

A rising number of arbitrations, both commercial and treaty-based, involve parties from North Africa, the Middle East and Turkey. **Steven Finizio** and **Amélie Skierka** of **WilmerHale** examine the arbitral options for parties resolving disputes in the region

## ARBITRATION IN THE SHADOW OF OLD EMPIRES

R

egional development in the energy, construction and maritime sectors has triggered a surge in foreign investment, increasing the number of arbitrations involving parties from North Africa, the Middle East and Turkey.

Many countries in the Near East region have taken steps to encourage the use of arbitration locally. This article examines different approaches adopted in three countries that have been struck by varying degrees of political instability – Turkey, Egypt and Libya – to see whether, and to what extent, the countries are attractive for international parties to arbitrate there instead of resolving their disputes in an external, neutral forum.

Turkey has already modernised its arbitration laws. Egypt, which has formally adopted modern arbitration laws, has simultaneously and contrastingly issued a decree creating uncertainties regarding the enforcement of arbitral awards. Libya on the other hand, has made no efforts to modernise its arbitration laws at all.

### Arbitration in Turkey



Turkish companies regularly rely on arbitration as a dispute resolution mechanism and are frequently involved in disputes involving the construction and energy sectors. In 2013 alone, 63 of the parties from Central and Eastern Europe involved in newly filed ICC arbitrations were Turkish. In Europe, only Germany, France, Italy and Spain had more parties than Turkey.

The number of arbitrations involving Turkish parties should continue to remain high, for a number of reasons. Firstly, Turkey's economy has been growing steadily since 2010, despite the economic crisis in Europe and some political turmoil in the country. Secondly, growth has been driven by foreign and domestic investment. Turkey is heavily investing in infrastructure projects and the diversification of its energy production through

solar, wind and nuclear energy; industries which traditionally attract foreign investors. Finally, Turkey also has a significant and growing role in the transit of oil and gas supplies from Russia, the Caspian region and the Middle East to Western Europe.

Turkey has a codified legal system, based on Swiss law. It has reformed and modernised its arbitration laws in order to make the country more arbitration-friendly. Turkey's International Arbitration Law, based on the UNCITRAL Model Law, was enacted in 2001. The International Private and Procedural Law (IPPL), governing, among other things, issues of recognition and enforcement of arbitral awards, was adopted in 2007.

Turkey has been taking steps to actively encourage arbitration as a dispute resolution mechanism. As reported in *CDR* online, in November 2014, Turkey's parliament approved the establishment of Turkey's first arbitration centre, the **Istanbul Arbitration Centre** (IAC). The purpose of the Centre is to encourage arbitration in domestic and international cases where there is a "foreign element". The law establishing the IAC came into force on 1 January 2015 and the Centre has not yet published any procedural rules.

Turkey has ratified the New York Convention and Turkish courts generally enforce arbitral awards, but the courts may refuse enforcement in particular circumstances e.g. on the grounds





of expired time limits and public policy reasons. These grounds for refusal have been interpreted very broadly in some cases by the Turkish courts.

Turkey is also a signatory of the ICSID Convention and has ratified the Energy Charter Treaty. It is a signatory to approximately 100 bilateral and other investment treaties and Turkey, as well as Turkish companies, have been involved in a number of investment treaty arbitrations. As of 2013, Turkey was a respondent in nine investment treaty arbitrations (*UNCTAD IIA Issues Notes*, April 2014).

## Egypt



Egypt has gone through a series of political changes since the revolution in 2011, including the ousting of two presidents. While Egypt has been relatively stable since the election of President Abdel Fattah el-Sisi in June 2014, it remains to be seen whether

political stability can be achieved for the long term.

Egypt's economy is strongly dependent on the extractive sector, relying mainly on oil and gas, manufacturing and agriculture (17%, 16% and 15% of their GDP respectively). Despite this, foreign investment has recently resumed.

Economic development in Egypt has been greatly affected by the political instability in the country and neighbouring countries such as Libya.

The Egyptian legal system was founded on a mixture of Napoleonic codes, Roman law, and Islamic Sharia law. Egypt traditionally has been a jurisdiction supportive of arbitration. Arbitration is generally preferred over court litigation because court proceedings are often very slow. International arbitration is regularly used to resolve disputes relating to large transactions involving foreign parties in case matters such as construction, oil and gas and maritime disputes. ►





Egypt traditionally has been a jurisdiction supportive of arbitration. Arbitration is generally preferred over court litigation because court proceedings are often very slow

- Egypt ratified the New York Convention in 1959 without any reservations. Egypt has also signed numerous bilateral treaties on judicial cooperation referring to mutual cooperation in the recognition and enforcement of arbitral awards with countries such as the UK, France and Germany.

In 2014, Egypt enacted the Arbitration Act, based on the UNCITRAL Model Law, to further encourage arbitration as a means of dispute resolution. A noteworthy derogation from the Model Law is the provision regulating the language of the proceedings: the language of arbitral proceedings is Arabic, unless the parties have expressly stated otherwise.

The **Cairo Regional Centre for International Commercial Arbitration (CRCICA)** has been active since 1979, administering both domestic and international cases. As of 31 December 2013, the CRCICA had administered 942 arbitrations; 72 new cases were filed in 2013. A total of 15 non-Egyptian parties were involved in arbitrations administered by the CRCICA in 2013, five of which were from Saudi Arabia.

Egyptian courts have generally been favourable to the enforcement of arbitral awards and have defined public policy narrowly (as a potential ground for refusing enforcement).

However, a decree passed by the Ministry of Justice in 2008 now imposes an additional hurdle on the enforcement of awards, in the form of a pre-approval requirement by the Technical Office for Arbitration. Approval depends on whether the case deals with real property, contradicts public policy or concerns family/personal status. If any of these features are present, approval may not be granted. This decree creates a large degree of uncertainty as to the availability of enforcement. The decree is currently being applied, although it has been challenged in the courts and may possibly be withdrawn in the near future.

Egypt ratified the ICSID Convention in 1972 and has observer status to the Energy Charter Treaty. Like Turkey, Egypt is also a signatory to over 100 bilateral and other investment treaties. After Argentina, Venezuela and the Czech Republic, Egypt is

the fourth most frequent respondent to investment treaty claims (*UNCTAD IIA Issues Notes*, April 2014, reporting 23 claims total as of the end of 2013).

## Libya



Libya has been politically unstable since the end of Colonel Muammar Gaddafi's autocratic rule in 2011. Five different prime ministers have been in place since 2011 and a rebel movement has taken control of parts of Tripoli, the capital city, appointing its own separate head of state and cabinet members.

Libya is heavily dependent on revenues from the energy sector, which make up 50% of the country's GDP. Political instability and deterioration of security in the region has slowed down Libya's oil and gas production. Gas production has not yet returned to pre-2011 levels and strikes at the country's oil terminals in 2013 have resulted in the government losing control over a large proportion of this significant natural resource. In this environment, the rate of foreign investment has slowed.

Libya has a "mixed" codified civil law system based on the French and Egyptian civil codes, as well as Islamic law. Unlike Turkey and Egypt, Libya is not a signatory of the New York Convention.

Arbitration is a popular means of dispute resolution in Libya. The country is home to a number of arbitration centres including the **Libyan Center for Mediation and Arbitration** and the **Libyan International Arbitration Commercial Center** in Tripoli.

Libya does not have a modern arbitration law; its arbitration law dates back to 1953. The Libyan Civil Procedure Code of 1953 grants parties the right to resolve "disputes relating to private contracts" by way of arbitration, with an important restriction: arbitrations concerning the petroleum industry must be seated in Libya and are subject to Libyan law. Further restrictions include a requirement that an arbitral award must be issued 30 days after the start of the arbitration. Parties can extend this period to a maximum of three months, after which the parties may either replace the arbitrators or go to court. Parties may also appeal arbitral awards in court.

Although Libya is not a signatory to the New York Convention, Libyan courts will recognise and enforce foreign awards if satisfied that the award is definitive, enforceable and in line with the rules of the country where the award was issued. Libyan courts will also ask for proof of reciprocal treatment of Libyan awards by the foreign court, i.e. the courts of the country where the award was rendered.

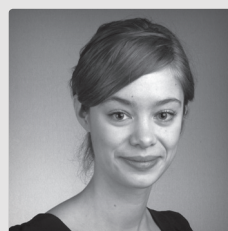
Libya is one of only six countries in Africa that have neither signed nor ratified the ICSID Convention (the others being Angola, Djibouti, Eritrea, Equatorial Guinea and South Africa). It also has not signed the Energy Charter Treaty and does not have observer status. Libya is a signatory to approximately 45 bilateral and other investment treaties.

As of 2013, Libya was a respondent in only one investment treaty arbitration, the *Al-Kharafi v Libya* case, filed against Libya by Kuwait under the Unified Agreement for the Investment of Arab Capital in the Arab States (*UNCTAD IIA Issues Notes*, April 2014). The second largest monetary award in the history of treaty-based

## About the authors



Steven Finizio is a partner at WilmerHale in London. His practice focuses on complex commercial and regulatory disputes, and concentrates primarily on international arbitration. He has advised clients regarding disputes under the rules of most leading international arbitration institutions and in ad hoc proceedings, and also serves as an arbitrator.



Amélie Skierka is a counsel in WilmerHale's litigation/controversy department, and a member of the firm's international arbitration practice group. She has experience with international arbitral proceedings sited at various seats, including London, Austria and Switzerland, and governed by various substantive and procedural laws.

[www.wilmerhale.com](http://www.wilmerhale.com)

investor-state dispute settlement was awarded in the *Al-Kharafi v Libya* case in March 2013, when the investor was awarded damages in the amount of USD 935 million plus interest. The award has since been declared enforceable by courts in Paris.

## Choosing an arbitral seat

Foreign parties are usually reluctant to agree to arbitrate in the home jurisdiction of their counterpart. That reluctance is even stronger in countries that have mixed reputations for supporting arbitration. Ongoing political instability makes these countries even less attractive.

While arbitration is a popular dispute resolution mechanism in Turkey, Egypt and Libya, foreign parties are likely to continue to exercise caution when considering arbitration in these countries because of legal and political uncertainties. At the same time, there are clear signs that demand for arbitration involving parties from the Middle East, North Africa and Turkey is increasing.

Given the lack of other regional alternatives (see *Africa's Advance* by Steven Finizio and Thomas Fühlich, *CDR*, July 2014), and concerns about Egypt, parties will likely prefer taking their disputes to foreign seats. London continues to be a popular choice as a seat of arbitration for disputes with parties from the region. ■