

# **Arbitration In Egypt And The UAE: Reflections On Law And Practice**

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Arbitration, or *tahkim*, has long-standing religious and cultural roots in the Middle East. However, there are also a number of differences and tensions between the Western perception of arbitration and certain Islamic legal principles and traditions which form the cornerstone of many Middle Eastern States. As the Middle East becomes more prominent in the global marketplace, it is important that anyone involved in arbitration in the Middle East is aware of some of these differences. This blog looks to summarise some of the key points to be aware of in relation to arbitration in Egypt and the United Arab Emirates (UAE).

### **Arbitration law**

#### *Egypt*

On 18 April 1994, the Egyptian Law of Arbitration in Civil and Commercial Matters (the "Arbitration Law") was enacted by Law No. 27 of 1994. The enacting law provided for its application one month after the day on which it was published, and more importantly, it repealed Articles 501-513 of the Code of Civil and Commercial Procedures enacted by Law No. 13 of 1968.

The Arbitration Law largely incorporates the provisions of the UNCITRAL Model Law on International Commercial Arbitration (1985), subject to some modifications. Amongst the most salient variations from the Model Law are that: (a) the Arbitration Law applies to both domestic and international arbitration; (b) the Arbitration Law applies extra-territorially to proceedings conducted abroad if the parties have agreed to such application; (c) the Arbitration Law adopts additional criteria for ascertaining the internationality of an arbitration; (d) a preliminary arbitral award on jurisdiction may not be challenged before the competent Egyptian court until a final award is rendered; (e) an arbitral tribunal does not have a default power to order interim relief unless such power is conferred on it by the parties' agreement; and (f) according to the Arbitration Law, if the parties have not agreed the language of the proceedings, the language shall be Arabic.

Nonetheless, the Arbitration Law shows some lacunae in practice which should be taken into consideration in a further amendment of the Arbitration Law. For example, there is no provision in the Arbitration Law dealing with the case where there is no majority to issue the arbitration award. Conversely, under the Arbitration Law of Saudi Arabia, if members of the arbitration tribunal fail to reach an agreement and a majority decision is not attainable, the arbitration tribunal may appoint a casting arbitrator within fifteen days. Otherwise, the competent court shall appoint a casting

arbitrator. In the meanwhile, the Tunisian Arbitration Law provides that if a majority is lacking, the chairman of the arbitral tribunal shall make mention of this and make the award according to his own opinion. In this case, the signature of the chairman is sufficient.

Furthermore, there is no provision in the Egyptian Arbitration Law determining the consequences of a judgment upholding a challenge to an arbitral award. On the contrary, pursuant to the Saudi Arbitration Law, a decision of a competent court nullifying an arbitration award does not result in the arbitration agreement being terminated unless the parties so agree or unless a decision nullifying the arbitration agreement itself is issued.

On a different note, most of the procedural rules governing the conduct of the proceedings are not mandatory and the parties may derogate from them by agreement. However, a few rules appear to be mandatory, such as that witnesses and experts may not be heard under oath, and that awards may not be rendered by truncated tribunals, but may be rendered by a majority of arbitrators.

## *UAE*

In the UAE, rules relating to arbitration are contained within the Civil Procedure Code (CPC). There is no separate Arbitration Law, but the UAE legislature is in the process of considering a new Federal Arbitration Law based on the UNCITRAL Model Law. The most recent draft of the proposed Arbitration Law was published in 2012, but there is no indication as to when it will be finalised or come into force.

Some points of particular note in the CPC are: (a) the subject of the dispute must be specified in the terms of reference or during the hearing of the suit; (b) witness testimony must be provided under oath; and (c) the award has to be rendered within six months after the date of the first hearing, unless the parties have agreed an extension or delegated to the tribunal the right to extend. There are also no provisions in the legislation providing for the principle of *kompetenz-kompetenz*, albeit this is provided for in a number of the institutional rules (notably the rules of the Dubai International Arbitration Centre (DIAC)).

## **Authority to enter into arbitration agreements**

### *Egypt*

Article 11 of the Arbitration Law provides that arbitral agreements may only be concluded by natural or juridical persons having capacity to dispose of their rights. Therefore, the validity of the arbitration agreement depends on the need for full capacity of the parties, otherwise the agreement is null. This is also confirmed by Article 53(b) of the Arbitration Law which provides that an action to procure the nullity of the arbitral award is admissible if, at the time of entering into the arbitral agreement, one of the parties thereto was a minor or incapacitated pursuant to the law governing his capacity. A party must have capacity to conclude an arbitration agreement because the consequence of doing so is that, when an arbitral award is rendered, a determination in respect of part or all of his rights will be made without the right to resort to the normal national courts.

On a different note, some opinions doubted the application of the Arbitration Law to administrative contracts. We do not agree with these opinions especially in light of the express statement found in the Explanatory Memorandum to the Arbitration Law Draft, which states that disputes arising from contracts between private or public persons may be subject to this Arbitration Law. Moreover, the *Conseil d'Etat* (State Council) Law allows disputes arising from administrative contracts to be submitted to arbitration and there have been several concurring legal opinions issued by the Legal Opinion Department of the State Council.

However, the Egyptian legislature decided to confirm its original position by an express legislative

provision. This was done by virtue of Law No. 9 enacted on 13 May 1997. It added another paragraph to Article 1 of the Arbitration Law, providing the following:

*“Concerning disputes of administrative contracts, the arbitration agreement shall have the approval of the competent minister, or whomever enjoys his authorities with respect to public juridical persons, and in this regard, delegation of powers is not permissible”.*

It is clear from the above text that in fact the amendment has not established a new rule, as this was expressly determined and well settled by Article 1 of the Arbitration Law. The only new rule established by the amendment was the essential requirement for the approval of a competent minister or of whomever enjoys his authorities.

## *UAE*

The CPC provides that an agreement to arbitrate shall not be valid unless made by a person having legal capacity to make a disposition over the right. While it is generally agreed that company directors have the right to agree to arbitration, it is not entirely clear whether other authorised company signatories do. There are decisions from the UAE Courts refusing to recognise arbitration agreements where the document containing the arbitration agreement was signed by a person who had a general power of attorney to bind the company, but did not have specific authority in the power of attorney to enter into an agreement to arbitrate. Accordingly, it is always important to confirm when entering into contracts providing for arbitration that the signatories have specific authority to agree to arbitration.

In the UAE, there are also a number of additional considerations to be aware of when dealing with sovereign entities. For example, without an exemption from the Ruler of Dubai, the Government of Dubai and its agencies shall not: (a) enter into a contract to be governed by laws of anywhere other than the UAE; or (b) provide a stipulation in any contract for arbitration outside Dubai.

## **Enforcement of foreign awards**

### *Egypt*

Egypt ratified the New York Convention on 7th June 1959 without any reservations or declarations. Egypt has also concluded several bilateral treaties on judicial cooperation that refer to mutual cooperation in the recognition and enforcement of arbitral awards. These include: the France-Egypt Treaty signed on 15 March 1982 and issued by virtue of Presidential Decree No. 331 (1982); the China-Egypt Treaty signed on 21 April 1994 and issued by virtue of Presidential Decree No. 361 (1994); the Bahrain-Egypt Treaty signed on 17 May 1989 and issued by virtue of Presidential Decree No. 260 (1989); and the Kuwait-Egypt Treaty signed on 6 April 1977 and issued by virtue of Presidential Decree No. 293 (1977).

Whilst the Arbitration Law provides for the explicit primacy of international conventions (such as the New York Convention), the grounds for refusal of recognition or enforcement under the Arbitration Law do not include a provision similar to Article V(1)(e) of the New York Convention pertaining to non-enforcement of awards that have been set aside. That said, it is worth noting that Egyptian courts have not, hitherto, adopted a clear position with respect to the French doctrine of delocalising arbitral awards. Accordingly, Egyptian courts will assess on a case-by-case basis whether an award that has been set aside by the courts in the seat of arbitration is enforceable in Egypt.

The Arbitration Law provides for only three conditions on which an *exequatur* may be refused. These are: (a) contravention of Egyptian public policy; (b) failure to validly notify the award to a losing party; and (c) inconsistency with a prior judgment rendered on the merits by a competent Egyptian court. In

fact, determining such a matter is difficult (if not entirely impossible) from a practical point of view. This is simply because the enforcement application is submitted by the party in whose favour the award has been made to the president of the competent court. The party against whom the enforcement is sought is not a party to such application and, naturally, it is only this party that will draw attention to the existence of another court judgment in the same matter.

By and large, recent enforcement decisions have shown that the trend with respect to international arbitration (in non-administrative contracts) is pro-enforcement. Whilst the procedure for recognition and/or enforcement appears to be a daunting process, Egyptian courts appear to be enforcement friendly with respect to international arbitration, and the public policy ground is normally narrowly construed.

## UAE

The UAE has been a signatory to the New York Convention since 2006. It is also a party to a number of other multilateral treaties relating to recognition and enforcement of foreign arbitral awards, notably the Riyadh and GCC Conventions. Before the UAE ratified the NY Convention, foreign arbitral awards were dealt with in the same manner as enforcing foreign court judgments under the CPC. However, notwithstanding the UAE's accession to the New York Convention, those provisions of the CPC remained in law and this was particularly noteworthy because the relevant rules of the CPC permitting the UAE Courts to set aside arbitral awards/judgments were broader than the permitted grounds in the NY Convention.

Nonetheless, since 2006 the UAE Courts have generally shown a willingness to enforce foreign arbitral awards. In particular, in September 2012, the UAE Court of Cassation gave a strong pro-arbitration ruling in *Airmech v Macsteel* and concluded that foreign arbitral awards will be enforced in Dubai in accordance with the UAE's international treaty obligations under the New York Convention. The decision also noted that the CPC was not relevant in the context of the enforcement of foreign arbitral awards. However, notwithstanding the New York Convention, in March 2013 the Court of Cassation declined to enforce a foreign arbitral award (an ICC award from Paris) against the Government of the Republic of Sudan. The court concluded that the UAE Courts did not have jurisdiction to hear the dispute because: (a) the parties were not domiciled in the UAE; and (b) the subject matter of the dispute had been performed outside the UAE (a link to a blog post on the decision is [here](#)).

While there is no formal system of precedent in the UAE, the decision in *Sudan* appears contrary to the decision in *Airmech* which had made clear that the provisions of the CPC are irrelevant and inapplicable when it comes to enforcing foreign arbitral awards in Dubai (the Court of Cassation in *Sudan* did not refer to *Airmech*). While it should be noted that the facts of *Sudan* were unusual, the decision nonetheless appears to be a step back from the generally pro-enforcement approach that the UAE courts had demonstrated over the past few years.

## Conclusions

As the Middle East becomes more active in the global market place, the number of arbitrations in the region is going to increase. Egypt and the UAE, as two major centres in the Middle East, are likely to play a big role in such developments. However, the arbitration landscape in the Middle East is different to that in a number of other jurisdictions and therefore those arbitrating in the Middle East need to ensure that their procedures comply with local laws so that they have the best possible chance to enforce any arbitral award. Moreover, states wishing to attract arbitral business and encourage parties to resolve their disputes within their territories may need to consider how their arbitral regimes/legislation can best support this. In 2012, Saudi Arabia issued a new arbitration law and it is likely that in the coming years we will see other Middle Eastern states (including possibly

Egypt and the UAE) amend, or perhaps even completely re-write, their arbitration laws.