awareness of Arbitration Rules and Addressing Its Issues

It is evident from developments in the Arab arena in the field of arbitration that there is a proliferation of seminars, conferences, and training courses, both within and outside the region. These events are organized by the numerous arbitration centers operating in Arab countries and attract a large number of individuals interested in arbitration matters.

Notably, despite their abundance, these seminars are most often conducted in Arabic, while most arbitration proceedings in the Arab arena are conducted in English. This does not add much benefit to the participants. At this transitional stage, it is preferable to prepare a summary in English of the seminar, conference, or training topics, ensuring that the English summary presents the key fundamental rules of the subject in clear and straightforward language.

There is a need to demand the establishment of more English language departments in law faculties in Arab countries, as well as in all other faculties directly or indirectly concerned with arbitration, in order to create and train a generation capable of handling arbitration cases with full command of the arbitration language, advocacy methods, and the drafting of awards, thereby reducing reliance on foreign arbitrators and lawyers.

Training should focus on the practical aspect by forming complete arbitration tribunals, including the selection of the arbitral panel and the defense team, procedures for challenging arbitrators, submission of documents, cases requiring expert involvement in disputes, training on issuing awards and drafting their reasoning, filing annulment actions, writing annulment grounds, submitting applications for a stay of execution and their justifications, as well as addressing

enforcement issues and objections to the award. This should go beyond merely explaining a theoretical arbitration case.

Fifth: Proliferation of Arab Arbitration Centers and the Absence of Cooperation and Coordination Mechanisms

In the field of arbitration, there is a noticeable proliferation of arbitration chambers and centers within Arab countries, with little to no coordination between them in most cases. As a result, each operates independently without engaging in positive cooperation with other chambers and centers, which would otherwise help reduce costs and increase focus on key issues for the benefit of the arbitration process.

The same applies to the list of arbitrators, which should be periodically reviewed and updated in coordination with other Arab chambers and centers, along with maintaining a permanent record of the prior experience of those on these lists. Efforts should also be directed toward publishing journals covering all aspects of arbitration, not limited to reporting the facts of arbitration cases, but also tracking the subsequent developments of each case, including whether the arbitration award was annulled and the grounds for such annulment, applications for a stay of execution, and appeals in cassation in cases where the annulment action was accepted or rejected. Such publications would undoubtedly provide comprehensive knowledge of all details and issues of arbitration, thereby contributing to the practical expertise of lawyers and other researchers in this field.

Sixth: The High Cost of Arbitration Compared to National Judicial Proceedings

It is observed that, in opting for arbitration to resolve disputes, the costs involved are significantly high, to the extent that there is concern about the deliberate inclusion of arbitration clauses in contracts in general, and in domestic contracts between citizens in particular. This raises fears of a negative impact on the spread

of arbitration. All chambers and centers should therefore establish limits on these costs, whether in relation to arbitrators' fees or the remuneration of experts appointed by arbitral tribunals.

Conclusion

It is clear from the foregoing that arbitration, despite being a modern and effective means of resolving commercial disputes, still faces major challenges in the Arab countries. These challenges include the weakness of Arab negotiators when dealing with advanced companies and states, the lack of sufficient legal and technical preparedness to handle complex issues in technology transfer and international trade contracts, as well as problems related to the choice of applicable law, the language of arbitration, high costs, and the proliferation of arbitration centers without coordination. All these factors undermine the effectiveness of arbitration in protecting national interests.

Accordingly, there is an urgent need to develop the Arab legal framework to ensure the existence of advanced legislation in areas such as civil liability, consumer protection, and technology transfer. It is equally important to strengthen national capacities by training arbitrators, lawyers, and experts who are proficient in foreign languages and possess practical experience in arbitration cases. Arab arbitration centers should unify their efforts, coordinate their work, establish unified professional rules, and create joint lists of arbitrators, thereby reducing costs and enhancing professionalism in arbitration practice.

Building a strong Arab arbitration system requires shared political and legislative will, along with the development of legal and technical expertise, and the promotion of specialized academic research in the field of international commercial arbitration. Such efforts would enhance the ability of Arab countries to negotiate on equal footing and protect their interests in dealings with advanced companies and states, thereby ensuring balance and fairness in international contractual relations.