Oil and gas arbitrations in the Middle East and North Africa

Tim Martin
Northumberland Chambers

1. Oil and gas in the Middle East and North Africa

In 1901 William Knox D'Arcy acquired an oil concession in Iran, on which he and his investors discovered oil in 1908. This discovery began the Anglo-Persian Oil Company (later called the Anglo-Iranian Oil Company), which became the foundation for the company known today as British Petroleum (BP). It was also the beginning of the oil industry in the Middle East. International oil companies (IOCs), which consisted predominately of American and British companies, acquired many other oil concessions throughout the Middle East and North Africa (MENA)[1] over the next 30 years. The IOCs' investments in the region during the first half of the 20th century resulted in the discovery of a significant majority of the world's proven oil reserves over a lengthy period, as shown in Table 1.

Table 1. Proven crude oil reserves (billions of barrels)[2]

	1980		1990		2000		2010	
	Barrels	% Total	Barrels	% Total	Barrels	% Total	Barrels	% Total
MENA region	396.0	58.0%	696.8	67.8%	748.1	59.5%	830.2	51.2%
Total world	683.4	100%	1,027.5	100%	1,258.1	100%	1,621.6	100%

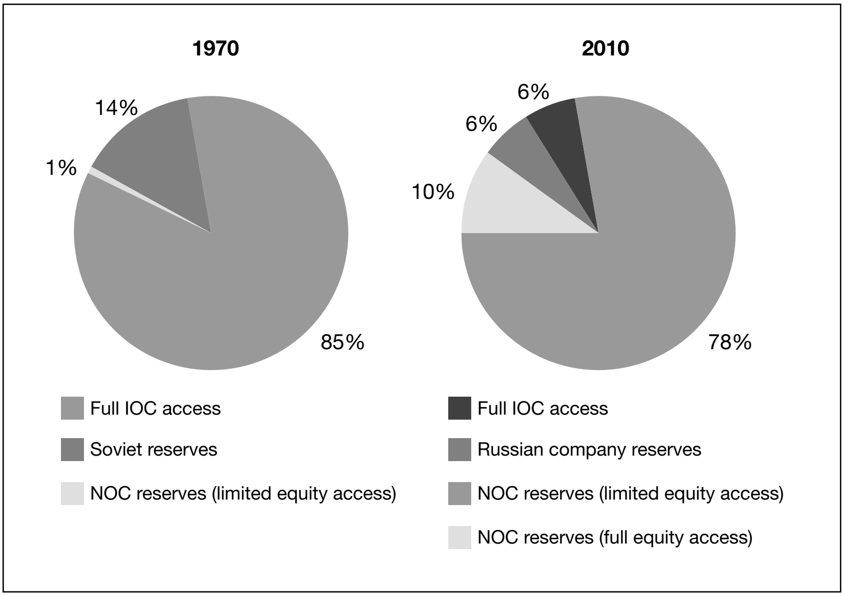
As a direct result of these discoveries, IOCs acquired control over the vast majority of global petroleum supplies. This did not sit well with countries in the

1 The countries included in the MENA region are, in the Middle East, Bahrain, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Oman, Qatar, Saudi Arabia, Syria, United Arab Emirates and Yemen; and in North Africa, Algeria, Egypt, Libya, Morocco and Tunisia.
2 *BP Statistical Review of World Energy.*

MENA region, which began their struggle to control their oil resources when Iran first nationalised the Anglo-Iranian Oil Company in 1951. A tumultuous period of coups, revolutions, deal making and nationalisations lasting several decades ensued.[3] During this period, countries in the MENA region were at the forefront of an anti-colonialist backlash, reflected in their increasing expropriation of oil concessions.[4] They sought economic independence by banding together and establishing the Organisation of the Petroleum Exporting Countries (OPEC) and issuing its Declaratory Statement of Petroleum Policy in 1960.

A major fallout from this struggle was a series of nationalisations by MENA host governments of the IOCs' investments in the region. This resulted in a dramatic reversal in control of the worlds' oil reserves from the IOCs to the national oil companies (NOCs) that host governments established to manage their petroleum reserves, as illustrated in Figure 1.

Figure 1. Control of world oil reserves: IOCs v NOCs



Sources: PFC Energy, Oil & Gas Journal, BP Statistical Review

2. Historical MENA oil and gas arbitration cases

The IOCs responded to these nationalisations with a number of ground-

3 For a fascinating narrative of this period, see Daniel Yergin, *The Prize* (Simon & Schuster 1991).

4 See Joan E Shapiro and Jeffrey A Hart, *The Politics of International Economic Relations* (Wadsworth, 7th ed 2010) at 315, where they describe an increase in expropriations from 10 in 1968 to more than 80 in 1975.

breaking investor-state *ad hoc* arbitration cases between the 1950s and 1980s that established many of the key principles in international investment, arbitration and oil and gas law. Those cases included the following:

- *Petroleum Development v Sheikh of Abu Dhabi* (1951);
- *Saudi Arabia v Aramco* (1958);
- *Sapphire v NIOC* (1964);
- *BP v Libya* (1974);
- *TOPCO v Libya* (1977);
- *LIAMCO v Libya* (1977);
- *Kuwait v AMINOIL* (1982);
- *Amoco International Finance v Iran* (1985); and
- *Mobil Oil v Iran* (1987).

2.1 *Petroleum Development v Sheikh of Abu Dhabi*

Lord Asquith of Bishopstone was the sole arbitrator in the *ad hoc* arbitration of *Petroleum Development v Sheikh of Abu Dhabi*.[5] The agreement did not include a governing law clause. It merely stated that the agreement was intended to be applied in the spirit of goodwill and integrity, and to be interpreted in a reasonable manner. Faced with the decision on what law to apply in interpreting the agreement, Lord Asquith stated the following:

> *If any municipal system of law were applicable, it would* prima facie *be that of Abu Dhabi. But no such law can be reasonably said to exist. The Sheikh administers a purely discretionary justice with the assistance of the Koran; and 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.*

As a result, Lord Asquith rejected the use of *Shari'ah* and how it would determine damages. Instead, he applied the "modern law of nature", which closely resembled the English common law with which he was most familiar. This would be considered offensive language from today's perspective, but it needs to be placed in historical context. What Lord Asquith was describing for the first time was the evolving international arbitration practice of supplementing (or replacing) national law with international law and legal practice.

2.2 *Saudi Arabia v Aramco*

On 29 May 1933 the government of Saudi Arabia signed a concession contract with Standard Oil Company of California (Socal, which subsequently became Chevron). The concession contract granted the exclusive right to Socal in eastern Saudi Arabia to "explore, prospect, drill for, extract, treat, manufacture, transport, deal with, carry away and export petroleum … however … such right

5 *Petroleum Development Ltd v Sheikh of Abu Dhabi*, Award of September 1951, 18 *International Law Reports* 144 (1951).

does not include the exclusive right to sell crude or refined products … within Saudi Arabia" for a period of 60 years. Socal found oil five years later in 1938, which began the development of the world's largest oil fields. By 1948, Socal had formed a consortium called the Arabian American Oil Company (Aramco) with three other large American oil companies – Standard Oil of New Jersey (Exxon), Socony-Vacuum (Mobil) and the Texas Company (Texaco) – to manage the concession contract. Among other agreements, Aramco entered into off-take contracts for the sale and transportation of crude oil and products from its concession to its shareholder companies and other buyers around the world.[6]

In 1954 Aristotle Onassis – who at the time owned one of the largest crude oil shipping companies in the world – obtained the approval of the government to form a company in Saudi Arabia called the Saudi Arabian Maritime Tankers Company (SATCO). The government then signed a shipping contract with SATCO to transport all the oil produced under the Aramco contract to foreign markets for a period of 30 years. Aramco refused to comply with the SATCO contract and did not allow Onassis to transport the crude oil produced from the concession. The Aramco agreement had an arbitration clause, which the parties revised to provide for an *ad hoc* arbitration[7] in Geneva, Switzerland with a three-member tribunal. The arbitration was held prior to the enactment of the New York Convention or the establishment of widely accepted international arbitration rules, such as the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. Since the Aramco contract did not provide for any particular procedural rules, the tribunal applied the law of nations to the procedural issues of the arbitration.

Saudi Arabia argued that Aramco was not entitled to the absolute right to transport oil beyond Saudi territorial waters, since that right was not expressly provided in the concession agreement. It further argued that even if Aramco was conferred such a right, it was in breach of the concession by transferring those rights to a third party (ie, its buyers). Aramco submitted that, by virtue of its agreement, it had the exclusive right to transport petroleum extracted by it to any place overseas and upon such terms as it chose.

There was no choice of law (or governing law) clause in the concession agreement. The tribunal therefore agreed that the law of Saudi Arabia governed the concession contract but that it was not prepared to fully apply *Shari'ah* because it determined that Islamic law was in an "embryonic state". Instead, the tribunal decided to reconstruct, in an abstract manner, the choice of law that reasonable persons would have intended to use in the concession agreement. As a result, the tribunal's decision on the choice of law provided that:

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6 Stephen M Schwebel, *The Kingdom of Saudi Arabia and Aramco Arbitrate the Onassis Agreement,* Vol 3, No 3, *Journal of World Energy Law & Business*, at 245 (2010).

7 *Saudi Arabia v Arabian American Oil Company (Aramco)*, Award of 23 August 1958, 27 *International Law Reports* 117 (1963).

- The law of Saudi Arabia applied to the relationship between the parties;
- Gaps in the law of Saudi Arabia would be filled by principles from worldwide custom and practice in the oil business;
- General principles of law applied because the concession agreement had an international character;
- The sale and transport of oil as governed by custom and practice in maritime law and the international oil business would apply; and
- Public international law applied when certain matters could not be governed by the municipal laws of the State.

The Aramco contract specified that Aramco's exclusive right to sell the oil it extracted did not include the right to sell crude or refined products within Saudi Arabia. The tribunal therefore concluded, by reverse logic, that Aramco must have had the exclusive right to sell outside Saudi Arabia. In its final award, the tribunal upheld the validity of the Aramco contract and held that the SATCO contract was in conflict with it and thus not effective against Aramco.

Saudi Arabia accepted the tribunal's decision, even though it very much disliked the award. As a direct result of this arbitration award, Saudi Arabia prohibited its government entities from including arbitration clauses in their agreements, unless they got special permission from the head of the government. It also slowed down Saudi ratification of the New York and International Centre for the Settlement of Investment Disputes (ICSID) Conventions. In the end, Saudi Arabia resolved the matter in 1973 by re-negotiating the original concession with the Aramco shareholders so that it purchased the Aramco company from them over a 10-year period, resulting in Saudi Aramco, the world's biggest company.

2.3 *Sapphire v NIOC*

Sapphire Petroleums Ltd, a Canadian company, and the National Iranian Oil Company (NIOC) entered into a contract in 1958 to expand the production and exportation of Iranian oil. They set up the Iranian Canada Oil Company in Iran to carry out the contract on behalf of the parties. Sapphire started work on the concession and then claimed reimbursement of its expenses. However, NIOC refused to reimburse the expenses, arguing that Sapphire had not consulted NIOC before carrying out its operations. On 28 September 1960 Sapphire commenced an arbitration against NIOC and appointed an arbitrator. NIOC refused to appoint an arbitrator. Pursuant to the contract, Sapphire requested the president of the Swiss Federal Court to appoint a sole arbitrator who appointed Swiss Federal Judge Pierre Cavin in an *ad hoc* arbitration.[8] NIOC did

8 *Sapphire International Petroleums Ltd v National Iranian Oil Co (NIOC)*, Award of 15 March 1963, 35 *International Law Reports* 136 (1963).

not appear at the arbitral hearing. Sapphire claimed breach of contract and requested compensation for expenses, loss of profit and the refund of a $350,000 indemnity, provided by Sapphire as a bank guarantee that was cashed by NIOC.

The contract did not provide an express choice of governing law. The arbitrator stated that since the contract was both concluded and performed in Iran, the *lex loci contractus* and *lex loci executionis* pointed to the application of Iranian law. However, the arbitrator found that the concession agreement provided that the contract was to be performed according to principles of good faith and goodwill. There was therefore a negative intention to reject the exclusive application of Iranian law since Sapphire would not be protected against legislative changes if the contract was governed by Iranian law. By reference to the rules of good faith, the arbitrator held that it was in "the interest of both parties to such agreements that any disputes between them should be settled according to the general principles universally recognized and should not be subject to the particular rules of national laws".

The arbitrator held that Iran, as an expropriating state, must compensate the investor for actual loss suffered (*damnum emergens*) and lost profits (*lacrum cessans*). He included lost profits based on the principle of *pacta sunt servanda*, which requires that contract damages put the aggrieved party in the position that it would have been in if the contract had been performed.

The arbitrator found that the existence of both commercial quantities and damages was uncertain. Sapphire argued it had the right to compensation for loss of "chance" to discover oil. A geologist retained as an expert by Sapphire testified that the minimum loss Sapphire would suffer was its investment of $8 million and a maximum loss would be lost profits of $46 million. The arbitrator decided that the geologist's analysis did not fully account for all risks involved, such as exploring in a desolate region and the possibility of wars and price recessions, and therefore awarded actual damages of $650,874 and lost profits of $2 million.

2.4 *BP v Libya*

Muammar al-Qaddafi seized power in Libya in September 1969. He began squeezing oil companies in the country the following year by calling for an increase in the posted price. He then began expropriating their concessions. The first of three noteworthy arbitration cases against Libya was initiated by BP.[9] This was an *ad hoc* arbitration with a sole arbitrator who decided that Danish procedural law would govern the arbitration, since the seat of the arbitration was in Copenhagen.

9 *BP Exploration Company (Libya) Limited v Government of the Libyan Arab Republic*, Award of 10 October 1973 and 1 August 1974, 53 *International Law Reports* 297 (1979), *V Yearbook Commercial Arbitration* 143 (1980).

The concession agreement provided that it was governed by principles of the law of Libya common to the principles of international law, and in the absence of such principles by general principles of law, including those principles applied by international tribunals. The arbitrator noted that this excluded any single municipal legal system.

The arbitrator accepted BP's arguments that the concession was in the nature of a contract, which was concluded pursuant to legislation that contemplated a contractual relationship, and created a direct contractual link between BP and Libya. The arbitrator found that the nationalisation of BP's property, rights and interests constituted a fundamental breach of the concession and was a total repudiation of the agreement. He also found that the government's actions:

- were arbitrary and discriminatory;
- violated public international law because they were made for purely extraneous political reasons; and
- were confiscatory because no offer of compensation had been made since the nationalisation.

2.5 *Texaco Overseas Petroleum Co (TOPCO) v Libya*

Texaco and California Asiatic Oil Company initiated an *ad hoc* arbitration[10] against Libya when it nationalised their oil concession. The Libyan government did not participate in the arbitration. The arbitrator adopted international law to govern the procedural aspects of the arbitration.

The sole arbitrator adopted the approach taken in the *Aramco* case, holding that the state party was not subject to the law of another country and that the parties had the right to select the governing law. The arbitrator applied a "two-tier system" to determine the governing law, so that:

- principles of Libyan law applied to the extent common to international law principles; and
- in the absence of such commonality, general principles of law applied.

The sole arbitrator held that under the new concept of international law, contracts between states and private persons can be 'internationalised' and subject to public international law. He based this on the reference in the contract to international law and general principles of law. He also held that the concession agreement granted by a former government of Libya was of a contractual nature because it expressed an agreement of the wills of both the investor and Libya based on general principles of law.

The arbitrator decided that the Libyan government could not exercise its

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10 *Texaco Overseas Petroleum Co (TOPCO) v Government of the Libyan Arab Republic*, Award of 19 January 1977, 53 *International Law Reports* 389 (1977), *IV Yearbook Commercial Arbitration* 177 (1979).

sovereignty to nationalise in violation of its specific commitments in the stabilisation clauses of the concession agreement, and that its nationalisation of TOPCO's investment amounted to a breach of the concession agreement.

2.6 *Libyan American Oil Company (LIAMCO) v Libya*

This was an *ad hoc* arbitration[11] with a sole arbitrator. The arbitrator held that the parties were free to select the law to govern their contractual relationship, and that any part of the Libyan domestic law that was inconsistent with principles of international law must be excluded. He also held that both Libyan and international law apply custom and equity, and that certain general principles of law were found in Libyan legislation and Islamic law, including the principle of sanctity of property and contracts, respect for acquired vested rights, prohibition of unjust enrichment and the obligation to pay compensation for expropriation.

The arbitrator concluded that compensation for nationalisation should include the value of all the tangible property seized, and that at a minimum, *damnum emergens* (the value of the nationalised property) should be compensated. He awarded LIAMCO the full amount of its claim for its interest in the physical plant and equipment for a value of $13,882,677.

The arbitrator determined that both Libyan and Islamic law allowed for the recovery of lost profits, and that classical international law allowed the recovery of lost profits for both wrongful taking of property and lawful nationalisations. However, he rejected compensation for lost profits if they were not "certain and direct", were doubtful and were not probably realisable.

Libya contended that for lawful expropriation, it owed only the net book value of the tangible assets seized. LIAMCO claimed lost future profits. The arbitrator described as "extreme" the compensation methods of net book value and recovery of full profits. Instead, the arbitrator held that "it would be reasonable and just to adopt a formula of 'equitable compensation' as the measure for the estimation of damages." The arbitrator concluded that it was "just and equitable to consider interest claimed not as usury (riba), but as compensatory equivalent of a discount rate".

2.7 *Kuwait v Aminoil*

Kuwait terminated the American Independent Oil Company's (AMINOIL) concession agreement and confiscated its assets in September 1977. As a result of the nationalisation of its assets, AMINOIL initiated an arbitration[12] against Kuwait, which resulted in the most cited case in state investment disputes.

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11 *Libyan American Oil Company (LIAMCO) v Government of the Libyan Arab Republic*, Award of 12 April 1977, 62 *International Law Reports* 140 (1977), *VI Yearbook Commercial Arbitration* 89 (1981).

12 *Government of Kuwait v American Independent Oil Company (AMINOIL)*, Award of 24 May 1982, 66 *International Law Reports* 518 (1982), *IX Yearbook Commercial Arbitration* 71 (1984).

The tribunal referred to a "transnational law" in determining the applicable substantive law, which was domestic plus international law. The tribunal also determined that the purpose of the stabilisation clause in the concession contract was only to prohibit measures of a confiscatory nature. However, with respect to damages, the stabilisation clauses were held to create "legitimate expectations" that must be taken into account in assessing damages. The tribunal refused to find duress, which required that there must be "absence of any other possible course" or means used to obtain it was illegal.

The tribunal did not apply *Shari'ah* principles in quantifying damages. Kuwait argued for net book value as the standard for compensating AMINOIL, while AMINOIL proposed valuating its expropriated assets using the discounted cash flow (DCF) valuation method. The tribunal held that the DCF method was acceptable in principle, but applied a combination of methods based mainly on a going concern value. The tribunal awarded AMINOIL a depreciated replacement value of the fixed assets seized by Kuwait and a going concern value plus "reasonable rate of return" (ie, profits). The tribunal took into account a reasonable rate of return for AMINOIL, noting that it "had come to accept the principle of a moderate estimate of profits, and this constituted its legitimate expectation". As a result of this valuation approach, the tribunal awarded AMINOIL $179,750,764.

Finally, Kuwait argued that a number of negotiations and settlements during the period from 1971 to 1977 "had generated a customary rule valid for the oil industry – a *lex petrolea* that was in some sort a particular branch of a general universal *lex mercatoria*". The tribunal rejected Kuwait's argument on *lex petrolea*.

2.8 *Amoco International Finance v Iran*

A series of oil and gas arbitrations arose from the Iranian revolution of 1979 and the subsequent seizure of US owned assets in the country by the revolutionary Iranian government. US investors initially pursued their claims in the US courts. However, in order to resolve the hostage crisis of US citizens seized by Iranian students, the United States agreed under the Algiers Accord to terminate litigation against Iran in US courts, to release Iranian assets in the United States that had been frozen under a US Treasury licence and to establish the Iran-US Claims Tribunal to handle all US claims against Iran.

Amoco International Finance Corp made a claim[13] against Iran at the Iran-US Claims Tribunal for the expropriation of its 50% interest in the shares of Khara Chemical Co Ltd. The tribunal determined that the legality of expropriation must be determined by international law, rather than domestic

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13 *Amoco International Finance Corp v Government of the Islamic Republic of Iran*, Award 310-56-3 of 14 July 1987, 15 Iran-US CTR 189, 83 *International Law Reports* 500.

local law. The tribunal held that a clear distinction must be made between lawful and unlawful expropriations, since the rules applicable to the compensation to be paid by the expropriating state differ according to the legal characterisation of the taking.

The tribunal stated that in the absence of a stabilisation clause, a contract does not bar nationalisation and any such nationalisation is not unlawful. Since there was no express stipulation in the contract barring the state from nationalising the investment, the tribunal held that Iran did not act unlawfully in nationalising Amoco's interests. However, it decided that Amoco's interests constituted "property" or "interests in property" under the bilateral treaty between the United States and Iran, and were subject to compensation in the event of an expropriation.

Amoco proposed a DCF method of valuation in its damages claim. Iran claimed that net book value was "the normal standard of compensation in case of lawful expropriation, especially in the oil industry". The tribunal decided that because the DCF method allows projection of damages over a long period, it opened "a large field of speculation due to the uncertainty inherent in any such projection", and said it amounted to "a capitalization of hypothetical future earnings for all other elements of valuation".

The tribunal rejected both the DCF and net book valuations methods. Instead, the tribunal decided that for a lawful expropriation, the going concern value at time of dispossession was the proper measure of compensation; while for an unlawful expropriation, lost profits might be added to the calculation of damages.

2.9 *Mobil Oil v Iran*

Mobil Oil Iran Inc also made a claim[14] against Iran at the Iran-US Claims Tribunal. Its claim was under a under a sale and purchase agreement where its first sentence stated that it "shall be interpreted in accordance with laws of Iran". However, the tribunal held that the reference to Iranian law was "solely for interpretation of the Agreement", and that general principles of commercial and international law would be applied to all other issues in the dispute. The tribunal decided that it was not appropriate that the contract be governed by the law of one party, given the contract's international character.

The tribunal concluded that the legality of expropriation (including contractual rights) must be determined by international law and held that a claimed loss "cannot easily be ascertained with a degree of certainty necessary to allow finding that profits claimed were within legitimate expectations of parties". The tribunal therefore rejected the application of lost profits in the calculation of damages.

14 *Mobil Oil Iran Inc v Government of the Islamic Republic of Iran*, Award 311- 74/76/81/150-3 of 14 July 1987, 16 Iran-US CTR 3, 86 *International Law Reports* 230.

2.10 Summary of historical arbitration cases

The above historical oil and gas arbitrations from the MENA region were instrumental in establishing many of the key principles now used in investor state disputes. They illustrated how contracts between states and private parties can be 'internationalised' by making them subject to public international law and international arbitration. In doing so, the tribunals chose not to exclusively apply local law, which was primarily *Shari'ah*. The tribunals also established other key principles in international investment law, including:

- the sanctity of property and contracts;
- a prohibition on unjust enrichment;
- the right of states to expropriate investments;
- the requirement that in doing so, a state must compensate the investor for its loss; and
- the use of legitimate expectations in determining damages.

On the commercial side, there were no reported commercial oil and gas arbitration cases from the MENA region during this period. Those that did occur took place in US and English courts.[15] Reported MENA commercial oil and gas arbitration cases have only recently emerged.

3. Recent MENA oil and gas arbitration cases

3.1 Commercial arbitrations

The International Chamber of Commerce (ICC) International Court of Arbitration is one of the leading commercial arbitration institutions in the world. Its caseload is a good indicator of trends in the international arbitration world. A review[16] was conducted of oil and gas arbitration cases at the ICC court that arose from the MENA region between 1988 and 2012. There were 450 oil and gas arbitrations in total at the ICC Court during that period, of which only 11 were from the MENA region.[17] That was less than 3% of all ICC oil and gas arbitration cases. There was no correlation between this number and the amount of oil and gas reserves in the MENA region.[18]

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15 An example is the series of *Hunt v BP* cases that dealt with a farm-in and joint operating agreement in 1960 between Nelson Bunker Hunt and BP on Concession 65 awarded to Hunt by Libya in 1957. Each party initiated various claims in the United States and English courts after the Libyan government nationalised BP's interest in 1971 and Hunt's interest in 1973: *Nelson Bunker Hunt v BP Exploration Company (Libya) Ltd,* 492 F Supp 885 (1980), 580 F Supp 304 (1984), 756 F 2d 880 (5th Cir 1985), and *BP Exploration Co (Libya) v Hun*t [1979] 1 WLR 783 (High Court), [1982] 1 All ER 925 (Court of Appeal), [1983] 1 WLR 232, [1983] 2 AC 352.

16 A Timothy Martin, "ICC Oil and Gas Cases in the MENA Region" *ICC ICArb Bulletin*, Vol 25, Issue 2 (2014) 21.

17 *Id* at 21. The 11 cases are reviewed and analysed in detail in the above article. Redacted versions of the cases are provided in the same issue of the *ICC Bulletin.*

18 Countries in the MENA region had up to 67% of the world's crude oil proven reserves and up to 52% of the natural gas proven reserves in the world during that time period. See *BP Statistical Review of World Energy (1988–2012).*

The amounts in dispute ranged from between $4 million and $10 billion. There was one state investment dispute involving a production sharing contract, while the remaining 10 cases were commercial disputes between companies involving:

- three seismic/drilling contracts;
- three construction infrastructure claims; and
- four sales contracts for crude oil, natural gas or liquefied natural gas.

There were no joint venture disputes involving either a joint operating agreement or joint venture company.

3.2 Investor-state arbitrations

The World Bank was involved in the settlement of the nationalisation of the Anglo-Iranian Oil Company after the overthrow of Iranian Prime Minister Mohammed Mosaddeq in 1953.[19] As a result of this and other nationalisations, the World Bank established ICSID in 1966 to provide a neutral forum to resolve investor-state disputes of this nature.[20] Even though ICSID developed into the "premier international investment arbitration facility in the world",[21] handling most of the world's investor-state disputes, it has registered very few oil and gas disputes from the MENA region. And the few that it has registered have only occurred in the last decade.

As of August 2017, ICSID had 642 concluded and pending cases in its registry, with 151 of those cases coming from the oil, gas and mining sector, which made up 23.5% of ICSID's caseload. Within that sector, 10 cases were from the MENA region, eight from the oil and gas sector and two from the mining sector. Of those eight oil and gas cases, two cases had the same parties, resulting in one of them being withdrawn, leaving a total of seven oil and gas cases from the MENA region. This resulted in oil and gas cases from the MENA region making up 4.7% of the total ICSID caseload from the oil, gas and mining sector.

The earliest MENA oil and gas case was registered at ICSID in September 2007. The parties settled that case with the tribunal registering the settlement without ruling on the merits. The next case was discontinued without an award. There are three cases pending without an award. The result is that there are only two ICSID oil and gas awards from the MENA region at this time. The seven oil and gas cases are listed in Table 2.

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19 Antonio R Parra, *The History of ICSID 21* (Oxford, 2nd ed 2017).
20 *Id* at 87.
21 *Id* at 267.

Table 2. Oil and gas cases at ICSID

Case	Claimant(s)	Respondent(s)	Date registered and dispute	Status
ARB/16/7	Attila Doğan Construction & Installation Co Inc	Sultanate of Oman	March 2016 Oil and gas engineering and construction enterprise	Pending
ARB/14/4	Unión Fenosa Gas, SA	Arab Republic of Egypt	February 2014 Natural gas liquefaction operations	Pending
ARB/12/30	Lundin Tunisia BV	Republic of Tunisia	October 2012 Oil exploration and exploitation operations	Concluded: Dec 2015
ARB/12/11	Ampal-American Israel Corporation and others	Arab Republic of Egypt	May 2012 Natural gas export	Pending
ARB/11/7	National Gas SAE	Arab Republic of Egypt	March 2011 Gas pipelines construction and operation agreement	Concluded: April 2014
ARB/09/14	Mærsk Olie, Algeriet A/S	People's Democratic Republic of Algeria	July 2009 Exploration and production of liquid hydrocarbons	Concluded: Sept 2013 Discontinued
ARB/07/25	Trans-Global Petroleum, Inc	Hashemite Kingdom of Jordan	September 2007 Oil exploration concession	Concluded: April 2009 Settlement

4. Correlation between number of arbitrations and amount of reserves

The amount of proven oil and gas reserves is a good indicator of a country's long-term production rates and therefore the amount of its petroleum activity and related business transactions generated over a sustained period.[22] Long-term business activity and transactions inevitably generate disputes. One would therefore assume that there would be some correlation between the amount of proven oil and gas reserves and the number of oil and gas disputes over time from one region of the world to another. However, that is not the case with regard to the MENA region when compared to the rest of the world. It is not even close.

The MENA region has had between 50% and 67% of the world's proven oil reserves and between 40% and 50% of the world's proven gas reserves at different times over the last half century.[23] There has not been an equivalent percentage of investor-state or commercial oil and gas arbitrations coming out of the MENA region compared to the rest of the world during that period.

The ICSID statistics are a good reflection of the number of investor-state disputes in the world. Oil and gas cases from the MENA region made up less than 5% of the total ICSID global caseload from the oil, gas and mining sector – significantly less than the percentage of global oil and gas reserves located in that region. In contrast, Central and South America had less than 10% of the world's oil reserves for most of that period,[24] while generating approximately one-third of the world's oil and gas investor state disputes during the same period.[25]

Similarly, the ICC statistics are a good reflection of the number of commercial oil and gas arbitrations in the MENA region compared to the rest of the world. Given the confidential nature of most commercial arbitrations, it is not possible to accurately track every oil and gas arbitration, but the ICC

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22 There is never a direct annual correlation because of geopolitical, economic, technological and logistical reasons over different periods. Examples are:
- Saudi Arabia's policy of maintaining 1 million to 2 million barrels of daily production in spare capacity to stabilise global markets;
- economic sanctions imposed upon Iran;
- regional conflicts in Libya, Iraq and Syria;
- technology advances in fracking and horizontal drilling in the United States; and
- pipeline constraints.

However, over time, there is generally a correlation between proven oil and gas reserves with a similar percentage of global production, revenue and business activity.

23 These percentages change over time with technology advances, fluctuating oil prices and what companies can reasonably recover based upon existing economic and operating conditions at the time of the estimate.

24 *BP Statistical Review of World Energy (1980-2010)*. The percentage of proven oil reserves was between 4% and 7% between 1980 and 2007. The reserve estimates for Venezuela began to increase significantly in 2008 as a result of recognising the economic viability of its heavy oil deposits based on the rapid increase in the oil price at that time, which resulted in Central and South America having an estimated 19% of the world's proven oil reserves by 2010. That percentage has subsequently dropped along with the dramatic drop in oil prices in 2014.

25 As of August 2017, ICSID had 151 cases from the oil, gas and mining sector. Fifty of them were from Central and South America.

database provides a good indication of where these arbitrations are occurring. The MENA cases were less than 3% of the total ICC oil and gas arbitration cases during that period. Once again, there was no correlation between the amount of oil and gas reserves located in the MENA region and the number of commercial oil and gas arbitrations generated from that region, compared to the rest of the world.

Why is there a disconnect between the large oil and gas reserves and related business activity in the MENA region and the relatively small number of oil and gas arbitrations it generates? Is it because investors in the region prefer not to use arbitration to resolve their disputes? There is some validity to this explanation, since there has been a long tradition in the MENA region for parties to use *sulh* (settlement) and *musalaha* (reconciliation) to settle their disputes, rather than the courts or arbitration. However, there could be a number of structural reasons for the relatively few oil and gas arbitrations in the region.

One factor is that IOCs were generally prevented from investing in major oil and gas fields in the region since the early nationalisations. Instead, it was the large NOCs that made those investments. No IOC investment meant that there could not be investor-state disputes in those countries. There have been a few investor-state arbitrations at ICSID over the last decade, but they have been in countries such as Tunisia, Oman, Jordan and Egypt,[26] which have smaller reserves and therefore a need to attract foreign capital and technology. There will be a few more in the future, but not on the scale seen since the historical cases described above.

There have been limited commercial oil and gas arbitrations in the region, for related reasons. The large NOCs – such as Saudi Aramco, NIOC, Kuwait Petroleum Corporation and Abu Dhabi National Oil Company – dominate petroleum activity in their respective countries. They are the only game in town. Consequently, service, equipment and infrastructure providers wanting to build long-term business operations are inclined to settle with the NOCs rather than arbitrate. Similarly, the big NOCs want reliable and quality contractors to be there when they need them. They can do that only by encouraging mutually beneficial, long-term relationships, which would preclude disputes.

The large NOCs use sophisticated contracts that lock in counterparties with detailed obligations. These contracts often require the use of local courts, local arbitration institutions or *ad hoc* arbitration under national arbitration laws, rather than international arbitration institutions. Finally, many of the commercial contracts generated by NOCs and performed in-country stipulate that the governing law is the domestic law of that country. In the MENA region,

26 There was one investor-state arbitration at the ICC during that period, which was between Hunt Oil and Yemen.

that law is either *Shari'ah* or based upon it. That choice of law has an impact on the dispute process and the kinds of damages awarded.

5. The role of *Shari'ah* in MENA oil and gas arbitrations

The historical oil and gas arbitrations described above 'internationalised' the contracts in dispute by making them subject to either public international law, general principles of law, general principles of commercial and international law, principles of good faith and goodwill, transnational law, custom and practice in the oil business, or a combination thereof, rather than applying the law of the jurisdiction where the investment was made. Many of the disputed contracts did not specify a particular governing law. When the contracts did reference local domestic law, the tribunals would restrict its application by concluding that since the contracts were international in nature, they should apply international law and practice. That approach may no longer be the case going forward, particularly if there is a governing law clause in the contract that clearly specifies local law, which is either entirely or partially based on *Shari'ah*.

Arbitration has a long history in the Islamic world. The *Qur'an*, and therefore *Shari'ah*, approves of arbitration. The Prophet Mohammed acted as an arbitrator in tribal disputes, including one regarding the Black Stone in the *Ka'ba*, which is located in Mecca. However, after losing the investor-state disputes described above, many of the MENA countries rejected the use of international arbitration, in particular for contracts with the government. That has begun to change over the last decade. These governments have moved from outright hostility to gradual acceptance of international arbitration by ratifying the New York Convention and by basing their national arbitration laws on the UNCITRAL Model Arbitration Law.

As a result, many of the national arbitration laws in the MENA region now:

- confer a right on parties to manage the dispute resolution process without interference from the courts;
- provide greater flexibility in the choosing of arbitrators, arbitral rules, institutions, the seat of arbitration, the governing law and the language of the arbitration; and
- accept the principles of separability and competence-competence.

Even though these national arbitration laws now accept international practice, they still explicitly or implicitly require the arbitration process and award to be *Shari'ah* compliant. That is not always straightforward, since the interpretation and application of *Shari'ah* principles will vary from one jurisdiction to another within the MENA region. Despite that variance, parties and arbitrators dealing with a dispute connected to the MENA region should nevertheless understand and apply *Shari'ah* principles to the arbitration process and the arbitral award.

Shari'ah provides that contracts are divine in nature and that there is a sacred duty to uphold them except for matters that *Shari'ah* has deemed void or unenforceable. Contracts are therefore usually strictly enforced as drafted in Islamic courts. The general rule of contract under *Shari'ah* is "all is permitted unless specifically prohibited". Under Islamic law, parties are therefore free to enter into any contract they wish and will be bound by its terms, except for certain matters prohibited by *Shari'ah*, which are typically *haram*, or forbidden. The most important prohibitions are *gharar* (uncertainty or speculation) and *riba* (interest or usury).

Shari'ah requires certainty in contracts, and thus forbids transactions comprising an element of uncertainty or *gharar* relating to the object of the contract, its consideration or the time allowed for performance of the parties' respective obligations. *Shari'ah* also prohibits *riba*, which literally means 'an excess'. *Riba* is interpreted differently in different Islamic jurisdictions. In Saudi Arabia, it means interest of any kind. Other Islamic jurisdictions are more flexible on what constitutes *riba*. Other prohibitions include *jahala* (uncertain or unclear terms), *ghabn* (deceit, such as large discrepancies from the market price), *khataa* (mistake), and *wa'ad ta'aqud* (a future promise or an 'agreement to agree').

Parties can claim damages under *Shari'ah*. However, it takes a more restrictive approach in determining the amount of damages than what international companies are accustomed to in common law or civil law jurisdictions. Islamic courts have traditionally only awarded damages that arise as a direct consequence of a breach of contract. This is because *Shari'ah* will only restore a party to the position it was in before the breach, not to where it would have been had the obligations been performed. Otherwise, this would be speculative in nature, which is not enforceable under *Shari'ah*.

As a result, consequential, indirect, punitive and speculative damages are not typically awarded in Islamic courts. This restriction can extend to future lost profits, which can result in much smaller damage awards in those courts. Simply being foreseeable may not be sufficient to make a damages claim legitimate. A party must prove the damages it actually suffered. It cannot rely upon a claim of what may be foreseen in the future, which under *Shari'ah* is considered speculative and unearned in nature.

Liquidated damages may be unenforceable in an Islamic court if they are considered a penalty. There is no exact equivalent term or legal concept for 'liquidated damages' under *Shari'ah*. The closest corresponding term is 'penalty clause' or 'agreed compensation' for damages. Despite that general restriction, various Islamic jurisprudence schools have allowed the inclusion of liquidated damages clauses in contracts if the parties have specifically agreed to such terms. In such circumstances, both parties are expected to adhere to the terms of the clause as compensation for breach of the contractual obligation.

However, they may still be required to show that the calculations underlying the liquidated damages do not equate to a penalty.

In addition to the requirements of *Shari'ah*, parties need to be aware of the many procedural hurdles that exist in these countries to have international arbitration awards recognised and enforced in local MENA courts, including the following.

5.1 Special power of attorney

Countries such as the United Arab Emirates[27] and Qatar[28] require that a signatory to an arbitration agreement be in possession of a special power of attorney that entitles it to agree to an arbitration clause. Failure to comply with this requirement may lead to an arbitral award being annulled.

5.2 Signing and attesting awards

Some jurisdictions, such as the United Arab Emirates, require arbitrators to sign every page of an arbitral award containing the reasoning and dispositive sections, and to sign their awards while physically located in the country.[29] Failure to do so could result in the award being annulled.

5.3 Submitting awards to local courts

The Saudi Arbitration Law[30] requires arbitral tribunals to deposit their original award and an Arabic translation from a Saudi accredited translation agency at the Saudi competent court within 15 days of issuance of their award to the parties. Failure to do so could result in the award not being recognised and enforced in Saudi Arabia. This is different from international arbitration practice (and Article 36(2) of the UNCITRAL Model Law), where an award is typically filed in the court by the party seeking to enforce the award (not by the arbitration tribunal) and only at the point of time when one of the parties wants to enforce it, not when the tribunal issues it.

5.4 Witness oaths

A number of jurisdictions[31] in the MENA region require arbitral tribunals to swear in witnesses appearing before them according to specific oath requirements under their respective codes of civil procedure or arbitration laws. Failure to swear in a witness using such formulistic oaths may result in the annulment of the award.[32]

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27 UAE Civil Procedure Code, Articles 58(2) and 203(4).

28 Qatar Commercial and Civil Procedure Code, Articles 72(1) and 190.

29 UAE Civil Procedure Code, Articles 205(2) and 212(4).

30 Saudi Arbitration Law, Royal Decree M/34 dated 24 Jumada 1433H, corresponding to 16 April 2012G, Articles 43 and 44.

31 UAE Civil Procedure Code, Article 211; Syria Law 4 of 2008, Article 32(2); Qatar Commercial and Civil Procedure Code, Article 200; and Jordan Law 31 of 2001, Article 32(d).

32 *Bechtel v Department of Civil Aviation of the Government of Dubai*, Petition 503/2003, 15 May 2005, Dubai Court of Cessation.

5.5 Attributing award

Some local courts have set aside foreign arbitral awards on the basis that they were not rendered in the name of the country's ruler and as such were contrary to domestic public policy.[33]

Over time, such procedural obstacles will diminish in significance as arbitration laws and courts in the MENA region learn to adapt to international arbitration practice and their treaty obligations. However, international practitioners will need to be aware of these procedural challenges in the short term.

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33 Petition 64/2012, 12 June 2012, Qatar Court of Cassation.