Sharm El Sheikh III: The Role of State Courts in Arbitration 2-4 June 2010 - Conference Report

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Sharm El Sheikh (III) is the third international conference organized by the Cairo Regional Centre for International Commercial Arbitration (CRCICA) about the developing relations between arbitration and state courts. Sharm El Sheikh (I) was held during 19-21 November 2005 and Sharm El Sheikh II was held during 19-21 November 2007 . The Conference on "The Role of State Courts in Arbitration" was enriched with 150 participants and 35 speakers.

CRCICA organized an International Conference on "The Role of State Courts in Arbitration", in cooperation with the Arab Union of International Arbitration (AUIA), the United Nations Commission on International Trade Law (UNCITRAL), the International Federation of Commercial Arbitration Institutions (IFCAI) .

The Conference program was divided into eight sessions lasting three days. During the inaugural session, Dr. Nabil Elaraby, the Director of the Cairo Regional Center for International Commercial Arbitration, and General Mohamed Abdel Fadil Shoosha, Governor of South Sinai, welcomed the participants. The following distinguished personalities delivered inaugural speeches:

H.E. Coun. Adel Abdel Hamid, President of the Egyptian Supreme Judicial Council and President of the Egyptian Court of Cassation, Dr. Hamza Haddad, Secretary-General of

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International Arbitration and Director of the Law and Arbitration Centre, Mr. Timothy Lemay Principal Legal Officer and Head of the Legislative branch of the International Trade Law Division (ITLD) of the United Nations Office of Legal Affairs/ United Nations Commission on International Trade Law (UNCITRAL), as well as Ms. Diana C. Droulers, President of the International Federation of Commercial Arbitration Institutions (IFCAI).

The Conference was enriched by the different nationalities of speakers and participants from Egypt, Tunisia, Jordan, Lebanon, Iraq, Qatar, Iran, Sudan, Venezuela, Austria, United States of America, Italy, France, United Kingdom, Switzerland, Poland and Sweden.

The sessions could be summarized as follows:

Day I

In the Opening Ceremony, the following points have been emphasized:

- The importance of the role of State Courts in Arbitration and the need for cooperation between both fora.
- The importance of arbitration as an alternative dispute resolution mechanism for commercial and investment disputes.

In the first session entitled "<u>The Role of State Courts in Arbitration: Setting the Scene</u>", the following points were discussed:

- The need to clearly understand that arbitration supplements the judiciary, but does not compete with it.

- The importance of the supervisory role of the Courts in arbitration, for instance, with respect to the interpretation of the arbitration Agreement.
- Overview of the judicial application of the UNCITRAL Model Law and the means to reduce discrepancies in its application and promote uniformity.
- The importance of the role of the judge was emphasized with reference to Articles 6 and 8 of the UNCITRAL Model Law. Developing tools for judges such as a guide for the interpretation of relevant conventions, and offering a digestive case law (e.g. CLOUT) to identify trends in the interpretation and application of arbitration law, would also serve as a means to facilitate technical cooperation and advice.
- The need for judges to be more supportive of arbitration; thus more cooperation is required between the judicial and the arbitral systems.
- Overview of the constitutionality of compulsory arbitration under the Egyptian Law in light of the rulings of the Supreme Constitutional Court and the Court of Cassation.

In the second session entitled ‘’The Supportive Role of State Courts’’, the following points were discussed:

- The need for Courts to offer more support before the commencement of the arbitration proceedings upon the request of one of the parties.
- The legal problems arising out of the procedural matters ignored by the arbitration Law, in light of the complexities surrounding the interplay between the provisions of the

Arbitration Law and the Civil Procedural Law, and the means of determining the rules regulating such unregulated matters.

- The requirements of neutrality, independence and impartiality of the appointed arbitrators. The relevance of the IBA Guidelines in avoiding the growing conflicts of interest; and the advisability, for legislators and judges, of taking into consideration these soft-laws when dealing with matters related to conflicts of interest.
- The role of judges in arbitration *ex-ante* (before the appointment of arbitrators) vs. their role *ex-poste* (in challenges of arbitrators). The increasing number of challenges of arbitrators is involving more and more the State Courts.
- The need to reconsider the procedure of party appointed arbitrators by allowing the institutions to choose instead of the parties to avoid conflict of interests in critical cases.

Open discussion: The issues discussed included the revision of the procedural and arbitration law in order for them to be more compatible and to avoid contradictions between their respective provisions; and the issues relating to party-appointed arbitrators.

In the third session entitled <u>"The Concurrent Role of State Courts"</u>, the following points were discussed:

- Overview of the intense debate over the regime regulating interim measures of protection (holding orders pending the outcome of arbitral award) and the need to create within the arbitration a regime for interim measures in order to prevent judges from intervening in the case. As well as a study of the legal regime of interim measures of protection under the

Egyptian Law through the analysis of Articles 9, 14, 24 and 45 of the Egyptian Arbitration Law.

- The clear trend of extending arbitral powers to grant interim measures of protection.
- The role of the Egyptian Court of Cassation in supervising the validity of the arbitration agreement and its legal effects.
- The salient features of the extension of the arbitration agreement to non-signatories and the judicial grounds for review of this extension through the French and Swiss case laws. The element of "intent'' that French Courts use to extend the arbitration agreement. By comparison with the French case law that shows many precedents for extension, Common Law Courts have more restrictive views on the matter.
- The extent to which "consent'' remains the rule by reference to which jurisdiction is assessed by arbitrators and controlled by national courts in the extension of the arbitration agreement to groups of companies; with the observation that consensual analysis prevails in arbitral decision-making, while significant variations in national judicial attitudes exist regarding the issue. An overview of the recent cases shows that the decline of consent is now *fait accompli* and that an effective *de novo* control of jurisdiction is of essence.

Day II

In the Fourth Session entitled <u>"The Concurrent Role of State Courts''</u>, the following points were discussed:

- The judicial review of the validity of the arbitration agreement during the course of the arbitral proceedings through

an analysis of Article 22 of the Egyptian Arbitration Law; as well as arbitration disputes arising out of administrative contracts through the analysis of the judgments of the Egyptian Administrative Court dated 29 February 2006 and 31 October 2009.

- The importance of the judicial review of the arbitrability of disputes arising out of the transfer of technology, with an emphasis on the necessity of reviewing the regime governing transfer of technology contracts under Egyptian Law.
- The liberal approach of Tunisian Courts with respect to arbitration in corporate disputes; the Tunisian legislator extends the scope of the arbitrability to such disputes.
- An overview of the judicial injunctions suspending arbitration proceedings in light of the decisions of the European Court of Justice ruling in Turner vs. Grovit and West Tankers Inc vs. RAS Riunione Adriatica di Sicurta SpA.
- The efficiency of the anti-suit injunctions designed to prevent one party to an arbitration agreement from pursuing a court or arbitration action in another jurisdiction on the same matter in violation of the said agreement.
- The relevance of precedents in international arbitration, through an overview of the different theories such as “persuasive precedents”, with an emphasis on the necessity of publishing more awards in order to have a more comprehensive and consistent arbitration case law, and therefore access to more precedents.

In the Fifth session entitled <u>"The Supervisory Role of State Courts: The Enforcement of Arbitral Awards"</u>, the following points were discussed:

- The future of the relationship between the judiciary of the country of origin and the country of enforcement of the award in light of the cases of Hilmarton and Chromalloy that consider international arbitral awards to be "delocalized", "a-national", "transnational", "supranational", "floating", "deterritorialised" - i.e. anything but embedded in a national legal regime. The legal ground for this approach is the most favorable rule provision of Article VII of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.
- The practical effect of the *delocalization* in France for parties to an international arbitral award, being that even if the award is annulled by the courts of the place of arbitration or has been refused recognition by the courts of another State, such award could still be recognized and enforced in France, if none of the grounds for non-recognition under the New York Convention apply.
- The enforcement of foreign arbitral awards in Egypt between the Civil Procedural Law and the Arbitration Law No. 27/1994 with an emphasis on the arguments in favor of applying the relevant provisions of the Egyptian Arbitration Law rather than those of the Civil Procedural Law since the provisions of the former are more lenient. The New York Convention, to which Egypt is a signatory, provides that the more lenient provisions should apply to the enforcement of foreign arbitral awards. This was confirmed by the Court of Cassation and the Cairo Court of Appeal.

- The principle of *res judicata*, aiming to avoid parallel proceedings, and the relevant French case law, with a special emphasis on the announcement of the "*Concentration des demandes et des moyens*" principle in the year 2006, according to which parties have the obligation to submit all their claims and all their arguments in the first statement of claims.
- The legal issues revolving around the foreign arbitral awards that are in contravention of prior judgments through the analysis of Article 58 of the Egyptian Arbitration Law and Article 7 of the New York Convention.

Open Discussion: The issues revolved around the risk of conflict between concurrent arbitration and national court proceedings, on account of the differences between the laws of the member states over the requirements for the validity of arbitration agreements.

In the Sixth Session entitled "<u>The Supervisory Role of State Courts: The enforcement of arbitral awards"</u>, the following points have been discussed:

- The adoption of a pro-enforcement approach by the English Courts with respect to the enforcement of arbitral awards.
- Overview of the legal framework for the enforcement of arbitral awards against States under the ICSID Convention. The voluntary compliance by States with the exception of only four ICISD awards not being enforced voluntarily (by the year 2004). The problem when enforcing awards against States that do not comply voluntarily is essentially the difficulty to find

attachable assets, as seen in cases such as CMS vs. Argentina and Noga vs. Russia.

- The extent of the judiciary control of award conformity with substantive public policy through the analysis of the two different forms of controls: "controle maximaliste'' and "controle minimaliste''; the Egyptian Courts are opting for "minimal'' control of award conformity with substantive public policy.
- The importance of the ICC Report on the National Rules of Procedures for Recognition and Enforcement of Foreign Awards pursuant to the New York Convention that enable States to clarify their national rules on the matter as well as any reservations they may have.

In the Seventh Session entitled: **"The Supervisory Role of State Courts, the Setting aside of Arbitral Awards''**, the following topics have been discussed:

- The jurisdiction of administrative courts in deciding setting-aside motions filed against arbitral awards rendered in connection with administrative contracts and the necessity to review and define clearly the scope of the role of the administrative courts and the arbitral tribunals in light of the increasing number of cases concerning the setting aside of arbitral awards in relation with administrative contracts before the administrative courts.
- The position of the Swiss Courts with respect to the setting aside of arbitral awards, with an emphasis on the legal

framework and the conditions of challenge through relevant court decisions. Both the Swiss legislator and the Federal Tribunal adopt a very restrictive approach to set awards aside. It is the general view that having agreed to arbitration, the parties should be held to that agreement and should not be afforded a second opportunity to re-argue the merits of the case in court.

Day III

In the eighth Session entitled: **"The Supervisory Role of State Courts, the Setting aside of Arbitral Awards"**, the following topics have been discussed:

- The particularities of the annulment process of arbitral awards and their enforcement under the ICSID system with an emphasis on the recent award in the case ATA v. Jordan in which the ICSID Arbitral Award ordered the termination of the judicial procedures undertaken in front of the local Jordanian Court as a result of considering the arbitration clause contained in the contract extinguished *ipsa jure* due to the annulment of an award previously rendered in Jordan.
- The recent position of Swedish Courts as to the revision of arbitrator fees under Section 37 and 41 of the Swedish Arbitration Act. There are very few cases of challenge relating to fees (e.g. Nemu and Soyak); therefore, there is a possibility to challenge arbitrator fees, but very little chances of success.
- The judicial mistrust of the professionalism and validity of the arbitration process itself. The necessity to instill more confidence in the process of arbitration through the regulation or certification of arbitrators (such as the Chartered Institute of

Arbitrators) as well as the review of the performance and competence of arbitrators.

In the Closing Session, Dr. Nabil Elaraby, the Director of the Cairo Centre, expressed his gratitude to the valuable contribution of all speakers for this event, the participants and the sponsors.

Dr. Hamza Hadad, the President of the Arab Union of International Arbitration, insisted on the importance of such conferences and emphasized that many interesting contemporary topics will be discussed in future conferences.

Finally, the following recommendations were made:

- To recognize the arbitral award as being a final and binding judicial decision rendered by a competent judicial authority;
- To adopt a balanced judicial review of arbitral awards in order to avoid both the abuse of rights and re-arguing the merits of the case before national courts;
- To limit the scope of public policy as a ground for setting aside or refusing the enforcement or the recognition of arbitral awards;
- To establish, within the national courts, a judicial organ specializing in arbitration disputes, with a view to maximize the benefit of arbitration;
- To revise and amend the arbitration laws in order to avoid possible defects and to cover potential lacuna;
- To exercise the important judicial review over the extension of the arbitration clause to non-signatories;

- To amend the current legislation with respect to arbitration of disputes arising out of administrative contracts and establishing a working group composed of Egyptian specialists and members of the State Council to discuss problems relating to such disputes and propose possible solutions; and
- To collect, publish and exchange arbitral awards and court judgments in relation to arbitration, particularly after the award is challenged before the competent courts and is thus no more confidential.