

**The Vital Role of State Courts in Arbitration**  
**Conference's Report**

**(Sharm El Sheikh),**  
**November 19-21, 2005**

The Cairo Regional Centre for International Commercial Arbitration and the Arab Union of International Arbitration (AUIA) organized an International Conference on "The Vital Role of the Judiciary in Arbitration", in cooperation with the League of Arab States, the United Nation Commission on International Trade Law (UNCITRAL), the International Federation of Commercial Arbitration Institutions (IFCAI) and great number of International Arbitral Institutions, Arab and Foreign Judicial Authorities on 19-21 November 2005 in Sharm El Sheikh, Egypt.

The Conference program was divided into seven sessions lasting three days. During the inaugural session, Dr. M.I.M. Aboul Enein, the Director of the Cairo Regional Center for International Commercial Arbitration and the Secretary General of the AUIA, and General Mustafa Afifi, Governor of South Sinai welcomed the participants. The following distinguished personalities delivered inaugural speeches:

Professor Ahmed Fathi Sorour, President of the Egyptian Peoples' Assembly, H.E. Couns. Fathi Khalifa, President of the Egyptian Court of Cassation and President of the Supreme Judicial Council, H.E. Couns. Dr. Abdel Rahman Azouz, President of the Egyptian State Council, Mr. Jernej Sekolec, Secretary of the UNCITRAL, Mr. Ulf Franke, President of the IFCAI, H.E. Prince Dr. Bandar Ben Salman Al Saud, President of the Saudi Arbitration Group and Assistant Secretary General of the AUIA for the Persian Gulf, Dr. Abdel Hamid El Ahdab, Assistant Secretary General of the AUIA, as well as Prof. Thomas Clay, Professor at Versailles University and Vice Dean of the Law School, France.

The Conference was enriched by the different nationalities of speakers and participants from Egypt, Saudi Arabia, Libya, Sudan, Lebanon, Syria, Jordan, Tunisia, Algeria, Morocco, Bahrain, Iraq, Yemen, Oman, Kuwait, Qatar, United Arab of Emirates, Palestine, United States of America, Switzerland, Spain, United Kingdom, France and Sweden.

**The late Professor Phillippe Fouchard was also commemorated.**

**First Session:**

This session which was chaired by Prof. Bernardo Cremades, President of the Spanish Court of Arbitration and co-chaired by H.E Prince Dr. Bandar Ben Salman Al Saud, dealt with the basis and rules that regulate the relationship, and establish balance between the concept of "Party Autonomy" and the necessities for the supervision of courts on arbitration.

In this session, a paper on the Constitutional and Legal Basis of Arbitration and the role of State Courts in relation thereto, upon the legitimacy of arbitration and the legal limits of the arbitration agreement, was introduced (Dr. Mohamed Aboul-Enien).

A paper was also presented regarding the need for harmonized legislation on the role of Courts in the arbitral process and for uniform interpretation of such legislation through legal application" and the role of the UNCITRAL Model Law, as means for achieving that goal (Mr. Jernej Sekolec).

Following that, the importance of institutional rules of arbitration in relation to the role of state courts in arbitration was clarified through the role of the institutional arbitration in avoiding the procedural irregularities and providing the institution's assistance to the arbitral process, and thus supplementing the role of national judiciary so as to make the arbitration more efficient (Mr. Ulf Franke).

The Conference also dealt, in this session, with the issue of excluding the contractual provisions by the arbitrator and the consequences of such an approach in light of the Judiciary precedents and the specialists' views (Dr. Fayeze E Hajj Shaheen).

The position of the amiable composition before national courts was also presented as well as the encouragement by national courts of resorting to equity and justice in arbitration and the problems of motivating arbitral awards rendered on such basis, especially in the absence of a final and decisive definition of the contents of equity and justice (Prof. Ibrahim Najjar).

The possibility of contractual modification of the scope of judicial review of arbitral awards by the contracting parties was examined, either by exclusion of annulment or the limitation or expansion of causes of setting aside arbitral awards. The consequences of such contractual intervention in the legislative regulation of the challenge of arbitral awards was also discussed in order to guarantee the enforcement of such awards subsequent to their annulment (Dr. Mohamed Abdel Raouf).

Lastly, the necessary balance between the finality of arbitral awards and justice considerations was also presented, especially due to the increasing resort to arbitration and the complexity of legal problems and issues facing the arbitrators. It was thus suggested to entitle the parties to file appeals against arbitral awards in some cases in view of expanding the judicial review of arbitral awards to comprise the verification of the correct application of the law and comprehension of facts (Dr. Karim Hafez).

### **Second Session:**

This session was chaired by Mr. Ulf Franke and was co-chaired by Dr. Mohamed Aboul-Enein, and was titled "The Vital and Creative Role of State Courts in Arbitration", there was a display of the most salient cases where the judiciary either rectifies the defects of the legislation or fill the gaps therein, through the positions and principles adopted in the absence or in the presence of legislative texts. The role of the Egyptian Court of Cassation in differentiating between international and domestic public order, the role of the Egyptian Constitutional Court in annulling compulsory arbitration, the role of the French Court of Cassation in supporting international arbitration and in establishing the autonomy of the arbitration clause and the similar role of the English and American judiciary was also examined (Dr. Mohamed Aboul-Enien).

Also, this session dealt with the effects of globalization on arbitration through the agreement to arbitrate, the applicable law, the relevance of Public International Law and the emergence of a new doctrine of arbitrations such as investment arbitrations and cultural changes in arbitration (Prof. Bernardo Cremades).

Then, the Creative role of the judicial courts in the realm of international commercial arbitration was introduced, through the role of the judiciary in the appointment and challenge of arbitrators, the termination of the arbitral proceedings and the annulment and enforcement of arbitral awards (Dr. Mahmoud Samir Sharkawy).

And within this context, the role of Courts in arbitration, under the Egyptian, Omani and Jordanian laws, was introduced during the appointment and challenge of arbitrators, the extension of the arbitration time-limit, the determination of arbitrators' fees and the annulment and enforcement of arbitral awards (Dr. Hamza Haddad).

Also, the Creative role of the Administrative Courts regarding arbitration in the countries that have Administrative Courts was introduced and specially Lebanon and Egypt (Dr. Mohi El Din Qaissy).

The first day of the Conference was concluded by a lecture on the lessons learned from the Egyptian and European judicial decisions in the construction industry and the legislative amendments required in this respect (Dr. Sherif El Haggan).

During the discussions that took place at the end of the first day, the participants confirmed that the creative and innovative roles of the judiciary are not exclusively limited to Administrative Courts, but naturally include the Constitutional and Normal Courts. Also, the legal nature of the setting aside motion was discussed and whether it is a challenge or merely a petition.

Also, a question was raised from the participants regarding the responsibility of the arbitrators in case of gross errors.

### **Third Session:**

This session was held on the second day of the Conference and was chaired by Prof. Gabrielle Kaufmann-Kohler, Honorary President of the Swiss Association of Arbitration (ASA) and was co-chaired by Dr. Abdel Hamid Al Ahdab. It dealt with the changing role of State Courts in arbitration in different legal cultures.

In this rich session, the role of the Judiciary in arbitration in three countries (U.S., France and England) was introduced.

In the U.S., the vital role of the American Judiciary was explained, prior to and subsequent to the adoption of the Federal Arbitration Act. The issue of admissibility of international arbitration in some matters which traditionally were not subject to national arbitration e.g. anti-trust issues as well as the role of American judiciary in class actions were examined (Mr. William Slate).

In France, emphasis was made on a recent judgement from the French Court of Cassation supporting arbitration and avoiding denial of justice (Prof. Thomas Clay).

In England, the role of the judiciary was presented in the light of the English Arbitration Act of 1996 in adopting the principle of autonomy of the arbitration clause, the appointment and removal of arbitrators and the danger of bias (Dr. Eugen Salipus).

After this session, discussions dealt with the role of arbitral institutions in administering arbitrations as well as their role as non-profit entities. Also, the English Judiciary's role in assisting the arbitration through the appointment of arbitrators was presented. It was also discussed whether the principle according to which the criminal proceedings suspend the civil proceedings should be applied in international commercial arbitration. The necessity of limiting the scope of such principle within domestic arbitrations was confirmed.

Also, a question was raised whether matters pertaining to bankruptcy are arbitrable under Moroccan and French Laws.

#### **Fourth Session:**

This session was chaired by Mr. William Slate, President of the American Arbitration Association (AAA) and was co-chaired by Dr. Hamza Haddad, President of the Jordanian Law and Arbitration Centre, former minister of Justice and Assistant Secretary General of the AUIA (Eastern Area), dealt with the leading role of the judiciary in arbitration through a certain number of important matters reflecting the judiciary's supporting role in relation to the appointment of arbitrators, the gathering of evidence before the arbitral tribunals, the issuance of conservatory measures and the establishment of arbitration rules in accordance with the Libyan, Egyptian, Lebanese and Tunisian Laws.

The session started by a paper that demonstrates the relationship between the Libyan judiciary and arbitration dealing with a variety of issues that show the vital role of the judiciary, specially with respect to the constitution of the arbitral tribunal and the matters beyond the jurisdiction of the arbitral tribunal and certain restrictions on the jurisdiction of the arbitral tribunal, such as the inability of ordering any conservatory measures or seizure. Also, the paper dealt with the means of enforcing arbitral awards in Libya and the supervisory role of the Libyan Judiciary on the arbitral awards and the different types of challenges e.g. appeal, petition for reviewing the award and the setting aside motion (Dr. Mustafa Al Alem).

The second paper dealt with the supporting and assisting role of the judiciary prior to the initiation of the arbitration proceedings upon approving the right of resorting to arbitration, the constitution of the arbitral tribunal and the issuance of conservatory and interim measures. Also, the judiciary's supporting and assisting role during the arbitral proceedings was examined. And lastly the judiciary's supporting and assisting role in enforcing partial or final awards issued by the arbitral tribunal was discussed (Dr. Refaat Abdel Maguid).

All issues relating to these topics were presented within the Egyptian and the comparative contexts.

The third paper focused on the role of the Lebanese judiciary in the issuance of interim and conservatory measures and confirmed the parallel role of the judiciary and the necessity of establishing a relationship between the Judiciary and arbitration (Dr. Ghaleb El Mahmasany).

The session was concluded by a working paper discussing the innovative role exercised by the Tunisian judiciary regarding the arbitration rules through asserting the necessity of the availability of adequate warranties for achieving the constancy of the arbitration process and equity considerations. The paper also analyzed some of the significant judicial decisions relating to the causes of challenging the arbitral awards and the procedural issues relating thereto (Judge Ahmad Warfaly).

A great controversy arose regarding the jurisdiction of national courts in the issuance of conservatory procedures and measures and the scope of this jurisdiction in the different legislations.

Moreover, a great controversy arose regarding whether arbitration is a rule or an exception to the general rule especially that according to some views, there are certain practical consequences for such distinction with respect to the interpretation of the arbitration agreement in a restrictive or an extensive manner.

#### **Fifth Session:**

The Fifth Session which was chaired by Dr. Eugen Salpius, President of the Chartered Institute of Arbitrators (CI Arb.) and was co-chaired by Dr. Mahmoud Samir Sharkawy, Professor of Law, Former Dean, Faculty of Law Cairo University-international arbitrator and lawyer, commenced by a working paper regarding the role of courts in the arbitral process. The different roles played by courts for guaranteeing the constancy of the arbitral process especially in the United States of America were introduced.

Such roles comprised those pertaining to international and national arbitrations, including the enforcement of the arbitration agreement, enforcement of the arbitral award and the possibility of challenging arbitral awards through setting aside motion, as well as the roles relating to the jurisdiction of the arbitral tribunal in examining the dispute, the appointment and removal of arbitrators, the issuance of interim measures, the issuance of an order for the production of documents and the appearance of witnesses (Prof. Markham Ball).

The second working paper discussed the judiciary's position regarding arbitration in a number of Arab countries for example, Saudi Arabia, Syria, Egypt and Lebanon for determining the possible extent of achieving reconciliation between the judiciary and arbitration (Dr. Abdel Hamid El Ahdab).

The third working paper discussed the judicial review of arbitral awards in Saudi Arabia and the regulation of the right for challenging the awards (Judge Abdel Mohsen El Dossary).

The fourth working paper explained the scope of setting aside arbitral awards in Tunisia and the exclusion of the petition for reviewing the award (Mr. Abdel Wahab Al Bahi).

The fifth working paper presented a lively description of the judicial review of arbitral awards under the Yemeni Arbitration Law. Such review varies, in line with the

prevailing principles in the other states, between a review prior and accompanying the arbitration and a review subsequent to the issuance of the arbitral award, especially regarding the causes for setting aside the arbitral award and controlling its enforcement (Mr. Shaher El-Salhi).

The sixth working paper discussed the supervisory role of courts on arbitral awards in the Gulf Co-operation Council especially the State of Kuwait. The paper showed the obligatory requirements that have to be included in the award and the causes for setting aside arbitral awards through filing a case. It is worth mentioning that appealing the arbitral awards in Kuwait is not allowed unless the parties agree otherwise (Dr. Nasser Zeid).

Other five working papers were presented dealing with issues relating to the enforcement of the arbitral awards.

The first working paper discussed the role of the judiciary in enforcing the arbitral awards. This paper explained and analyzed the procedural system of the exequateur according to the provisions of the Egyptian law especially regarding the jurisdiction and the conditions for issuing the exequateur as well as its procedures (Dr. Fathi Wali). Another working paper prepared by Prof. Jean-Louis Delvolvé, French lawyer and President of the French Committee of Arbitration, dealt with the expectations of an arbitrator confronted with the perspective of an award made/or subject to enforcement in France.

Another working paper discussed the role of the judiciary in enforcing arbitral awards according to the Riyadh Judicial Convention and it showed the conditions for enforcing awards and the cases where enforcement is rejected either for the absence of one or more of the formal or substantive conditions (Dr. Sadir El Khardaji).

Another working paper discussed the notion of public policy according to article 5 of the New York Convention and proposed the necessity of the cooperation between the judiciary and arbitration in this respect and establishing specialized courts for unifying and harmonizing the different legal systems regarding the application of public policy (Prof. Gabrielle Kaufmann-Kohler).

The final paper discussed and analyzed the notion of public policy defense in the national, international, territorial and universal contexts. A proposition was made to the effect of putting aside the distinction between procedural and substantive public policy (Dr. Mohamed Salah Abdel Wahab).

### **Sixth and Final Session:**

This session was chaired by Mr. Jernej Sekolec and was co-chaired by Dr. Mohamed Aboul-Enein. It was held on the third and final day of the Conference in the form of a round table for the Chief Justices and members of the judiciary from Egypt, Tunisia, Lebanon, Morocco, Saudi Arabia and Kuwait. They discussed the supervisory, supportive and parallel roles of the judiciary in arbitration, during the appointment and challenge of arbitrators in issuing

conservatory measures and challenging and enforcing arbitral awards. The session was concluded by comparing the challenge of judges and arbitrators.

It was also suggested that a special Conference be held regarding arbitration from the perspective of the Islamic Sharia.

In the closing session of the Conference chaired by Dr. Mohamed Aboul-Enein and co-chaired by Mr. Abdel Wahab Al Bahi, President of the Tunisian Conciliation and Arbitration Centre- Assistant Secretary General of the AUIA. Dr. Mohamed Aboul-Enein presented the Conference's report, in which he applauded the innovative and enlightened role played by the judiciary in arbitration. He also invited the judges in the Arab States to continue activating and developing their efforts not just through exercising their normal role stipulated in the law, but also through raising their awareness with respect to the recent legal and judicial developments in the field of arbitration.

## **Recommendations**

- 1) The Conference recommends teaching judicial decisions to post-graduate students in Arab Faculties of Law and conducting research studies pertaining to such decisions.
- 2) The Conferees also recommend increasing possible means of cooperation, harmonization and exchange of information as well as experience between the Arab Judicial Authorities in the field of reviewing arbitral Awards.
- 3) The Conference recommends publishing Arab and foreign court decisions relating to arbitration and encouraging the study and the commentary thereof.
- 4) The Conference recommends the participation of members of the judiciary in conferences and seminars organized in order to discuss and exchange views and to be aware of the recent trends in Arab and foreign court decisions rendered in arbitration.
- 5) Inviting the UNCITRAL to provide the Arab Arbitration Institutions with judicial trends and different court decisions relating to arbitration.
- 6) The Conference invites the Arab Judicial Authorities as well as other judicial authorities in the world to exchange court decisions rendered in arbitration.