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SETTLEMENT OF FOREIGN INVESTMENT DISPUTES IN THE ARAB COUNTRIES

By Abdul Hamid EL-AHDAB

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I. INTRODUCTION : FOREIGN INVESTMENTS ALWAYS CALL FOR THE PROTECTION OF ARBITRATION.

1) Foreign investments only trust arbitration. Those who have invested in a foreign country feel that its courts and justice are foreign. This is why the industrialized countries have created important insurance companies covering investments contracted abroad. Those are :

- The COFACE in France
- The Allgemeine, Gerling and Hermes in Germany
- The General Surety Guarantee Co Ltd in Great Britain
- The American Credit Indemnity Company of New York (Baltimore)
- The Federal Insurance Company (New Jersey)
- The Insurance Company of North America (Philadelphia)
- The Fidelity Deposit of Maryland (Baltimore).

Moreover, there is a visible and quite important phenomenon in this respect : the insurance premiums for investments contracts with the developing countries vary depending on whether or not a contract contains an arbitration clause. They are of a reasonable amount if such a clause is included, and very high if such clause is not included. Some insurance companies even refuse to cover the latter category of contracts.

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Ltd
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2) Arbitration itself has considerably evolved and is no longer an adventure, nor a jump into the unknown. It now has permanent institutions and organizations which regulate it.

Academic writing on arbitration has also evolved. Today, questions are not answered by other questions but by precise, convincing and fair replies.

Moreover, arbitration has become institutional and as soon as it is governed by one of the permanent arbitration institutions, a party who wishes to paralyse it will no longer be able to do so. To use a metaphor, the parties bound by an arbitration clause referring all possible disputes to arbitration by a permanent institution, are in the same situation as a traveller who has reserved his ticket on a regular airline. His plane will leave at a precise hour, arrive at a precise hour and be piloted by competent and experienced pilots.

3) Foreign investments required arbitration but the latter is somewhat feared. The principal reasons for this are :

(a) The conflict between developing countries -who need foreign help notably with private investments for the implementation of their development projects- on the one hand, and foreign investors on the other hand who are afraid for their capital and wish to avoid non-commercial risks which might arise out of administrative, political or legislative steps taken by the host countries.

(b) Developing countries deem that justice must be given by their State courts and they should not be treated as if they were not able to do so. Thus, they do not accept to give the investors the right to take measures against them before the courts of another country, notably that of the investors, nor before international courts.

4) Arbitration also developed. In national commerce, it existed even before the courts and it is now the only alternative to national courts accepted in international commerce.

Today, it is held to be the privileged means of settlement of international commercial disputes. The national courts are not longer adapted to the needs created by the very nature of international disputes and the means to their solution, because they apply rather rigid local rules. However, arbitration is not a revolution against national justice as, on the contrary, its aim is to give justice on the international level outside of the frontiers, which means that it does not contradict any national consideration.

Thus arbitration supplied the legal framework for the solution of the foreign investment crises. However, tracing this framework is not enough, as it had also to be accepted by all the parties concerned.

II. A HISTORICAL OUTLINE ON THE RELATIONSHIP BETWEEN ARBITRATION AND INVESTMENT IN THE ARAB COUNTRIES.

A. Arbitration is accepted and legally admitted in Islam.

Islam recognizes that the arbitration mentioned in the Koran is legal. Its principle was laid down in the following verse :

" Allah doth command you
To render back your Trusts
To those to whom they are due ;
And when ye judge
between man and man
That you judge with justice :

Verily how excellent
Is the teaching which He giveth you !
For Allah is He Who heareth
And seeth all things."

The Prophet himself had accepted to be an arbitrator in a dispute which was referred to him. More precisely, he had appointed an arbitrator and had approved the decision given by the latter on the dispute. He also counselled a tribe to have a dispute arbitrated.

The Rachidin Caliphs did likewise with respect to disputes relating to goods and chattels.

The "Sunna" confirmed the use of arbitration and the companions of the Prophet unanimously recognized its validity. The "Idjma'" (consensus, the first source of Moslem Law), was even more explicit with respect to the definition and determination of the field of arbitration. Consequently, the validity of arbitration never was, and never could be, discussed or objected to, in the Moslem Shari'a.

B. The crisis of international arbitration in the Arab countries.

After the award given in the ARAMCO case, followed by the "Abu Dhabi award" and some others which the arab world perceived as being imposed by a "civilized" party upon a "barbarian" party, a feeling of hostility towards arbitration was born and arbitration was considered as being a foreign justice, seeming to be beyond reproach.

C. The end of the crisis of international arbitration in the arab countries and the return to the trust in arbitration.

- The failure of one marriage does not mean that all a marriages fail ;

- The crash of one airplane does not mean that air transport is no longer possible ;

- International arbitration regained life and the trust of the operators in the arab countries. It reappeared when investments returned. But what favoured its return ? or was it return of investments which favoured that of international arbitration ?

- One of the signs of the return of arbitration in the arab countries is the issuance of new arbitration acts in a large number of these countries, i.e. Lebanon, Yemen, the Kingdom of Saudi Arabia, the Sultanate of Oman and in Kuwait. One should add the draft laws on international arbitration in Egypt and Tunisia as well as the new draft law on arbitration in Jordan.

- A large number of arab countries acceded to the New York Convention, i.e. Egypt, Syria, Jordan, Algeria, Kuwait, Tunisia and Bahrain.

- A large number of arab countries also acceded to the International Convention on the creation of the International Centre for Settlement of Investment Disputes between States and nationals of other States. Amongst these countries are the Kingdom of Saudi Arabia, Morocco, Egypt, Jordan, Tunisia and Sudan.

D. Investment and arbitration in the arab countries.

There is a phenomenon in the arab countries to which we draw a particular attention. This is the bond which exists between foreign investment and arbitration, and the progression of arbitration parallel to that of investment. The increase of the number of arab countries which acceded to the New York Convention is a visible sign and the increase of the number of the same countries having acceded to the International Convention on the creation of an International Centre for Settlement of Investment Disputes between States and nationals of other States is another a sign, just as visible. A third sign is the Convention of Settlement of Investment Disputes between Arab investments receiving States and nationals of other Arab States. A fourth sign is the UNCITRAL model law on international arbitration which was adopted by certain arab countries. The AMMAN Convention on commercial arbitration and the birth of the Association Arabe de l'Arbitrage International, which cooperates with the ICC, are other signs.

We shall briefly set out some of these Conventions and Organizations.

The phenomenon which can be observed in the arab countries is not peculiar to them. Indeed, the distrust of the third world vis-à-vis foreign investment and the doubts which the third world had in this respect, are slowly disappearing because these countries need all kinds of foreign investments and also because of the awaking of the different people to their reciprocal needs notably on the economical level, awakening which has imposed immediate legal solutions.

Thus, new laws were issued which encouraged and even called for these investments. Each of the developing countries now has its foreign investments act so that these investments are authorized in all sectors where the need is felt. It should be noted that the required investment not only concerns capital but also financial and technical know-how.

In turn, however, those foreign investments required the guarantees necessary to their protection against the risks of change, especially that of direct or indirect nationalization. Thus, countries exporting private capital have employed local methods to guarantee these investments against the non-commercial risks in the host countries.

Moreover, the world has heard numerous chiefs of State of the third world giving assurances to investors on the future of their capitals and the UN itself started to cover this subject by commenting a study on the adoption of an international charter on investments.

The Havana Convention of 1948 had already laid down the foundations for solutions which could be adopted in this framework, but it was unable to reach concrete results. The Organisation for Economical Cooperation and Development (OECD) prepared a project in this respect in 1964, but this draft has not come to fruition. Investments continually looked for "guarantees", but the third world only saw a search for "privileges" !

Where do these guarantees stop ? and where do the privileges start ? This was the question asked by the financial and business world and which preoccupied legal thinking.

1. The Convention on the Settlement of Investments Disputes between States and Nationals of other States (1965).

On March 18, 1965, the International Bank for Reconstruction and Development (IBRD) prepared a draft Convention for Settlement of Investment Disputes between States and nationals of other States, through the creation of an International Centre for the Settlement of Investment Disputes (ICSID). This Convention came into force on 14/10/1966 following its signature by the required number of States (20 States). Most arab States acceded thereto, notably Egypt, the Kingdom of Saudi Arabia, Morocco, Jordan, Tunisia and Sudan.

This was the first attempt on the international legal level. It has been preceded by a long search for international means to improve the legal situation of foreign investments in developing countries. It crowned the efforts deployed in this respect by international organisations, governments and businessmen.

Was this convention a solution which could put an end to the crisis of conscience and reconcile the right to private property and contractual agreements on the one hand with the right of a State to its sovereignty and justice on the other hand ?

The arbitration system defined in the ICSID Convention is held to be one of the fundamental guarantees of foreign investment in developing countries. Indeed, this category of investments fears the increase of occasions of conflict between the parties, or their complication.

In fact, the obligations upon the investor on the one hand, and upon the host State on the other hand, can conflict over the construction of the content and the details of the performance thereof or the revision due to changes in circumstances. A dispute can also arise if the State resorts to nationalisations or confiscation. Today, a foreign investor, who cannot bring his legal system with him -which had been possible in the past when "mixed courts" existed- requires that the guarantee be at least equivalent to the submission to a contractual method which governs legal relations with the host State. The ICSID guarantee is in fact a form of private justice, which is peculiar to foreign investments and attempts to conciliate the developing countries' rights to sovereignty and to the satisfaction of their needs in foreign investments with the industrialized countries' right to justice and to guarantees for its investors.

This convention has foreseen a supple and independent arbitration system which insures a balance between the interests of the parties and remains outside of political conflicts.

Today, international arbitration is a guarantee for an investor who considers that those offered by national courts of the third world countries are insufficient.

The preamble of the "Convention on the Settlement of Investment Disputes between States and Nationals of other States", signed on 18/3/1965, is a summary of the ideas which gave birth to it :

> " ***Considering*** *the need for international cooperation for economic development, and the role of private international investment therein ;*
>
> ***Bearing in mind*** *the possibility that from time to time disputes may arise in connection with such investment between Contracting States and nationals of other Contracting States ;*

Recognizing *that while such disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases ;*

Attaching particular importance *to the availability of facilities for international conciliation or arbitration to which Contracting States and nationals of other Contracting States may submit such disputes if they so desire ;*

Desiring *to establish such facilities under the auspices of the International Bank for Reconstruction and Development ;*

Recognizing *that mutual consent by the parties to submit such disputes to conciliation or to arbitration through such facilities constitutes a binding agreement which requires in particular that due consideration be given to any recommendation of conciliators, and that any arbitral award be complied with ; and*

Declaring *that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration. "*

2. <u>The Convention on the Settlement of Investment Disputes between Arab Host States and Nationals of other Arab States (signed in 1974).</u>

When the 1973 oil crisis arose, with the increase in the crude oil price, the arab investing States had the idea to "arabise" the ICSID Convention in the shape of a "Convention on the Settlement of Disputes between Arab Investment Receiving States and Nationals of other Arab States". Thus, an international convention became a regional convention. The former arose out of the efforts deployed by the IBRD in Washington, the latter out of those deployed by the Council of Economic Unity which depends on the Arab League.

The Convention on the Settlement of Investment Disputes was signed on 10/6/1974 by Jordan, Sudan, Syria, Iraq, Kuwait, Egypt and Yemen and later by Libya and the State of the United Arab Emirates.

The Council of Economic Unity ratified it in its session of December 1974 and it came into force on 20/8/1976.

This convention reflected the wish to create an arab common market, which was one of the major preoccupations of the Council of Economic Unity. It also reflected the wish to facilitate arab investments in the other arab countries. It was completed by another Convention called "Unified Convention for Capital Investment in Member States of the Arab League", which has come into force in September 1981.

Earlier, an agreement has been signed for the creation of an Arab Company of Investment Guarantees. It was implemented on 1/4/1974 and also referred all disputes in this field to arbitration.

All of the above shows that Arab law considers that arbitration is one of the means to guarantee investments.

The provisions contained in the agreement on the creation of the Arab Company of investments is but the most recent sign.

The Convention for the settlement of disputes between arab investment receiving States and nationals of other arab states is contained in the ICSID Convention and is in fact but an implementation of the latter and a reply to the requirements of Arab investment in its different fields. The two Conventions are in agreement on many points and only disagree on some rare specific points.

3. The arbitration of the Inter-Arab agency for investment guarantees (1974).

The "Congress on Industrial Development of Arab Countries", held in Kuwait in March 1966, issued a series of especially important recommendations, including "the study of the possibility to create a Collective Arab Agency for the guarantee of Arab and foreign capitals invested in development projects".

The Kuwait Fund for Arab Economical Development undertook to follow up the execution of this particular recommendation, in collaboration with the Kuwait Ministry of Foreign Affairs. A first meeting of Arab financial experts was held in Kuwait between 6 to 9 November 1967 in order to consider this proposal on the basis of a preliminary study presented by the Kuwait Fund. The discussions held during this meeting produced a resolution entrusting the Fund with the role to follow up the study on the question and the preparation of basic documents necessary for entering into a collective agreement in this respect.

A second meeting of Arab financial experts was held between 10 to 12 March 1970 in Kuwait when a draft agreement for the creation of an Inter-Arab Agency for Investment Guarantee was discussed. This draft had been prepared by the Kuwaiti Fund and distributed to the various Arab governments. The meeting led to a resolution recommending certain amendments to the draft and the submission of its text to a commission of eminent Arab jurists.

The Kuwait Fund was entrusted to take the necessary measures for the creation of this agency and the commencement of its activities. It was also charged with establishing an explanatory memorandum specifying the general principles on which the project was based to be distributed along with the text of the Agreement. The Kuwait Fund drafted the final version of the draft in light of the proposed amendments and submitted the text to the different Arab governments during the summer of 1970. The draft was approved by the Council of Arab Economical Unity on 29 August 1970 and by the Economical Council of the League of Arab States on 16 December 1970.

It was then submitted for signature to the Ministry of Foreign Affairs of Kuwait in May 1971. The Convention came into force on 1 April 1974, on which date it had been ratified by twelve Arab States.

The Convention specified in its preamble that the purpose of the Agency is to :

> " *encourage circulation of capitals between (the signatory States) in order to finance their developing efforts in the interest of their people, in confirmation of the importance of the role which the arab investor may have in this respect if he is offered the adequate guarantee, and in order to ensure the supply of this guarantee in order to face non-commercial risks which might be an obstacle to investments between arab countries and which the investor will be able to prevent only with difficulty by any other means ... ".*

The Convention also specifies that the purpose of the Agency is "to insure the Arab investor, by compensating him in an appropriate manner for losses due to non commercial risks such as confiscation, nationalization, expropriation or any other measures substantially limiting the possibilities to repatriate the capitals or their revenues, etc".

The Agency is a juristic person with a financial and administrative autonomy. The seat of the Agency is in Kuwait.

The Convention also provides that :

(1) the investor, party to the insurance contract, must be a national of one of the contracting States or a juristic person whose shares are held substantially by such a State or one of its nationals and with its main headquarters in one of these States.

However, a juristic person whose seat is outside one of the contracting States may, upon decision of the Council, be a party to an insurance contract provided that more than 50 per cent of its shares belong to one or more contracting States, their nationals or to juristic persons which fulfil the conditions necessary to be admitted as parties to this type of insurance contract. In all cases, the investor may not be a national of the State in which the investment is made.

(2) If the investor has several nationalities, it is sufficient that one of them be that of the contracting States but if one of these nationalities is that of the host State, only this one is taken into account.

It should be noted that the Convention contains, in an appendix, a chapter called "Settlement of Disputes" which give details of the procedure relating to the settlement of any dispute by means of conciliation. If conciliation fails, one resorts to arbitration. It should also be noted that the Convention does not mention arbitration directly but refers to the appendix jointed thereto which is a set of arbitration rules, starting by conciliation and finishing by arbitration.

Thus, the disputes which may be referred to arbitration are :

1. The disputes on the interpretation and implementation of the Convention.

2. Disputes on insured investments.

3. Disputes relating to insurance contracts.

4. <u>The Unified Agreement for Investment of Arab Capital in Arab Countries (which came into force on 1981).</u>

This Convention was signed during the Arab Summit in Amman on 27 November 1980. Twenty-one Arab countries of the Arab League signed it, and it came into force in 1981.

The Preamble of the Convention states that the founder countries are:

> " *Convinced that the creation of an adequate climate for investment destined to start Arab economic resources in the field of common Arab investment requires the establishment of legal rules for the investment within the framework of a clear, unified and stable system of law which facilitates the circulation of Arab capitals and their investment in the Arab countries so as to serve the development, liberation and evolution of these countries and to heighten the standard of living of their nationals,*

(3) The Convention laid down a final ultimate objective, the creation of an Arab Court of Justice but it provided that "in the meantime ... a Court for Arab Investments is created". This Court is made up of at least five judges of different Arab nationalities. Its seat is the same as that of the Arab League and it has jurisdiction over disputes relating to the implementation of the provisions of the Convention, or those which stem therefrom.

A foreign investor may also bring an action before the courts of the State where the investment is made, but resorting to one of these two courts means that the investor can no longer resort to the other.

In case of any conflict of jurisdiction between the Court and the courts of a State which is a party to the dispute, the decision made by the Court is final.

(4) The Convention provides three methods of settling disputes relating to investment :

a. the Court for Arab Investments ;
b. conciliation ;
c. arbitration.

It also determines the particular procedure applicable to each of these.

It should be noted that the Convention preferred arbitration to the Court for Arab Investment and it should be kept in mind that anyway, as is explicitly provided in the Convention, the latter is only provisional.

(5) The dispute governed by the Convention may either be :

a. between two Arab States ; or
b. an Arab State and a State agency of another Arab State ; or
c. State agencies of different Arab States ; or
d. a State or a State agency and Arab investors ; or
e. an Arab State, State agencies or Arab investors and those parties which grant guarantees for investment in compliance with the provisions of the Convention.

(6) The Convention provides that the Arab Agency for Investment Guarantees must insure the capital invested in compliance with its provisions.

(7) It defines "Arab capital" as being that belonging to "nationals of an Arab country and which encompass all rights which may be pecuniarily evaluated such as corporeal or incorporeal rights, including bank deposits and financial investments. The revenues of Arab capitals are moreover considered as Arab capital and the same holds true for "indivisible shares" ...".

(8) The Convention provides that any invested Arab capital may not be subject to any measure leading to its confiscation, expropriation, nationalization, liquidation, dissolution, prohibition or forced postponement of reimbursement ...

The expropriation in the public interest however is allowed provided that it is made in a non-discriminatory manner and that fair compensation is paid in a period not exceeding one year.

(9) Finally, and in addition to the financial, legal and custom guarantees which it grants to Arab investment, the Convention gives an additional guarantee, namely arbitration. It has established conciliation and arbitration rules applicable to any disputes, but such arbitration is not compulsory as the parties may resort to other means such as conciliation or the Court for Arab Investment.

The provisions relating to arbitration and conciliation are contained in an annex to the Convention which is deemed to form an integral part thereof.

5. The UNCITRAL model law.

Today, there are about of 4000 arbitration institutions. The parties just refer to their rules so that the arbitration can be held within their framework.

Such an arbitration is called "institutional" and it is made in compliance with the arbitration rules of such institution.

It should be noticed that most of the permanent arbitration organizations remained, until recently, historically and geographically bound to the industrialized States of the Eastern and Western blocs. Indeed, their creation was linked to the activities of Chambers of Commerce and Industry and those of organizations of specialized crafts in a given sector of transactions relating to goods or other war materials negotiated in the international market. Each permanent organization has its own rules which constitute an ensemble of procedural rules to be followed.

This led to a general evolution which can be shown as follows :

The newly independent developing countries -which were called "third world countries"- felt that they had to deal with an unknown world applying rules in the elaboration of which they had not participated and which kept them outside any true contribution as to the consolidation thereof. It should be noted that the ICC Court of Arbitration was created in 1923 in Paris, when that city was the capital of an immense empire stretching over all oceans and continents. The competing Court in London was also located within the capital of an Empire "in which the sun never set".

In other words, international commercial arbitration systems were historically and geographically bound to the colonial inheritance. The countries of the three continents (Asia, Africa and South America) were unable to discuss the content of this inheritance and they could only participate in its evolution after the ebb of the imperialist expansion during the sixties.

But it was difficult to imagine that after the conquest of political independence, the third world countries would modify at the same speed international economic relations, which were characterized by their dependence on the modern industrialized world and the submission to established rules in the field of commercial exchanges, such as that of a resort to permanent arbitration organizations (located in Europe or Northern America) for the settlement of international commercial disputes within the framework of rules which are used there. They succeeded in this through a fundamental institution in which they could bring a certain political pressure to bear so as to modify the rules governing international economic relations. This institution was the United Nations and its different organizations. The political apparatus of this organization had already been able to prepare the basis of a new international economic system in the shape of programs and

charters made at the beginning of the seventies, but the technical apparatus -headed by the United Nations Commission for International Trade Law (UNCITRAL)- went even further by transforming the results of this recent evolution into a visible reality in the shape of specific rules capable to ensure the necessary balance between the legitimate interest of the third world countries and those of the modern industrialized countries. In this field, one of the most marked realizations of this commission was the elaboration of arbitration rules with the name of this Commission, which were ratified by the UN General Assembly under resolution n° 98 voted during the thirty first session of December 15, 1976.

The United Nations Commission on International Trade Law then made a new broad step on the way of unification and cooperation of arbitration acts throughout the world, with the cooperation of the international Council of commercial arbitration : a group of eminent jurists specialized in arbitration was indeed able to conceive a model law on international commercial arbitration on 21/6/1985.

The model law contains arbitration rules conciliating the different legal, social, economic and political systems throughout the world. It is an invitation given by the United Nations to the different countries of the world, so that they adopt it as their international commercial arbitration act instead of issuing acts which are specific to them but which do not tally with other laws and which would make the arbitration made on their basis incompatible with other international arbitration acts in force throughout the world. This model law respects all the systems of the different countries of the world and all arbitration laws which are applied therein. Its issuance and ratification would give more security to international arbitration and free it from any obstacle which could hinder a settlement of disputes relating to international commerce. It would also open the way to an easy implementation of the solution settling the dispute.

This arbitration evolved with the needs of international commercial and now respects the legal systems of all countries. The United Nations General Assembly moreover confirmed, in its resolution n° 40/72, the extent of the bond between arbitration and foreign investments as well as the economic and commercial relations between the different countries of the world.

Indeed, this resolution specifies :

" *The General Assembly,*

Recognizing the value of arbitration as a method of settling disputes arising in international commercial relations,

Being convinced that the establishment of a model law on arbitration that is acceptable to States with different legal, social and economic systems contributes to the development of harmonious international economic relations, (...) "

6. The Arab AMMAN Convention on international arbitration in 1985 : The Arab Arbitration Centre in RABATH.

This Convention is an arab confirmation of the bonds between foreign investment and arbitration. Moreover, it mirrors the efforts deployed in order to regulate arab arbitration.

This Convention has created an Arab Centre of Arbitration, following preparatory works which took many years of studies and discussions. The decision to create it arose out of a general conviction in the Arab business community, aware of the need to promote arbitration so that it can play its role of stimulant and security of international commerce. This idea arose from the observation of the importance of arbitration cases in which one of the parties is an arab party, and which are referred to the international permanent arbitration organizations. If international arab commerce feeds international arbitration institutions with such a considerable number of cases, why should the Arab countries not have their own arbitration centre ?

Thus this idea was transformed into a draft Arab Convention of International Arbitration. This draft was studied and prepared during a Council of Arab Ministers of Justice after a resolution taken in 1984 by this Council, during which it was agreed to create a permanent arab commercial arbitration institution. The General Secretary of this Council prepared a draft Convention of arab commercial arbitration, together with an explanatory memorandum and reasons.

2. International arbitration has also become an acknowledged fact in the arab countries. The most visible sign of this is the issuance of new arbitration acts in a large number of these countries, which are appropriate to the evolution thereof. Most of the arab countries also acceded to the New York Convention as well as the ICSID Convention and the similar Arab Convention.

3. It is in the interest of international arbitration that it becomes truly euro-arab instead of being disguised as such, whereas it was really only european in its essence.

A successful arbitration is one which leads to an award which the losing party would read and think : I would be ashamed not to enforce it.

Consequently, euro-arab arbitration needs to be based on euro-arab legal, social and cultural thinking, and not only on European one.

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