Conference on Aspects of International Arbitration in the Law and Practice of Arab Countries

Session III "The Reception of New Legislation and International Standards on Arbitration: The Role of the Legislator and State Courts"

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Introduction

As a result of the increasingly developing globalized world economy, the world witnessed a phenomenal rise in commercial disputes crossing the national borders; hence the world needed an effective regime of rules which can settle such disputes. These rules found their base in new international legislation and modern standards on arbitration.

However, in the Arab Middle East which is the focus of our discussion today, religious considerations have played a major role in both the acceptance and the success of the arbitral process. It is indeed very important to examine the main features of arbitration in *Sharia'* to understand the legal environment governing arbitration in the Arab countries.

In general, the recent evolution in the concept of arbitration caused many countries to amend or change their arbitration laws; this trend included many Europeans countries. In case of the Arab countries, two trends have prevailed: namely the French model which has been adopted by Lebanon, Algeria and Tunisia, and the Model Law on International Commercial Arbitration endorsed by the United Nations Commission on International Trade Law (UNCITRAL) (the "Model Law") which has been adopted by many countries such as Egypt, Bahrain and Jordan. In this paper, the latter will be taken as a case study of Arab jurisdictions.

By taking Jordan as an example, the objective of this paper is to examine to what extent the Arab Laws and Courts have adopted and accommodated international and modern standards of international commercial arbitration within their own legal environments. This examination should be conducted in conjunction with the understanding that the Arab legal systems have been mainly influenced by *Sharia'* and other legal systems. The modernization of the Arab legislation on arbitration is evidenced by the ratification of New York Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention") and other conventions that adopt arbitration as one of

the main means to settle disputes such as the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 (the Washington Convention). Furthermore, it is rare to find any bilateral investment treaty that an Arab country is a party to that does not include an arbitration clause.

This paper will attempt to shed light on the Jordanian jurisdiction as a case study in order to assess the reception of the Arab jurisdictions to the modern norms established in the sphere of international commercial arbitration.

Jordan:

As Jordan emerged as an important business centre in the Arab Middle East region, recognition for the need for expeditious and efficient alternative means of resolving commercial disputes and the significant role that arbitration plays in international arbitration.

As most Arab countries, Jordan has always been aware of the importance of arbitration as a method of resolving disputes outside national courts. Currently Jordan is witnessing a major economic growth combined with an expansion of bilateral trade dealings; these factors have paved the way for the use of modern alternative dispute resolution in general and for arbitration in particular. It is a well established fact that arbitration is one of the fundamental ways in which contractual disputes may be settled in Jordan.

The legislative development in Jordan is considered to be a unique example among the Arab countries; Jordan is distinguished in this regard by the fact that it was the first country to issue a separate legislation governing arbitration, the only separate piece of legislation enacted before the Jordanian legislation was the Palestinian Arbitration Law of 1933 which has been replaced by the 1953 Arbitration law.

In contrast, most of the Arab Countries have embedded the provisions governing arbitration matters within their own Codes of Civil Procedure.

The first Jordanian Law on Arbitration of 1953 was evidently influenced by the English law, unlike the case of most of the Arab countries that have been influenced by the French law. Furthermore, Jordan was among the leading Arab countries that ratified the 1952 Convention on the Enforcement of Judgments between the Arab Countries that was been later replaced by the Riyadh Convention for Judicial Cooperation of 1983.

On 1972 Jordan joined the Washington Convention that established the International Center for the Settlement of Investment Disputes (ICSID). In 1979 Jordan also joined the New York Convention. It should be mentioned in this regard that the Jordanian Court of Cassation in its Judgment No. 3203/2004 has confirmed the constitutionality of the New York Convention as follow*:" It is understood from the Article (2) of Enforcement of Foreign Judgments Law No. 8 of 1952 that the foreign arbitral award which has been enforced and ratified by the forum court , shall be enforceable in Jordan in accordance with all the clauses and requirements, and does not conflict with any of the stipulated provisions of Article (7) of the said law " .*

Due to the major developments that have occurred in Jordan since the enactment of the 1953 Arbitration law, there was a vital need to adopt a new law endorsing the modern norms and standards in international commercial arbitration. In order to implement this there were various initiatives for drafting the new law. The last of these initiatives was the formation of a drafting committee to endorse the new draft, after reviewing Arab and international laws that have been based on the Model Law, the committee reached the conclusion that the Egyptian Arbitration Law No. 27 of the 1994 is the closest to the Model Law on one hand and to the Jordanian legal environment on the other hand, therefore, the committee adopted the provisions of said Egyptian law after making various amendments in order to meet the national requirements.

Main Features of the New Law:

The intention of the parties to arbitrate their disputes and the party autonomy are given a great importance in the Jordanian law. Article 3 of the law reads as follows: "*The provisions of this law shall apply to every consensual arbitration conducted in the*

Kingdom and relates to a civil or commercial dispute between parties of public or private law persons whatever the legal relationship to which the dispute is connected, whether contractual or not." The Court of Cassation in its Judgment No. 4186/2005 dated 29/6/2006 has relied on this Article in ruling that the Arbitration law is not applicable to arbitrations conducted outside Jordan.

Contrary of some foreign legislation, the Jordanian law did not require that the arbitration agreement should be separate or adopted by the competent court, the Jordanian law has stipulated one requirement in this regard which is the writing requirement, this has been stated in Article 10 of the law that a proof of a record of agreement to arbitrate shall be provided whether in a document signed by the parties or as an exchange of letters, telegrams, faxes, telexes or other means of telecommunications. This has been upheld by the Court of Cassation in its judgment No. 3307/2004 dated 7/3/2005 when it has stated that "*the arbitration clause as established should be written, clear and explicit as well, by virtue of Article 10/A of the Arbitration Law No. 31of 2001"*.

According to the new law, it is essential that each party to the arbitration agreement have the capacity to act, it should be noted in this regard that Article 9 of the Jordanian law is identical to Article 11 of the Egyptian law which states that: *"Arbitration agreement may not be concluded except by natural or legal persons who have legal capacities to dispose of their rights"*. To determine the capacity of non – Jordanians, the laws of the nationality of the non-Jordanians shall prevail, and such capacity shall be the subject of their laws. In all cases, the capacity of the arbitration parties shall be free from any defects that might impair their consent. Agreements to arbitrate may be entered into by any natural or juridical person having the capacity to dispose of their rights. Thus, if an arbitral award was rendered on the basis of an agreement to arbitrate signed by a minor or someone who lacked the legal capacity, said arbitral award could be set aside.

Furthermore, the matters to be arbitrated should be arbitrable; in this regard the law states a general rule that any matter that cannot be conciliated cannot be subject to arbitration accordingly. This eliminates various categories of disputes such as family matters and criminal disputes. The principle adopted by the new law is that arbitration is not allowed

in matters that cannot be subject to compromise. Article 9 states in this regard: "*Arbitration is not permitted in matters on which compromise is not allowed"*. The Court of Cassation in its Judgment No. 10/2005 dated 16/6/2005 has further stated that since employment rights are allowed to be compromised they could be subject to arbitration as well.

As an evidence of the reception of the modern standards in arbitration, the Jordanian law has adopted the well established doctrine in arbitration competence – competence that entails that the arbitral tribunal has the jurisdiction to rule on its own jurisdiction, this is evident by the wording of Article 21 in the new law. In this respect, Article 21 /A reads as follows:

"The arbitral tribunal is entitled to rule on pleas related to its own jurisdiction including those related to the non-existence of an arbitration agreement, the expiry or nullity of such agreement, on that the subject of the dispute is not included in the agreement". This Article is regarded as one of the pillars of the law, with the adoption of the doctrine competence – competence and by granting an arbitrator the power to rule on its own jurisdiction, Jordan demonstrated its undivided support for international commercial arbitration and for the principles stated in the Model Law. In general, the respondent in the arbitral proceedings can raise any jurisdictional challenge at different phases whether at the very beginning of the arbitral process or during such process if one of the parties believes that the arbitral tribunal has exceeded its scope of authority.

The law also holds both types of agreements to arbitrate, namely arbitration clauses and arbitration agreements, to be valid and binding. The new law mentions two forms of the arbitration agreement one of which is the arbitration clause that refers to future disputes which do not exist at the time of concluding the arbitration agreement. However, such disputes might never arise and this fact causes the parties to define the subject matter of the arbitration by reference to the relationship governing the parties rather than the potential disputes. The other form is the submission agreement that refers to existing disputes that have already arisen. Some national laws require the execution of submission agreements despite the existence of previously concluded arbitration clauses.

Regarding the challenge of the arbitrators, it could be stated that this procedure could be a result of doubts concerning the impartiality and independence of the arbitrator this is confirmed by the Article 17 of the Jordanian law. This principle has been considered in the Judgment of the Jordanian Court of Cassation No 3055/2001 dated 6/1/2002 which confirmed that *"all arbitral procedures, in which the challenged arbitrator has participated, including the arbitral award, shall be deemed void"*. It could be noted that the arbitral awards are subject to be challenged by virtue of Article 49 of the Jordanian Law.

The Jordanian law goes beyond the acceptance of arbitration clauses, it further accepts the incorporation of such clauses provided that such reference is clear and unambiguous, Article 10/B states in this regard that *"the reference in a contract to the provisions of a standard contract or to an international convention or any other document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference (to such clause) is clear in regarding that clause as a part of the contract"*. A reference made in a contract to another document containing an arbitration clause is considered a valid agreement to arbitrate, provided that such reference clearly makes such a clause an integral part of the contract, a classic example is the incorporation by a bill of lading to an arbitration clause contained in a charter party.

The Jordanian law has also clearly recognized the classic notion of severability or autonomy of arbitration clause, the relevant provision in this regard is Article 22 which reads as follows:*" An arbitration clause shall be treated as an agreement independent of the other terms of the contract. The nullity, revocation or termination of the contract shall not affect the arbitration clause therein if such clause is valid by itself."*

Regarding the effects of the arbitration agreement, the law applies the general rule that such agreement deprives the Jordanian courts of law from their jurisdiction to rule on the merits of dispute that is subject to the arbitration agreement. Article 12/A of the Law states in this regard that: *"A court before which an action is brought in a dispute which is the subject of an arbitration agreement shall dismiss the case if the defendant so requests before entering into the substance of these dispute"*. It is clear from the wording of this

Article that the defendant must raise this plea before submitting any demand or defense on the merits of the dispute. This has been confirmed by the Court of Cassation in its Judgment No. 3691/2004 dated 2/2/ 2005.

Concerning the number of arbitrators, the law provides that if there is more than one arbitrator, the arbitral tribunal must consist of an odd number. However, the parties are free to choose the number of arbitrators and if the parties fail to do so, the number of arbitrators shall be three; this is clearly explained in Article 14 of the law.

To sum-up it should be noted that the Jordanian law has taken into consideration most of the principals adopted by the Model Law this is evident by the following points:

- Articles 2-8 of the Jordanian law that deals with the scope of application conform to Articles 1-6 of the Model Law.
- Articles 9-13 of the Jordanian law that deals with the arbitration agreement conform to Articles 7-9 of the Model Law.
- Articles 14-20 of the Jordanian law that deals with the arbitral tribunal conform to Articles 10-15 of the Model Law.
- Article 21 of the Jordanian law that deals with jurisdiction of arbitral tribunal conforms to Articles 8-9 of the Model Law.
- Article 23 of the Jordanian law that deals with interim and conservatory measures conforms to Article 17 of the Model Law.
- Articles 24-35 of the Jordanian law that deals with the conduct of arbitral proceedings conform with Articles 18-27 of the Model Law.
- Article 36-47 of the Jordanian law that deals with making of the award and the termination of the arbitral proceedings conforms to Articles 28-33 of the Model Law.
- Articles 48-51 of the Jordanian law that deals with the recourse against awards conform to Article 34 of the Model Law.
- Article 52 of the Jordanian law that deals with the recognition and enforcement of awards conforms to Articles 35-36 of the Model Law.

Conclusion:

It should be noted that the evolution in the concept of arbitration in the last years of the last century, caused all the countries of the World including the Arab countries to change or amend their arbitration laws.

The Jordanian law presently provides the foreign investor with a workable arbitration system. In today's international business climate, the use of arbitration proceedings is becoming both common and essential. Not only is arbitration cost – effective, less time – consuming, and generally more efficient than litigation, it also provides the parties with the opportunity to select experienced individuals to resolve their disputes. The use of an arbitration agreement is not only common in international commercial contracts between private parties; it has also been found to be essential in international transactions where one of the parties is a governmental entity. By endorsing well established principles in international commercial arbitration such as competence – competence and severability of arbitration clauses, the Jordanian legislator has proved its clear reception for modern international principles in arbitration; Jordanian courts in their turn have shown great hospitality to these endorsed principles; this is evidenced by the recent judicial precedents rendered in this regard.

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