The Vital Role of State Courts in Arbitration
Conference's Report II
(Sharm El Sheikh),
November 19-21, 2007

Sharm El Sheikh (II) is the second 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. The Conference on "The Vital Role of the Judiciary in Arbitration II" was enriched with 185 participants and 35 speakers.

CRCICA organized an International Conference on "The Vital Role of the Judiciary in Arbitration II", 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), a great number of International Arbitral Institutions and Arab and Foreign Judicial Authorities.

The Conference program was divided into six 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 Mohamed Hany Metwaly, Governor of South Sinai welcomed the participants. The following distinguished personalities delivered inaugural speeches:

H.E. Coun. Moqbel Shaker, President of the Egyptian Supreme Judicial Council and President of the Egyptian Court of Cassation, Mr. Renaud Sorieul, Principal Legal Officer at 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 Mr. Ulf Franke, President of the International Federation of Commercial Arbitration Institutions (IFCAI).

The Conference was enriched by the different nationalities of speakers and participants from Egypt, Saudi Arabia, Lebanon, Bahrain, Tunisia, Jordan, Yemen, Morocco, Syria, Libya, Algeria, United States of America, Switzerland, United Kingdom, France, Italy, Austria and Sweden.

First Session:

This session, which was chaired by Mr. Ulf Franke, dealt with the "The Role of State Courts in Arbitration According to the Different Legal Cultures." Mr. Franke started the session by stating that the relation between state courts and arbitration could be tackled according to the following: a) appointment of arbitrators, b) control of conduct of the arbitral tribunal for minimum standards observed, c) consensus that court interference is restricted throughout the arbitral process and last but not least d) maintaining the right balance between court involvement and the autonomy of the arbitral process.

Works of this session started by Dr. Mohamed Aboul-Enein's presentation, where he presented a paper titled "The Role of Constitutional Courts in Arbitration**".** Dr. Aboul-Enein asserted the importance of the role of such courts in any country seeking arbitration based on sound constitutional principles, especially the party autonomy principle which gives the parties in a dispute the right in resorting to either national courts or to arbitration. Dr. Aboul-Enein also referred in this concern to some decisions of the Supreme Constitutional Court of Egypt which ruled for the unconstitutionality of compulsory arbitration (such as the Supreme Constitutional Court of Egypt's decision indicating the unconstitutionality of compulsory arbitration in the case of Fisal Islamic Bank in accordance with Law No. 48 of the year 1977 . Dr. Aboul-Enein asserted that the Supreme Constitutional Court of Egypt advocates distinguishes arbitration awards from by court decisions (e.g. Competence Competence, such as the award it rendered in Case No. 155 of the 20th constitutional year, issued on 13/1/2002).

Mr. Renaud Sorieul made a presentation titled "the Judicial Application of the UNCITRAL Model Law on Arbitration". Mr. Sorieul overviewed the relationship between the sphere of arbitration and the sphere of the judiciary highlighting that according to Article 5 of the UNCITRAL Model Law no intervention of court is allowed except by law, and that the intervention of courts as a supporting judge are to solve issues and provide assistance before the appointment of the arbitral tribunal, their challenge and through interim measures as well. Mr. Sorieul highlighted that one of the most effective mechanisms of the UNCITRAL Model law was that it facilitated the application of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 and its role in the efficiency of arbitration. Mr. Sorieul concluded his presentation by making certain recommendations: a) domestic legislation is a complex issue and that the only means for solving such problem is through an interpretation of domestic legislations based on the revision of the New York Convention and through the UNCITRAL Model law, b) An approach to be taken on the domestic level where specialization of courts is to be taken seriously, c) arbitration and ADR are victims of their own success, thus they need to be used beyond their normal sphere i.e. to be used in courts, and lastly d) dissemination of information and collection of international as well as domestic arbitration awards from different countries and uniform interpretation of their awards with the UNCITRAL Model law and the New York Convention (CLOUT Project).

Mr. Jean-Louis Delvolvé, Former Chairman of the Comité Français d'Arbitrage (CFA) and President of the CFA Commission d'Etude, presented a paper titled "The French Law Approach and Methodology". Mr. Delvolvé started in his presentation by stating that French courts have established necessary protection of the interest of the parties in arbitration and in insuring that international arbitration is a free process of settlement of disputes without the suppression of courts. Mr. Delvolvé also mentioned that guarantees must be provided when courts enforce arbitral awards without infringing any fundamental rules. Mr. Delvolvé added that in order to establish equilibrium: French courts are entitled to refrain from intervention in cases where arbitration is referred to in contracts, also that one of the main functions of the supporting judge is to achieve efficiency of party autonomy, and that at the end of the arbitral process the court must interfere to insure that the interest of the parties is still standing. Mr. Delvolvé discussed the "negative effect" of the arbitration agreement as understood in French international arbitration law i.e. the principles of Competence

Competence and Separability. He also discussed the role of the French courts in supporting international arbitration i.e. wherever actual implementation of the parties' agreement to arbitrate is prevented by a circumstance which otherwise could not be surmounted. Lastly, he discussed the control of international awards by French courts in verifying that the arbitration award does not infringe any of the fundamental guarantees of fair justice, and that the award does not affect French international public policy if executed in France.

Mr. Richard Naimark, Senior Vice President of the International Centre for Dispute Resolution; American Arbitration Association (AAA), made a presentation titled "The Role of American Courts in Arbitration". Mr. Naimark started his presentation by briefly explaining the history of the federal arbitration act of USA, where he mentioned that it was based on the common law (British system), based on the understanding of law and presedents which are binding on the judge. Mr. Naimark mentioned that early in 1924 there were those who favored the creation of the arbitration and there were some who opposed arbitration. In 1926, the American Arbitration Act (AAA) was adopted to enforce arbitration agreements through legislations based on fairness (including independent adjudication and fundemental procedural rights e.g. due process). Supreme courts supplemented the Federal Arbitration Act (FAA) and the FAA kept evolving throughout time. Mr. Naimark concluded his presentation by stating that arbitration became one of the pillar systems in the settlement of disputes, where tens of thousands of cases are setlled via arbitration in USA.

Judge Hans Danelius, Former Justice of the Supreme Court of Sweden, presented a paper titled "The Role of State courts in Swedish Arbitration Law". Mr. Daneluis started his presentation by giving a brief insight on the Swedish Arbitration Act of 1999 and how it provides for a solid basis for arbitration proceedings in Sweden. Mr. Daneluis mentioned that the functions of the Swedish courts are either supportive or supervisory to the arbitration. The Swedish courts are supportive through the setting up of arbitral tribunals, and since arbitral tribunals have no state power with regards to procedural compulsion (relating to civil or penal sanctions), thus arbitral tribunals resort to state courts for such procedural compulsion. The Swedish courts are supervisory, where arbitral tribunals can not exceed their competence. Section 2 of the swedish arbitration act provides for the principle of Competence Competence, however in case the matter is brought before the court by a party, the arbitral tribunal would continue the arbitral proceeding despite that a certain ruling have to be rendered by a court. Mr. Daneluis added that in case of challenge of arbitral awards to state courts, the competence of the court to examine the challenge is only restricted to the procedural aspects of the case and not on the substantive (merits) aspect. Mr. Daneluis mentined that Swedish courts are respective to arbitral awards and do not like to hamper or quash them. Mr. Daneluis concluded his presentation by stating that the enforcement of foreign arbitral awards in Sweden follow the New York Convention where the latter is closely reflected in the Swedish Arbitration Act.

Dr. Soliman Al Shady, Judge at the Saudi Grievances Board, presented a paper titled **"**The Expected Role of the Saudi Legislation and Judiciary in Support of Arbitration". Dr. Al Shady tackled the legislative role of the Saudi jurisdiction in supporting arbitration, which had witnessed explicit development for meeting the increased

international need of settling disputes via arbitration. Hence, the Saudi legislative authority drafted legal provisions for ensuring the application of the arbitration condition in the settlement of disputes that arise out of electronic commerce e.g. the validity of the electronic arbitration condition, which is considered one of the most prominent modern applications of arbitration. He also stated that the Saudi judical authorities have electronic mechanisms for dealing with arbitration awards which are rendered through electronic means.

Second Session:

This session was chaired by Mr. Renaud Sorieul and was titled "The Evolution of the Relationship between State Courts and Arbitration: Striking a Balance between Party Autonomy and Judicial Review". Mr. Sorieul started the session by mentioning some of the characteristics of international arbitration and that arbitration has been spreading outside the sphere of commercial arbitration. Mr. Sorieul added that arbitration is being adopted more strongly than before in newly independent states. He also discussed that the UNCITRAL could be considered an alternative to ICSID arbitration in relation to inter-state investment disputes, where he called for the transparency of international arbitration organizations in dealing with such disputes and that there are proposals to setting a set of investment arbitration disputes on the UNCITRAL website.

Dr. Mahmoud Samir Al Sharkawy, Professor and Ex-Dean, Faculty of Law, Cairo University, Lawyer before the Court of Cassation; International Lawyer and Arbitrator, presented a paper titled ” The Impact of the Arbitration Clause on the Settlement of the Dispute Before National Courts- Comparative Study”. Dr. El Sharkawy demonstrated – through a comparative study between the French Law, the New York Convention and UNCITRAL Model Law the effects of the arbitration clause on reviewing any dispute before national courts. He discussed also the different doctrinal opinion on the legal characterization of the state courts' abstention on reviewing cases that arise out of the original contract which contains the arbitration clause, and he wondered whether state courts had no jurisdiction to settle the dispute, or whether the case which has been raised before the state courts would be accepted in the first place or not? Further, he highlighted the uncertainty and hesitancy of the Egyptian judiciary and jurisprudence towards these two adoptions, before the issuance of the Egyptian Arbitration Law, till the Egyptian Arbitration Law No. 27 of the year 1994, which had settled this issue by stating that the court should refuse the case if the Respondent requests that refusal before making any claim or providing any defense. Dr. Al Sharkawy asserted that the refusal of the court to review the case does not contradict with the competence of the state in reviewing interim and conservatory measures and in issuing decisions in this regard.

Dr. Abdel Hamid Al Ahdab, President of the Arab Organization for International Arbitration, Stroke a balance between party autonomy and the judicial review in arbitration, with regard to the change of the relationship between the national courts and arbitration. He explained the nature of this relationship in several phases starting from the jurisdiction of courts before arbitration takes place and indicated the different juridical supervisions in that phase in different Arab countries in accordance with the nature of the arbitration law of each of them. Moreover, Dr. Al Ahdab

mentioned the important role that courts have during arbitration proceedings, the second phase, as courts rule upon certain issues such as the appointment of arbitrators in ad-hoc arbitration cases and issuing interim and conservatory measures. The role of courts become apparent after the issuance of the arbitration award, as the competent court according to each state's system, is the court which issues the executive order for the enforcement of arbitration awards and review annulment challenges. Dr. Al Ahdab asserted that courts have a supervisory role only in this phase in order to ensure the arbitrators' compliance with the main procedural factors of the arbitral award. He referred to a ruling which was rendered by the Cairo Court of Appeal, indicating that the review of challenges is not an appeal but an exceptional review, as stated in Article 53 of the Egyptian Arbitration Law. Also, he asserted that the efforts of the Egyptian courts in this regard will affect greatly the efforts of the judiciary in the Arab countries which will be reflected on the development of arbitration. He referred also to the efforts of the Lebanese Court of Appeal in this field and asserted that the role of the annulment judge is restricted to the conformity and investigation of the reasons for the challenge. Dr. Al Ahdab asserted also that the direction of judiciary in Egypt and Lebanon is a direction which protects arbitration especially with regard to annulment.

Dr. Karim Abou Youssef, Lecturer in Private and Comparative Law, Faculty of Law, Cairo University; Legal Advisor, Cairo Regional Centre for International Commercial Arbitration and Member of the National Law Commission of Egypt to Reform Economic Laws, presented a paper tiled "The Concept of "Efficiency" of the Arbitration Agreement: or the Upcoming Judicial Revolution in the Law of Complex Arbitrations". Dr. Youssef's presentation reflected on a fairly new concept in the field of international commercial arbitration: the concept of efficiency or efficacy of the arbitration agreement. While efficiency is a general concern in arbitration, Dr. Youssef puts in evidence the rise of considerations of efficiency as a major element of the way decisions on jurisdiction are made in *complex* arbitrations. Numerous cases, from different jurisdictions, explicitly establish the right or the obligation to arbitrate of a non-signatory on the need to preserve the *"efficiency", "efficacy" or "practicality"* of arbitral justice. In many more, conceptions of fairness or equity seem to be at the basis of the decision to extend or not to extend the arbitration agreement beyond its initial scope. The trends at hand are neither fiction nor *trivia.* They constitute a massive phenomenon which transcends different legal cultures as well as different degrees of arbitral development. While the marginalization of pure legalism in decisions on jurisdiction may have side effects, pertaining to *legitimacy*, the evolution is a necessary step to adapt arbitration to new and changing needs. Solutions lie, not in denying the existence of the evolution, Dr. Youssef suggests, but rather in ensuring the procedural integrity of a process which has become a universal practice and has evolved beyond the strict limits of consent.

Dr. Jalal Al Ahdab, Senior Associate at ORRICK, HERRINGTON & SUTCLIFFE, Paris and Teaching Associate at Political Sciences- University of Paris, made a presentation titled "Judicial Review of the Extension of the Arbitration Clause to Non-Signatories". Dr. Jalal Al Ahdab started his presentation by stating that arbitration is said to be the creature of the contract. Then he highlighted the different types of parties who could be involved in an arbitration case where there are the actual parties, party to the arbitration agreement, party to the arbitration proceeding,

or party to the arbitration award. Dr. Jalal Al Ahdab explained the major cases of extension of parties that could occur in an arbitration case, where a parent company could be included as a party in an arbitration case based on the request of one of the parties and be bound by the arbitration agreement, he added that third parties could also be included in the case where mergers and/or acquisitions could occur to a party in an arbitration and as such be included in the arbitration case. Dr. Jalal Al Ahdab explained that in all instances parties can not agree orally on arbitration agreements and that writing is an explicit requirement according to Article 2 of the New York Convention, Article 1443 of the French Civil Code and Article 178 of the Swiss code. He mentioned that certain substantive requirements should be taken into consideration such as the privity of the contract, autonomy of each party and the *res judicata* of arbitral awards. Dr. Jalal Al Ahdab concluded his presentation by stating that equity and efficiency are vital to the scope of arbitration, and that there are certain fundamental contradictions ought to be taken into consideration to extend the scope of arbitration agreements in settling multi-party disputes.

Third Session:

This session was chaired by Prof. Yahia Al Gamal, Professor at the Faculty of Law, Cairo University; International Lawyer and Arbitrator, and was titled "The Role of State Courts during the Arbitral Proceedings: the Supportive and Parallel Roles of State Courts". Prof. Al Gamal started the session by highlighting the importance of state courts in relation to the state authority where compulsion and coercion are needed with regards to interim measures, the presence of third parties and the enforcement and recognition of arbitral awards.

Mr. Ulf Franke presented a paper titled "State Court Involvement in the Arbitral Proceedings: Desirable Support or Undue Interference". Mr. Franke started by mentioning that his presentation will focus on the relationship between national judges and international arbitration from the perspective of the UNCITRAL Model law, and he gave a brief history on UNCITRAL and its works. Mr. Franke mentioned that we can not stop parties to arbitration from involving state courts in their cases, but only limit the court's intervention in the arbitral process, and that is what the UNCITRAL Model law tries to achieve. Mr. Franke explained when court intervention is considered acceptable or even desirable throughout specific articles found in the UNCITRAL Model Law in relation to Article 8 (enforcing the arbitration agreement), Article 11 (appointment of arbitrators), Article 13 (challenge of arbitrators), Article 14 (removal of arbitrators), Article 16 (competence competence), Article 34 (setting aside the award), Article 36 (recognition and enforcement of arbitral awards), Article 27 (court assistance in taking evidence), and Article 9 (interim measures).

Coun. Mongi El Akhdhar, General Public Prosecutor at the Court of Appeal of Tunisia, presented a paper titled "The Role of the Tunisian Judiciary in Supporting International Arbitration". Coun. El Akhdar started his presentation by explaining the development of arbitration in Tunisia till the issuance of the Tunisian Arbitration Journal, where its provisions are in conformity with the requirements of the present. He also explained the role that the Tunisian courts play in confirming the role of arbitral tribunals either during the arbitration proceedings whether in the first phase or

in the following phase when the arbitration award is rendered. Coun. El Akhdar asserted that the Tunisian judiciary adopts an important arbitration principle, namely, the choice of international arbitration as a method for the settlement of disputes settlement means giving up resorting to state courts.

The first day of the Conference was concluded by Dr. Eng. Sherif El Haggan, Partner, Contract Administration and Arbitration Bureau; Consulting Engineer and International Arbitrator, where he presented a paper titled ”Statutory Adjudication”. Dr. El Haggan started his presentation by mentioing that the English Arbitration Act of 1996 entitles a party to most types of construction contract to require that a dispute be immediately referred to adjudication, where the decision would be rendered within 28 days or longer if the parties consent, and that the decision is not final but is binding until finally determined by some other legal process or by agreement. However, the 1996 Act says nothing about the enforcement of that decision. Dr. El Haggan highlighted that statutory adjudication has been successful in preventing the party to a contract which is in the stronger position from abusing that position. Following that, he mentioned statutory adjudication cases such as Macob Civil Engineering v. Morrison Construction Ltd. and A & D Maintenance & Construction Ltd. v. Pagehurst Construction Services Ltd. Further, he discussed the aspects of contractual adjudication, and the role, types and functions of dispute boards (dispute review board, dispute adjudication board and combined dispute board). Dr. El Haggan concluded his presentation by stating ”Adjudicate then, if necessary, Arbitrate”.

Fourth Session:

This session was held on the second day of the Conference, and was divided into two parts and was titled “The Role of State Courts Before and After Rendering the Arbitral Award”. The first part session was chaired by Mr. Jean Louis Delvolvé, and was titled “Judicial Orders Suspending the Arbitral Proceedings”. Mr. Delvolvé started the session by discussing the Bangali case, where the Bangladesh government ordered to terminate the proceedings of the International Chamber of Commerce (ICC) case held before the arbitral tribunal, as an act of aggression, with no grounds whatsoever.

Prof. Martin Hunter, Professor of International Dispute Resolution, Nottingham Trent University; Member of the International Council for Commercial Arbitration (ICCA), presented a paper titled ”Status of an Arbitration While a Challenge to a Partial Award is Pending in a National Court”. Prof. Hunter started his presentation by wondering what an arbitral tribunal should do when a party requests a “stay” (suspension) of an arbitration while parallel proceedings are pending in a national court in which a partial award (or other events in the arbitration) are the subject of challenge. Prof. Hunter discussed two arbitrations in length which were S.D. Myers, Inc. V. Government of Canada and Salini V. Ethiopia. The first case involved a NAFTA investment arbitration, where the Canadian government took the partial award on liability to the Canadian court to suspend the arbitration proceeding until the case before the court is finalized. The Arbitral Tribunal determined that the second phase of the arbitration would therefore continue in parallel with the proceedings in the Canadian courts. The second case involved an ICC arbitration case, where the Ethiopian party applied to the Ethiopian Courts to remove the arbitrators. The

Ethiopian Supreme Court issued an injunction to the effect that the arbitration should be suspended pending its decision on the matter of the removal of the arbitral tribunal. However, *Salini* requested the arbitral tribunal to proceed with the arbitration. In this case, the arbitral tribunal concluded that a state entity should not be allowed to resort to the national courts within its own territory in order to frustrate an arbitration agreement.

Dr. Karim Hafez, Principal, Hafez, Fellow, the Chartered Institute of Arbitrators, made a presentation titled "Anti-Suit Injunctions by National Courts in Support of Arbitration Agreements". Dr. Hafez started his presentation by asking whether a court could prohibit a party to the arbitration agreement from resorting to more than one tribunal or court, and could arbitral tribunals prohibit parties from doing the same? Dr. Hafez further posed a question on what is the standard where more than one case could be adjoined together involving more than one party and multiple proceedings. He also discussed the principle of bad faith, forum non conviniens, relief personum, the power of arbitral tribunal to issue interlocutory measures and the ordering of injuncted relief. He also mentioned that there were certain conflicting considerations, such as the pros and cons of enjoining multiple proceedings (competence competence) and the advantages and disadvantages of post and judicial reviews. Dr. Hafez mentioned the principle of pacta sunt servanda is tackled where there is a need to arbitrate reasonably. Dr. Hafez concluded his presentation by mentioning that trust and sanctions are needed to ensure that the relationship between the courts and arbitral tribunals function correctly, also sophisticated (specialized) courts and not just competent courts are needed and that more serious academy is called for where there is a need to reflect the comfort of libraries.

Mr. Mauro Rubino-Sammartano, President, European Court of Arbitration (Strasbourg), presented a paper titled "Anti-Suit Injunctions-Protection of Legal and Equitable Rights: Ambit of anti-suit injunctions (arguments in favour and against)". Mr. Sammartano started his presentation by mentioning that the physiology of arbitration, if used correctly could end up with a successful arbitration. Mr. Sammartano discussed injunctions which could be rendered by a court, either concerning foreign court proceedings or concerning foreign arbitral proceedings in relation to a party or an arbitral tribunal or an arbitral institution, or injunctions concerning an arbitral tribunal in relation to a party or another arbitrator or to a court. He further stated that injunctions concerning a court could be in support of arbitral proceedings, or to continue the arbitral proceedings, or to a neutral entrusted with the task to settle a dispute, or in relation to mediation proceedings, or in relation to anti-suit injunctions. Mr. Sammartano concluded his presentation by discussing the position of the European Court of Justice on Anti-suit injunctions between member states.

The second part session was chaired by Prof. Samir Al Sharkawy, and was titled "The Judicial Review with Respect to the Annulment of the Arbitral Award".

Prof. Fathy Waly, Professor and Former Dean at the Faculty of Law, Cairo University and International Lawyer and Arbitrator, presented a paper titled "The Role of the Egyptian Judiciary in Limiting the Setting- Aside Motions". Dr. Fathy Waly mentioned that arbitration awards are not subject to appeals and are distinguished accordingly from courts' decisions. He referred also to Article 53 of the Egyptian

Arbitration Law in its paragraphs (a) to (g) which are considered conditions for the admissibility of nullifying an arbitral award. Also, he asserted that paragraph (g) is considered a general provision and that the Court of Appeal does not apply it in its judgments specifically. He stated that the Egyptian Arbitration Law is different in this concern from the French Law and the Italian Law, because it does not limit the reasons of challenging an arbitral award. Dr. Fathy Waly referred also to some judicial applications in this field as some Egyptian judgments were issued after rejecting the challenge for the nullity of the arbitration award for different reasons (such as the contradiction between the reasoning of the arbitration award and not resorting to conciliation before resorting to arbitration). He asserted also that some Egyptian judgments ignored paragraph (g) in spite of recognizing it, subsequent to its ruling. He added that there is a great difference between discussing the merits of the dispute and discussing the reasons of annulling the arbitral award because the latter has been expressly stipulated upon in the provisions of the law. Dr. Fathy Waly concluded his presentation by stating that the Egyptian judiciary should expand the reasons for accepting the nullity of the arbitration awards of awards because of the explicit direction towards spoiling arbitration in Egypt, which will eventually lead to the corruption of arbitration and contracting parties would refrain from including any arbitration clause in their contracts.

Dr. Hamza Haddad, President of the Jordanian Law and Arbitration Center; Former Minister of Justice and the Assistant Secretary General of the Arab Union for International Arbitration for the Eastern Area, referred in his presentation to the judicial review through the annulment of arbitral awards, and indicated that arbitration in the Arab world is still facing several problems in spite of the great flourishment it achieved lately. He stated also that one of the most pertinent problems is that some judicial institutions consider arbitration as a competitor and that is why they seek to annul arbitration awards for formal reasons. Dr. Hamza Haddad asserted this as a characteristic of arbitration in the Arab world and referred to a case in Emirates, where an arbitration award was challenged because one of the witnesses did not take the oath before witnessing though the two parties had agreed that the witness would not take the oath. Accordingly, a judgment was rendered annuling that arbitration award which lasted for several years because it contradicted with public policy due to the non-taking of the oath by the witness. Moreover, Dr. Hamza Haddad wondered about the parties' right to agree on not annulling the arbitration award before the issuance of the arbitration award. He asserted that distinction should be drawn between challenging arbitration awards because of their incompliance with the public policy and challenging them for other reasons. He mentioned also the achievements of the Egyptian Court of Appeal in this concern, as it rendered a judgment indicating that not all mandatory rules are considered as matters of public policy. He concluded his presentation by indicating that this development is considered an important step towards limiting the annulment of arbitration awards in Egypt and the Arab world.

Judge Mohib Meamari, President in the Lebanese Court of Cassation, presented a paper on “The Setting-Aside of Arbitral Awards in the Light of the Jurisprudence of the Lebanese Court of Cassation”. He stated that the efforts of the Lebanese jurists have played an important role in restricting the concept of juridical supervision on arbitration and placed its procedures in a separate system which has resulted in decreasing the supervisory procedures of state courts till they have become in most cases just a formal supervision.

Dr. Said Yehia, Legal Advisor and Managing Director at Salah Al Hejilan Law Firm, mentioned in the same session the vital role of Saudi jurisdiction and indicated the advantage of having a prior judicial supervision on Saudi arbitration represented in giving orders for enforcing arbitration awards, which is considered a precautionary measure taken by the Saudi Legislative Authority for avoiding the reasons that may lead to the annulment of the arbitration agreement or the arbitration award which is issued based on this agreement, which will in its turn lead to securing the parties' interests and saving time and efforts exerted in arbitration.

Dr. Mohamed Abdel Raouf, Attorney at law, Partner, Abdel Raouf Law Firm and Secretary General of CRCICA made a presentation entitled "*The Egyptian jurisprudence concerning the setting-aside of arbitral awards: An analytical study*" where he presented the results of his analytical study conducted over 200 unpublished court judgments rendered with respect to annulment motions filed against domestic and foreign arbitral awards rendered within the context of institutional and ad hoc arbitrations. According to Dr. Abdel Raouf, Egyptian courts have set-aside only 70 arbitral awards out of 200 representing 35% of the decisions subject of the study. The majority of such awards was set-aside following the decisions of the Egyptian Supreme Constitutional Court, which considered compulsory arbitrations, under certain Egyptian laws, as unconstitutional. According to the study, the most important cause for setting-aside arbitral awards is the one stipulated under paragraph (g) of Article (53/1) of the Egyptian arbitration law. The second most important cause is the one provided for under paragraph (e) of the same Article regarding the composition of the arbitral tribunal in a manner contrary to the law or to the parties' agreement. Public policy (Article 53/2) is the third most important cause for setting-aside arbitral awards, followed by the cause pertaining to the absence of the arbitral agreement and its validity (Paragraph (a) of Article 53/1). This is followed by the cause pertaining to the exclusion of the application of the law chosen by the parties to govern the merits of their dispute (paragraph (d) of Article 53/1) and exceeding the limits of the arbitration agreement (paragraph (f) of Article 53/1). Regarding the reasons for dismissing the setting-aside motions, Dr. Abdel Raouf referred to Article (8) of the Egyptian Arbitration Law as one of the most important reasons in this respect. He also indicated that the Egyptian judge categorically confirmed that the setting-aside motion is not an appeal of the arbitral award and thus the annulment judge is not entitled to revise the merits of the dispute. Also, the Egyptian courts constantly held that they lack jurisdiction over setting-aside motions filed against foreign arbitral awards. Dr. Abdel Raouf concluded his presentation by indicating that the Egyptian judge has fully understood the nature and the scope of his supervisory role regarding the setting-aside of arbitral awards. He added that the causes stipulated in the law are amply sufficient and should not be widely interpreted. Instead, he called for a better application of such causes as well as for a more serious choice of arbitrators and lawyers.

The session was concluded by Prof. Felix Dasser, Partner of Homburger AG, Zurich and Professor at the University of Zurich Law School, where he presented a paper titled "International Arbitration and Setting-Aside Proceedings in Switzerland: A Statistical Analysis". Prof. Dasser started his presentation by mentioning that Swiss law offers only five restricted grounds for challenging an international arbitration

award: constitution, jurisdiction, ultra/infra petita, right to be heard and public policy. Prof. Dasser provided a statistical material on the number, duration and particular features of challenges to arbitral awards brought before the Swiss Supreme Court in general. He mentioned that only 12 out of 221 awards were challenged between 1989 and 2005 i.e. 5.4% were set aside, mostly on jurisdictional grounds and never on public policy grounds, and that only 7% of the cases being challenged have a chance of at least partial success. He further stated that there is some supervision of the arbitral process by the Federal Court, and that the Federal Court consistently refuses to review the substance of the underlying dispute. According to the statistics, the average duration of the proceedings before the Supreme Court is less than five months, and the chances that the award will be confirmed is around 93%. Prof. Dasser concluded his presentation by discussing that in regards to arbitration rules the ICC has a dominant position, however the secret winner appears to be the Court of Arbitration for Sports that boosts over 200 proceedings per year.

Fifth Session:

The Fifth Session was chaired by Prof. Fathy Waly and was titled "The Judicial Review with Respect to the Enforcement of the Arbitral Award".

Dr. Coun. Refaat Abdel Meguid, Vice-President of the Egyptian Court of Cassation and President of the First Commercial and Investment Circuit at the Court of Cassation, presented a paper titled "The *Res Judicata* of Arbitral Awards and their Enforcement in the Light of the Jurisprudence of the Egyptian Court of Cassation. Dr. Abdel Meguid discussed in his presentation the basis of arbitration awards in Egypt and asserted the agreement of the doctrinal opinions on the possibility that arbitration parties may agree after the rendering of an arbitration award on raising a lawsuit before state courts or before another arbitral tribunal in order to review the dispute without any judgment for annulling the reviewing of the case again due to *res judicata*.

Mr. Shahir Al Salihi, General Manager of the Minister office of Justice and Consultant of the Yemeni Center of Conciliation and Arbitration, presented a paper titled "The Judicial Review of Arbitral Awards under Yemeni Law". Mr. Al Salihi started his presentation by explaining the supportive role of state courts to arbitration in accordance with the Yemeni Arbitration Law, as the main characteristic of the Yemeni Arbitration Law asserts the rules and principles that create and develop cooperation between state courts and arbitration. First: Appointment of Arbitrators: Disagreement may arise between the parties on the appointment of the arbitrators; when one of the parties does not appoint its arbitrator; when the two parties fail to appoint a sole arbitrator or when the appointed arbitrators do not agree on appointing the third arbitrator. Hence, state courts should, in that case, support arbitration in order to avoid having problems in appointing the arbitral tribunal and to avoid restricting or hindering the arbitration process. Second: On challenging the arbitrator. Third: In interim and conservatory measures. He mentioned also the supervisory role of state courts in accordance with the Yemeni Arbitration Law through the prior judicial supervision during the arbitration process and the judicial supervision that follows the issuing of arbitration awards through challenging arbitration awards from one hand and on the enforcement of arbitration awards from the other hand.

Mr. Abderrahmane Mesbahi, Head of a Chamber in the Moroccan Supreme Court Commercial Division, tackled "The Role of the Judiciary in Arbitration in the Light of the Jurisprudence of the Moroccan Supreme Council". Mr. Mesbahi referred in this concern to a number of decisions of the Moroccan Supreme Council which have solved the problems that are associated with some legal provisions or which have modified their defects such as Decision Number 274 which was issued on 8/3/2006 in the commercial file number 292/03, where the lesson learnt from it relates to limiting the expansion in the interpretation of the public policy that hinders arbitration. He referred also to Decision Number 15 which was issued on 10/1/2007 in the commercial file number 1015/03, where the lesson learnt from it relates to the role of state courts in limiting the expansion in the interpretation of the concept of public policy.

Dr. Farid Fenri, Professor of Law, Faculty of Law, Aleppo University and Secretary General, International Commercial Arbitration Centre, Aleppo Chamber of Commerce discussed "The Enforcement of Arbitral Awards in Syria". Dr. Fenri stated that the Syrian arbitration is proceeding slowly towards completion especially when it is compared to arbitration systems in many Arab countries that have proceeded quickly in the field of arbitration. Dr. Farid Fenri stated also that the Syrian legislation does not distinguish between domestic arbitration and international arbitration neither in the arbitration agreement nor in relation to the arbitrators as the only distinguishing criteria is the place of issuing the arbitration award, as the arbitration award is considered a domestic award so long as it has been issued in Syria and a foreign award so long as it is issued in any other place regardless of the nature of arbitration or the nationality of arbitrators. The implementation of arbitration awards takes place in Syria by through the enforcement judge, who examines thoroughly the arbitration award and practices his supervisory role for providing the minimum guarantees that should be ensured in arbitration through ascertaining that the arbitration award includes all the legal reasons and ensuring that the arbitrators have observed the preliminary legal principles such as abusing their powers and due process … etc. Dr. Fenri added that the Syrian legislator does not permit challenging the Syrian arbitration award but permits referring it to the president of the court in his capacity as a judge for urgent matters for reviewing it from all aspects. He concluded his presentation by stating the importance of issuing arbitration awards, either institutional or ad-hoc in Syria in order to avoid the application of the provisions which are relevant to the foreign awards.

Mr. Richard Naimark made a presentation titled "The Trends of the American Judiciary with Respect to the Enforcement of Arbitral Awards". Mr. Naimark started his presentation by mentioning that in the last ten years arbitration has expanded in the consumer area, where arbitration was involved in purchasing agreements e.g. car dealings, employment agreements (condition of employment to be bound by arbitration), health care areas e.g. hospitals also include arbitration clauses. However, in health care clauses, the AAA can not accept a mandatory arbitration clause as it is unfair, unless it is voluntary arbitration and not compulsory arbitration. Mr. Naimark stated that it is necessary that an arbitration clause should be a fair and valid, which could be supervised via a committee called "Due-process Protocols", where courts use these protocols as a fair play. He also added that filing class actions can be arbitrated.

Mr. Naimark concluded his presentation by stating that when judges retire they tend to be arbitrators, and that an expansion in the role of arbitration is witnessed and has been in the direction of courts in the increase of number of cases in USA.

Coun. Azzam Eddebb, President of Civil Chamber – Libyan Supreme Court, presented a paper titled "The Role of the Libyan Supreme Court with Respect to Arbitral Awards". Coun. Eddebb started his presentation by discussing the role of the Libyan Supreme Court in arbitration cases through the legal principles it applies on all arbitration relevant matters such as : choice of arbitrators, the mandatory nature of the arbitration clause and the arbitration agreement, limits of agreeing on arbitration, the arbitration clause an public policy, characterization of the arbitration agreement and procedures, challenge of the arbitration award and enforcement of the arbitration award. He concluded his presentation by stating that the principles of the Supreme Court which are relevant to arbitration reveal the role of the Supreme Court in supporting arbitrators in the arbitration case and in supporting judges during reviewing arbitration cases. For reviewing the details of these principles and any other principles, you can resort to the Supreme Court magazine and the journals that will be issued soon on the most important judgments of the Supreme Court.

Dr. Abdel Elah Ibn Abdel Aziz Al Ferian , President of Al Taaef Courts, discussed "The Enforcement of Foreign Arbitral Awards in Saudi Arabia". Dr. Al Ferian distinguished between the foreign awards that are rendered by institutions that have international agreements, with Saudi Arabia and accordingly whose awards are treated in accordance with the provisions of these agreements, and the awards that are rendered by the international centers that have their own systems which are recognized by the Saudi legislator. Moreover, in case of rendering awards by institutions that do not have any agreements with Saudi Arabia, the equal treatment principle is applied as well as the conditions that should be fulfilled for enforcing foreign arbitration awards in Saudi Arabia. He asserted also that the Saudi law is distinguished because it could only permit arbitration in the cases that can be settled via settlement.

Coun. Hussein Mostafa Fathy, Vice-President of the State Law Suite Authority, presented a paper titled "Judicial Review of the Enforcement of Arbitral Awards under the Sudanese Arbitration Law". Coun. Hussein Mostafa tackled in his presentation the issues of judicial supervision and enforcement of awards in accordance with the new Sudanese Law which was issued in 2005. He discussed in his presentation the Sudanese Civil Procedures since 1900 till the issuance of the first arbitration law in the history of the Sudanese legal system. He mentioned the finality of arbitration awards that could not be appealed except by challenging it. He stated that challenging reasons are the same reasons that are indicated in the Washington Agreement of 1965 for the settlement of investment disputes between states and citizens of other states. Coun. Hussein Mostafa talked also about the conditions of enforcing the awards of foreign arbitration tribunals in accordance with the provisions of the Sudanese law.

Dr. Mohamed Salah Abdel Wahab, Partner, Shalkany Law Firm; Lecturer, Faculty of Law, Cairo University and Vice-Chairman, Cairo Branch of the Chartered Institute of Arbitrators, presented a paper titled "Public Policy and International Commercial

Arbitration: Navigating through the Perils of Scylla and Charybdis". Dr. Abdel Wahab started his presentation by analyzing the relationship between the principles of public policy; the enforcement of arbitration awards and the requirements of judicial supervision. Moreover, he explained the principles of public policy through the previous legal comparisons between theory and application. Dr. Abdel Wahab concluded his presentation by stating that public policy should not be a reason for unjustified judicial intervention in arbitration awards, as public policy is not a means for applying the rules of the national law, even if they were considered mandatory rules. He called for achieving a balance between the requirements of public policy and the finality of arbitration awards in order to enforce arbitration awards without any prejudice to any objective fairness criteria especially compliance with judicial instructions. Dr. Abdel Wahab asserted the direct relationship between restricting the principle of public policy and increasing the chances of choosing the state as a place for arbitration.

The final speaker in this session and on the second day was Judge Dr. Ehab El Sonbaty, President of a Court and Lecturer at Egyptian and Foreign Universities, presented a paper titled "Judicial Review on the Enforcement of Arbitral Awards : An Overview of Ad Hoc Arbitral Awards" Dr. El Sonbaty started his presentation by mentioning that ad-hoc arbitration has increased due to the increasing resort to that type of arbitration which has led to bad effects on arbitration institutions and centers that do not have objective and procedural basis, and that do not even have in some cases the minimum required knowledge and experience in the field of arbitration. He stated that supporting arbitration by state courts, regardless of international and national legal obligations, agrees with logic and reality because arbitration serves justice from many aspects and gives state courts a chance for improving its works. Nevertheless, this will not be achieved without a strict judicial supervision on the procedures and guarantees of arbitration in order to achieve the purpose of arbitration. He also discussed the executive and judicial developments of institutional and ad-hoc arbitrations. He stated that the only international centers in Egypt are the Cairo Regional Centre for International Commercial Arbitration and the Marine Arbitration Centre in Alexandria. He concluded his presentation by indicating that arbitration texts should be accompanied by mechanisms for supervising, following up, receiving complaints, having penalties for breaching arbitration awards and their enforcement and a procedural mechanism for its functioning.

Sixth and Final Session:

This session was held on the third and final day of the Conference in the form of a round table which was chaired by Dr. Mohamed Aboul-Enein and with him in the round table were Dr. Coun. Refaat Abdel Meguid ,Dr. Abdel Elah Ibn Abdel Aziz Al Ferian, Mr. Abdel Rahman Al Sabahi, Dr. Soliman Al Shady, , Judge. Coun. Mongi El Akhdhar, Coun. Azam El Deeb and Judge Mohib Meamari and Coun. Gamal Boztiny , Counsellor, Commercial and Maritime Chamber ;Representative of the Algerian Supreme Court.

In this session Dr. Mohamed Aboul-Enien presented a set of questions for open discussion with the members of the round table as well as the participants. The questions were as follows:

1) Does the national judge take into account the impact of his decisions pertaining to arbitration on the appropriateness of the choice of his country as a place for conducting arbitrations?

2) Does the national judge play any role in making his country a suitable place for international commercial arbitration?

3) Should the national judge consider the nature and type of arbitration (institutional or Ad hoc, domestic or international?

4) How should State courts deal with the restrictive causes for setting-aside arbitral awards?

5) How should State courts deal with the recognition and enforcement of foreign arbitral awards?

6) How should the enforcement judge deal with public policy?

7) In case a State court is seized with a dispute in respect of which an arbitration agreement exists, should the judge verify the validity of the arbitration agreement before declaring the case inadmissible?

8) How do State courts concretely nominate arbitrators on behalf of the defaulting party? Are there any guidelines in this respect?

9) Should the national judge content himself with mastering his national law or should he also be aware of court decisions in other jurisdictions?

10) Should sitting judges act as arbitrators?

In the closing session of the Conference, 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. Dr. Aboul-Enein also mentioned that Sharm El Sheikh (3), to be organized by CRCICA, shall take place in November 2009 and that further information in this matter shall be announced on CRCICA's website.

Recommendations

1- Supporting the efforts of Arab States intending to enact new laws on arbitration or to revise their existing ones and encouraging them to adopt the UNCITRAL Model Arbitration Law

2- Enhancing the cooperation between the judicial entities in the Arab States in the field of exchanging court decisions with respect to arbitration, studying and analyzing them.

3- Organizing conferences and training programs for Arab judges in order to raise awareness with respect to arbitration in general and the vital role of State courts in supporting and supervising arbitration in particular.

4- Identifying salient problems facing arbitration in the Arab World, whatever their sources and proposing means for resolving them.

5- Boosting the cooperation between the recognized Arab Arbitration Centers with the aim of encouraging the settlement of Arab-Arab disputes by arbitration.

6- Confronting illegal arbitration centers and inviting the Arab states to license only those arbitration centers that satisfy the prerequisites for guaranteeing the rights of the disputants and the reliability of the proceedings.