

ARBITRATION IN THE ELECTRONIC COMMERCE CONTRACT IN THE ARAB LEGISLATIONS

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ABSTRACT

This study aims at discussing the concept of arbitration in the electronic commerce contract in the Arab, legislations, Providing definitions and characteristics of the electronic contract and arbitration and the most important principles relating to arbitration as an alternative means of dispute resolution. In particular that the different nationalities of the parties to the commercial contract and their place of residence, causes many complications and problems for the law applicable to the dispute and the court competent to hear the dispute, so the parties to the electronic contract choose arbitration to resolve their contractual disputes. Therefore, this study was to identify the legal system of arbitration in the contract of electronic commerce in Arab legislation And the binding force statement of the judgments of the Arab arbitral tribunals in a comparative study with the Model Law on International Arbitration. The study recommends the necessity of explicitly stating in the Arab arbitration systems the application of arbitration rules to the electronic contract.

Keywords: Arbitration, Electronic Commerce Contract, Arab Legislation.

INTRODUCTION

The commercial, economic and technological developments caused by the communications revolution and globalization in some Arab countries such as the UAE, Saudi Arabia, Tunisia, Bahrain and Egypt have affected the commercial contracts (Fried, 2006). This has emerged in the development and legislative modernization of the procedural rules of the international trade contract disputes, establishing special arbitration laws as a means of resolving trade contract disputes, arbitration shall be exercised in one of two ways either under an item included in the original contract in respect of which the dispute has arisen or in accordance with an independent charter of this contract containing the differences between the parties, and on the international scale, the UNCITRAL model law on international commercial arbitration, as well as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

RESEARCH METHODOLOGY

The study followed the comparative descriptive analytical approach, which is descriptive because it describes the subject of arbitration in the contract of electronic commerce in the Arab regimes, within the framework of international conventions, based on a thorough analysis, compilation and analysis of facts, laws and conventions; It is an analytical approach because it is based on the interpretation of the rules of commercial arbitration in the Arab laws and

international conventions and explain their texts, it is a comparative approach because it compares between Arab regimes and international conventions.

RESULTS AND DISCUSSION

In resolution 31/98 of 15 December 1976, the United Nations General Assembly recognized the value of arbitration as a means of settling disputes arising under international trade relations, it was recommended that the rules of arbitration of the Commission on International Trade Law should be used in the widest possible manner in 1985, the Model Law on International Commercial Arbitration, which aimed at assisting States to reform and modernize their laws on arbitration proceedings, was issued, Lebanon was one of the first Arab countries to organize arbitration rules. The Lebanese legislator promulgated the Civil Procedure Law by Legislative Decree No. 90/1983, which included special provisions in international commercial arbitration (articles 809-82), followed by the rest of the Arab countries in the issuance of laws on commercial arbitration, with the accession of eleven Arab countries to the Newark Convention of 1958 on the implementation of foreign arbitration provisions. In addition to signing the regional agreements for the organization of arbitration among its nationalities, the most important of which was the Amman Arab Convention for Commercial Arbitration (1987), So we review the concept of arbitration in the disputes of the electronic contract and the most important principles and applicable law and binding force.

Concept of Arbitration in Electronic Contract

The Arab legislations have agreed on the concept of arbitration. Article (1) of the UAE Arbitration Law 2018 (Laws and Regulations, 2018)

"Is a means regulated by law through which a binding judgment is made in a dispute between two or more parties by an arbitral tribunal pursuant to the agreement of the parties?"

In Article (9) of the Jordanian Arbitration Law 2018, it is defined as an agreement of the parties, whether of the juridical or natural persons who have the legal capacity to contract, to convert to arbitration, Article (5) of the Palestinian Arbitration Law 2000 defines the arbitration agreement: an agreement between two or more parties providing for the assignment of all or some of the disputes that have arisen or may arise in connection with a particular legal relationship, contractual or non-contractual, Article 4 of the Egyptian Arbitration Law in Civil and Commercial Law of 1994:

"The agreement of the parties in disputes of a civil nature to refer disputes arising between them regarding the implementation of a particular contract or to refer any dispute existing between them to be resolved by bodies or individuals chosen by their will or by their agreement"

Concept of Electronic Contract

Means the execution of some or all commercial transactions in goods and services between a merchant and a consumer using ICT (Mansour, 2006).

The Saudi legislator defined in the electronic transactions system for the year 1428 as:

"Any exchange, correspondence, contract or any other procedure which is concluded or carried out, in whole or in part, by electronic means."

In the Tunisian Trade and Electronic Transactions Law (Albrary, 1993). The electronic contract concept in the international trade law was defined by article 2/a of the Model Law on Electronic Commerce of the 1996 Committee of the UNCITRAL as:

"Information created, sent, received or stored by electronic or optical means or by similar means Exchange For electronic data, e-mail, telegraph or telex"

Arab legislation on electronic transactions has been silent on the explicit provision of the electronic contract for arbitration, by reference to the Arab arbitration systems, it is concluded that the parties to the electronic contract may agree by their will to refer the disputes that arise between them to an arbitrator or arbitrators, Article (3) of the Jordanian Arbitration Law 2018 (Laws and Regulations, 2018):

"Subject to the provisions of the international conventions in force in the Kingdom, the provisions of this law shall apply to any arbitration agreement which shall be based in the Kingdom and any arbitration agreed upon subject to this law, Whether civil or commercial dispute between the parties to the public law or the private law and whatever the nature of the legal relationship in which the dispute revolves, contractual or non-contractual. Article (203) of the UAE Arbitration Act 2018" (Hlafalah, 1997).

In general, the contractors may require in the basic contract or by subsequent agreement to present any dispute that may arise between them in the execution of a particular contract against one or more arbitrators. It may also be agreed to arbitrate in a particular dispute on special terms.

Principles of Arbitration

First: Freedom of parties to choose courts, procedures and language Article 16 of the Saudi Arbitration Law stipulates that:

"The parties to the arbitration shall have the right to agree on the place of arbitration in or outside the Kingdom"

In accordance with Article (15) of the Saudi Arbitration System 1428 corresponding to Article (10) of the UNCITRAL Model Law on International Commercial Arbitration of 2006, (Laws and Regulations, 2006). The parties have the freedom to determine the number of arbitrators and Article 11 of the same law states that:

"The parties shall have the freedom to agree on the procedure to be followed in the appointment of the arbitrator or arbitrators."

Article 19 of the same Model Law on International Commercial Arbitration 2006 states:

"The parties shall have the freedom to agree on the procedures which the arbitral tribunal shall follow when proceeding with arbitration".

It corresponds to Article 15.2 of the Saudi Arbitration Law, and article 22 of the Model Law provides that:

"The parties shall have the freedom to agree on the language or languages used in arbitral proceedings".

The Principle of Equal Treatment

Article (25) of the Jordanian arbitration law which corresponds to Article (27) of the Saudi Arbitration law provides *"treat the parties equally and give each and every one of them the full and equal opportunity to present their case or defense"*, and this text is identical to Article (18) of the Model Law of 2006, *"the two parties shall be treated equally and shall have full opportunities to present their case."* This principle corresponds to article 21 of the Sudanese Arbitration Act of 2005. Article (Laws and Regulations, 2005):

"The arbitral tribunal may subject to the equal treatment of the parties at all stage of the arbitration proceedings ".

Applicable Law in International Arbitration

According to article 19 of the Palestinian Arbitration Law 2000, parties to international arbitration may agree on the law applicable to the subject matter of the dispute. If they do not agree, the arbitral tribunal shall apply the Palestinian law, according to Article (39) of the Egyptian Arbitration Act 1994-The arbitral tribunal shall apply the rules agreed by the parties to the subject matter of the dispute and if they agree to the application of the law of a particular state, the substantive rules thereof shall be followed without the rules on conflict of laws unless otherwise agreed, if the parties fail to agree on the applicable legal rules on the subject matter of the dispute, the arbitral tribunal shall apply the substantive rules of the law which it deems most relevant to the dispute.

The provisions of the Arab legislation are in conformity with Article 3/1 of the Rome Convention of 1980 concerning the law applicable to contractual obligations shall apply to the contract of law chosen by the parties (Kamal, 1954). Such choice shall be explicit or derived in a definite manner from the provisions of the contract or from Contract conditions with Article 7 of the Geneva Convention on International Commercial Arbitration of 1961, *"the parties are free to determine the law that the arbitrators should apply to the dispute,"* Article 7 of the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods of 1986 states (Alshrgaoy, 1991):

"The sale shall be governed by the law chosen by the parties. The agreement of the parties with respect to the choice of the law applicable to their contract shall be explicit or can be clearly deduced from the provisions of Contract or behavior of the parties or in conjunction with them".

In accordance with the Saudi regulations in Article (38) of the Saudi Arbitration Law 2007, Subject to non-violation of the provisions of the Islamic Sharia and public order in the Kingdom, the arbitral tribunal shall, in the course of the dispute, consider the application of the rules agreed upon by the parties to the dispute (Laws and Regulations, 2007). A state which has followed its substantive rules without rules on conflict of laws unless otherwise agreed.

It is clear from this that the will of the contractors in the determination of the law of will, be explicit, by specifying the contractors of a particular law governing their contract, as expressly stated in the contract and may be implied so that it can be derived from the facts and circumstances of the contract, and includes the expression of the law chosen by the parties Internal law issued by a particular state (Habib, 1975).

The International Commercial Arbitration Court shall resort to the rules of private international law in general or to the principles which have been established in international arbitration based on model contracts, in addition to the general principles which may be considered as part of contemporary international trade law. Objective provisions for the regulation of international trade links (Khaled, 2001; Hmodah, 2009).

According to Article (25) of the Saudi Arbitration Law:

"The arbitral parties shall have the right to agree on the procedures followed by the arbitral tribunal, including their right to subject these procedures to the rules in force in any organization, body or arbitration center in the Kingdom or abroad, provided that they do not violate the provisions of the Islamic Sharia"

Article 30 of the Sudanese Arbitration Act of 2005 and corresponding Article (39/1) of the Egyptian Arbitration Law which states that:

"The arbitral tribunal shall apply the rules agreed by the parties to the subject matter of the dispute if they agree to apply the law of a particular State; the substantive rules shall be followed unless otherwise agreed"

Those national legal systems were in conformity with, The agreement of Arab legislation is also reflected in article 28 of the UNCITRAL Law, which states: The arbitral tribunal shall decide on the dispute in accordance with the rules of law chosen by the parties as its duty to apply to the subject matter of the dispute Any choice of the law of a country or its legal system shall be taken as a direct reference to the substantive law of that State and not to its own rules, unless the parties expressly agree otherwise (Saied, 2009). If the parties do not specify any rules, the arbitral tribunal shall apply the law determined by the conflict of laws rules which the arbitral tribunal considers to be enforceable.

It is clear from the foregoing that the parties to the arbitration agreement are free and broad in determining the law, applicable to the subject matter of the dispute and the choice of procedures, in this context, the New York Convention signed in 1958 established an indirect conflict rule in Article 15/1/5: Which is:

"It is not permissible to refuse to recognize and execute the judgment at the request of the opponent who is invoked by the judgment only if the opponent submitted to the competent authority in the country required to recognize and implement that the formation of the arbitral tribunal is contrary to what agreed by the parties or contrary to the law of the country in which the arbitration was done Lack of agreement".

3-Form of Arbitration

The UNCITRAL Model Law on International Commercial Arbitration of 1994 (Laws and Regulations, 1994) stipulated that the arbitration agreement should be in writing in Article (7/2)

"The arbitration agreement shall be in writing. The agreement shall be deemed written in the form of a document signed by the parties or in the exchange of letters, correspondence, telegrams or other means of wireless communication which shall serve as a record of agreement or exchange of data."

The UNCITRAL Code has not been tightened in written form, where it can be in correspondence, telegrams, prosecution or defense memos, as well as the New York Convention.

As for the Arab legislations regarding the arbitration agreement, most countries require a written and documented agreement in their legislation, including sometimes only verbal agreement. This is stated in Article (9) of the Saudi Arbitration Law, which stipulates that writing in the arbitration agreement. The arbitration agreement must be in writing or otherwise invalid as the Sudanese law of arbitration. Article 8 of the Sudanese Arbitration Law of 2005, which corresponds to Article 12 of the Law Egyptian Arbitration. The arbitration agreement must be in writing or otherwise it is null and void. The letter of exchange between the two parties through the various means of communication.

Extent of Recognition of the Binding Force of Judgments Rendered by Arbitral Tribunals

The international conventions and the national and model laws gave the arbitral awards the same validity as the court rulings issued by the courts. The New York Convention states in article (3) that Each Contracting State shall recognize decisions made by the arbitral tribunal as binding decisions, Article 35 of the UNCITRAL Model Law on International Commercial Arbitration states that an award is binding regardless of the country in which it was issued. The provisions of Article (50) of the Saudi legislator stipulate that, Subject to the provisions of this Law, the arbitration award issued in accordance with this Law shall have the authority of the order and shall be enforceable. Article 40 of the Sudanese Arbitration Act of 2005 stipulates: The decision of the arbitral tribunal shall be binding and executed automatically or upon written request to the competent court, accompanied by a certified copy of the original decision. The Egyptian Commercial Arbitration Law stipulates in article (55) that the arbitrators judgments issued in accordance with this law shall have the authority of the order and shall be enforceable subject to the provisions provided for in this Law (Sabra, 2001).

CONCLUSION

This paper reviews the legal system for arbitration of electronic contract disputes in Arab legislation, the current study showed that the Arab legislation is consistent in its definition of the electronic contract in terms of content, while not explicitly stipulating the application of arbitration in the disputes of the electronic contract, but implicitly understands the application of arbitration rules and principles and procedures on the disputes of the electronic contract, with the freedom of the contractors to choose the law applicable to their dispute provided that it does not violate the public order of the state concerned or Islamic law, as well as the existence of Arab agreements for arbitration such as the Amman Arab Convention for Commercial Arbitration and the Unified Arab Convention for the Investment of Arab Capital in the Arab Countries, which are in conformity with the international conventions related to arbitration. And we recommend that arbitration regulations be updated and that arbitration be clearly stated on the electronic commerce contract.

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