

Youssef calls for "COP-27 moment" for arbitration

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In a speech in Egypt, **Karim Youssef** has called for a "COP-27 moment for arbitration", arguing that "the preservation of the good health and good functioning of global arbitration is a matter of global public interest."

Speaking at a Cairo Regional Centre for Commercial Arbitration event in Sharm El Sheikh, which recently hosted the 2022 United Nations Climate Change Conference or COP-27, Youssef said that we are in "difficult times".

"Whether we like it or not, we live in an age of deglobalisation. Europe is already in recession and the US and the rest of the world are about to follow; anti-globalisation forces have been rising for the last decade, feeding nationalism like never before."

Covid has caused a more significant economic downturn than the two World Wars, the Great Depression and the 2008 financial crisis, he noted, and we are also contending with the effects of Brexit and the war on Ukraine.

Despite that, he said arbitration continues to take place all over the world and the New York Convention today has more signatories than the UN Genocide Convention, ensuring "universal" minimum standards.

"But is arbitration's universalism coming under fire because of the forces messing with global capitalism?" Youssef asked.

Answering that question with a yes, Youssef explained that investor-state dispute settlement is facing "a huge backlash" from states, with the main alleged criticism being that it gives rise to "regulatory chill" and prevents them from passing laws to protect their own citizens.

Youssef argued that deglobalisation has augmented what **Brigitte Stern** has called investment arbitration's "existential crisis," and that "defining moments" came in 2015 and 2017, when European Union officials described ISDS as "the most toxic acronym in Europe" and as "dead" for the EU.

Then came the *Achmea* judgment of 2019, declaring ISDS in violation of EU laws and leading to the termination of 87% of intra-EU bilateral investment treaties. "The eurocrats prefer investment disputes to be settled by European local courts, with the European Court of Justice as the usual last resort," Youssef said.

President Donald Trump was famous for his "unfocused resentment" of globalisation and of NAFTA, he noted, while outside

Europe and the US the backlash to ISDS has led to BIT terminations by Bolivia, Ecuador and India, among other countries.

In Africa and the Middle East, in contrast, no countries have terminated BITs, which Youssef said was "all the more admirable considering the hydraulic effect of the Arab Spring influx of [ISDS] cases".

In fact, Youssef suggested it is "boom time" for arbitration in the Gulf and the region will see "a new golden era for ISDS for decades to come".

Unlike investment arbitration, commercial arbitration is facing not an existential threat but "an existential thrill," Youssef argued. It is "used and needed more than ever, but also challenged in its main components more than ever and enhanced in many ways through the technology revolution".

If you look at the global cumulative data from the top 10 arbitration centres worldwide, it reveals that in 2021 there were more than 6,450 institutional arbitrations, he said. Over the past 10 years, there have been more than 65,000. "So the war of the demagogues of protectionism doesn't seem to affect commercial arbitration".

The biggest development in this field has been the technological revolution, with behaviours that started during covid outlasting the pandemic and becoming "a permanent part of arbitration's DNA", Youssef said. This has helped to "democratise" arbitration by significantly improving access to it.

He also spoke about the rise in global transparency, opening with the "powerful mind-bender" that there is a proven correlation between the night lights visible in satellite images from space and countries' GDPs.

In the arbitration business it is not lights that reveal the truth but GAR, said Youssef. "When courts misuse public policy to avoid enforcing on state assets or convict arbitrators because they rendered adverse awards, or... when judicial breakthroughs or innovative initiatives take place, it is reported almost overnight in GAR and practitioners around the world read it".

"We take that for granted but it is groundbreaking when you think about it. It enforces the transparency revolution in the arbitration world."

Looking into the future, Youssef had five predictions. Despite the backlash against ISDS, we are not returning to gunboat diplomacy - so investment arbitration will not die anytime soon. Commercial arbitration will "remain king". Future pandemics will accelerate technology's impact on arbitration. Disputes over cryptocurrency and blockchain will become mainstream. And artificial intelligence will be pervasive, including in decision-making.

To preserve global arbitration and give it a "safe sail" into the future. Youssef said we must recognise that it is "as old as time" and "here to stay" and that it is a necessity, the only reliable option for resolving cross-border disputes. "The respective imperatives for commercial and investment arbitration are the 'race to the home court' and the fact that no foreign investor will accept local court jurisdiction over investment disputes, especially when executive interference is a plausible suspicion."

For mega investment claims, the "quest for impartial decision-makers" almost invariably leads to arbitral justice.

Youssef went on to argue that we have become "complacent" and, just as we can't imagine a world without internet or a liveable climate, we don't think of arbitration as in need of preservation.

He warned, however, that we need to cease thinking of it as a purely "private good" and recognise the emerging global public interest in maintaining its quality and good health because "without arbitration...global business and commerce will perish".

"Arbitration protects global business *despite* difficult times, *especially* in difficult times," he said.

As a result, Youssef said we need to be aware that "what we do daily as judges, arbitrators or counsel matters in the grand scheme of things and, if misguided, could ruin arbitration for us and generations to come".

We also need to be cautious, wise and minimalist in our approach to reform and "fixing investment arbitration's quicksands",

"Beware of the bridge too far [and] don't forget your history lessons.... you better get it right because the stakes are... high and, if you don't, history will judge you".

Youssef's speech featured a surprise video intervention from leading arbitration specialist **Gary Born**, who described investment treaties, both bilateral and multilateral, and the investment arbitration mechanism within them as "among the chief accomplishments of international law in the 20th and 21st centuries" and said they will continue to play "a vital role" in international affairs.

They protect and promote foreign investment, creating employment opportunities and prosperity in countries around the globe,

Born said. More importantly, they advance the rule of law by curtailing states' ability to take oppressive or tyrannical action and protecting individuals' rights to property, justice and freedom from discrimination.

Youssef also quoted **Abdulqawi Yusuf**, a Somalian judge at the International Court of Justice, who has argued that we must focus on arbitration's "real-world effects relevant to our daily lives and to the preservation of what we share as humankind."

The inference, said Youssef, is that "there are much bigger issues at stake than the typical private bubble we assume we operate exclusively within."

As arbitration practitioners, Youssef concluded, we are standing "at a crossroads". Each of us carries a "sacred responsibility" that lies on the divide between being private service providers and guardians of the international public interest in having functional arbitration systems.

Entitled "Global arbitration in a de-globalised world: arbitration for difficult times," the speech was part of the annual CRCICA Sharm El Sheikh conference from 5 to 6 December. Youssef 's 2018 speech at the same conference, on how Egypt "aced the test of the Arab Spring", won the GAR Best Speech Award the following year.

In 2020, he delivered a further speech which was "a call for cosmopolitanism" in arbitration and was also nominated for a GAR Award.