INTRODUCTION TO NATIONAL ARBITRATION

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Abstract

This study provides a general introduction to arbitration. In particular, this study focuses on the definition of arbitration as well as explaining the differences between arbitration and other alternative dispute resolution methodologies including the main advantages and disadvantages of arbitration.

Keywords: *Arbitration, Alternative Dispute Resolution, Mediation*

1. Introduction

Many parties all over the world deem arbitration to solve dispute that may arise between them the most acceptable method of dispute resolution, due to its characteristics that make it much better than any other means. Because arbitration is one of the most important methods of solving disputes, various nations have enacted modern arbitration laws, such as the Kingdom of Saudi Arabia which issued its first Arbitration Law in 1983, which was replaced with a new arbitration law in 2012[1].

[1] The previous arbitration law was issued in the Royal Decree No. M/46 in 12 Rajab 1403 on April 25, 1983. The New Arbitration Law was issued by Royal Decree No 35 on April 16, 2012. It was approved by the Decree of Council of Ministers No. (156) on April 9, 2012.

2. Definition of Arbitration

Like the Old Arbitration law (1983) in Saudi Arabia[2], the New Arbitration law (2012)[3] does not include a definition of arbitration. Furthermore, when going through the provisions of relevant international conventions and statutes, we do not find any legal definition of arbitration, including under the UNCITRAL Model Law.

While there is no comprehensive definition of "arbitration", scholars have attempted to define the term in order to narrow-down and specify the legal concept of arbitration to improve practitioners' general understanding of the concept. For example, Hamzeh Haddad in his book wrote that "Arbitration, in its most simple form, is an agreement reached by parties to a defined legal relationship within the context of private law, it may be also in Public Laws / to submit their financial dispute to a person or more, to be appointed, directly or indirectly, by the parties, and for that person(s) to issue a final (binding) award in relation to the dispute in lieu of the official judicial system."[4] Abed Alkader in his book wrote that "Egyptian jurisprudence defines arbitration as a way to settle disputes which arise between two parties or more, whom agree to refer their dispute to an arbitrator or arbitrators to resolve their dispute." [5]

Mark Huleatt-James and Nicholas Gould state in their book that "arbitration may be described broadly as a private process which commences with the agreement

[2] Issued by Royal Decree No. M/46 (12 Rajab 1403 on April 25, 1983).

[3] Issued by Royal Decree No. M/35 on April 16, 2012; and approved by the Decree of Council of Ministers No. (156) on April 9, 2012.

[4] Jordan: Arbitration Law No. 31 of 2001, 4 (Amman : Law And Arbitration Center).

[5] Narmeen, Arbitration Agreement, 25 (Dar Al Nahda Al Arabia, Cairo 1996).

of a parties to an existing, or potential, dispute to submit that dispute for decision by a tribunal of one or more arbitrators. The tribunal is chosen by, or on behalf of, the parties who may also establish the procedures to be adopted by the tribunal. The decision [award] of the tribunal is final and legally binding on the parties."[6] Enid A. Marshall, in her book, wrote that "an arbitration is the reference of a dispute or difference between not less than two persons for determination after hearing both sides in a judicial manner by another person or persons, other than a court of competent jurisdiction." [7]

Henry Brown and Arthur Marriot defined arbitration as: "A private mechanism for the resolution of disputes which takes place in private pursuant to an agreement between two or more parties, under which the parties agree to be bound by the decision to be given by the arbitrator according to law after a fair hearing, such decision being enforceable at law."[8]

These definitions demonstrate the core principles of arbitration: the need for an arbitration agreement; a dispute; a reference to a third party; and, an award by the third party. Also, these definitions show that an arbitration agreement is an optional agreement. In other words, arbitration is voluntary[9]. Furthermore, arbitration is between two parties or more.

[6] Mark Huleatt-James et al, International Commercial Arbitration: A Handbook, 1 (1999).

[7] Marshall, Enid, Gill, The Law of Arbitration 1 (London: Sweet and Maxwell. 2001).

[8] Henry Brown and Arthur Marriot, ADR Principles and Practice, 56-7 (1993).

[9] In some states, arbitration can be compulsory, particularly in relation to specific classes of disputes, such as labor disputes. For example, for labor disputes under Syrian Law the parties are required to use arbitration: see Khalawi Ahmed, Types of Arbitration, 2015 available at: http://www.droitetentreprise.org/web/%D8%A3%D9%86%D9%88%D8%A7%D8%B9-%D8%A7%D9%84%D8%AA%D8%AD%D9%83%D9%8A%D9%85/

Some of these definitions show that the arbitration agreement may be of one of two kinds, relating to either an existing or potential dispute. Also, the number of arbitrators and how arbitrators are appointed is important. Finally, the award is final and binding.

Based on the above definitions, it is clear that there is no official legal definition and even scholars disagree about what arbitration means. For the purposes of this study, the arbitration shall be defined broadly as a method of alternative dispute resolution that allows two parties or more to agree to settle an existing or potential dispute by one or more arbitrators who are appointed by the parties, and the award is final and binding. This definition allows for the range of views various scholars have articulated, because this definition includes all of the core principles: existing or potential dispute; the number and appointment of arbitrators; and, the type of arbitral award.

3. Differences between Arbitration and other Alternative Dispute Resolution Means

Arbitration is one way of settling disputes, but there are many other ways of settling commercial disputes. The field is known as Alternative Dispute Resolution (or ADR). This following discussion differentiates between each of these methods and arbitration.

3.1. Differences between Arbitration and Judicial Process

The judicial process differs from the arbitration process in many ways. First of all, the judicial process is the original way disputes were resolved in a community. Arbitration developed as a secondary alternative to judicial litigation. Also, consent in arbitration is essential. In contrast, the judicial process does not require consent.

The parties in an arbitration have the right to choose their arbitrator, whereas litigants cannot choose their judge. Furthermore, under Islamic law, the judge must

reach the level of Ejtihad[10]. An arbitrator is not required to reach this level, and only needs to have experience resolving disputes, and does not need to have any particular form of higher education[11].

The rules of arbitration differs from the court rules. For example, under Saudi Arbitration Law Article 2, the arbitrator can rule on all matters except personal status and to matters in respect of which no settlement is permitted., A judge, on the other hand, can adjudicate over anything. A judge must follow specific rules and procedures which depend on the type of case (e.g. commercial, criminal or civil procedure). In contrast, the arbitrator follows procedures that are agreed on by the parties provided that those procedures do not contradict existing laws.

Finally, unlike a judge, the arbitrator's task is not limited to the country where the arbitration is taking place. Furthermore, the parties can dismiss the arbitrator after appointing him, but a judge cannot be dismissed by the parties[12].

3.2. Differences between Arbitration and Negotiation

Negotiation is a fast and simple way to resolve disputes. In negotiation, the parties try to resolve their disputes by establishing areas of agreement and reconciling

[10] This means "an independent reasoning" of "the utmost effort an individual can put forth in an activity": see Marinos Diamantides, Shari'a As Discourse: Legal Traditions and the Encounter with Europe (Edited by Jørgen S. Nielsen and Lisbet Christoffersen, Farnham: Ashgate, 2010. 280 pp. "International Journal of Law in Context 10, no. 03 (2014).

[11] Wagdy Ragheb, Is Arbitration Kind of Judiciary? 17(1) JOURNAL OF LAW, 134 (1993).

[12] Abdel-Moneim Fouad and al-Husain Ghunaim, Mediator in the Judicial Organization, 20 (1992).

areas of disagreement.[13] Furthermore, settlement of a dispute by negotiation is always possible, even after other methods of resolving the dispute have been set in motion.[14]

The main differences between arbitration and negotiation are that first, the parties in negotiation do not need to appoint a third party to help them in resolving their dispute, because they may perform the negotiations amongst themselves. In contrast, the parties in an arbitration must appoint an arbitrator or arbitrators. Second, the arbitral award is binding and enforceable, while the award or the agreements resulting from negotiation are not binding and enforceable unless accepted by all parties.

3.3. Differences between Arbitration and Expertise

An expert is person appointed to make an evaluation of an issue through his own observations, knowledge, and skill.[15] The use of an expert differs from arbitration in many ways. First, the role of the expert is to present his opinion on a specific point, but the arbitrator gives the parties an award. Also, decisions made by an arbitrator are binding and can be appealed, but an expert report is not binding and thus there is no formal appeal mechanism necessary.[16]

Another difference is that the arbitrator can bring in an expert who makes his own investigation and comes to his own conclusion, while the arbitrator performs a

[13] Brown, supra note 13, at 18.

[14] Alan Redfern and Martin Hunter, Law and Practice of International Commercial Arbitration, 16 (2009).

[15] Robert Hunt, The Law Relating to Expert Determination, April 2008, at 8, available at: http://www.roberthuntbarrister.com/ExpertDetLawApril2008.pdf

[16] David R Perks, Expert or Arbitrator? Points to The Draftsman to Consider, 51 (Landlord and Tenant Review. 2017). See also Faisal Al-Fadhel, Party Autonomy and the Role of the Courts in Saudi Arbitration Law, Ph.D. Thesis, Queen Mary, University of London, 67 (2010).

quasi-judicial function: he is asked to hear the evidence, arguments and attestations, and then to make a decision based on that material.[17]

The use of an expert may prevent a dispute from arising[18]. Arbitrators are appointed after a dispute arises. Furthermore, in some situations, when the contract contains terms of a highly technical nature, the arbitrator may ask for the assistance of an expert. A construction contract, for example, may involve complex issues so it may be better to ask for the help of an expert[19].

3.4. Differences between Arbitration and Mediation

Mediation and arbitration are both achieved by the parties' consent. Mediation is "a process of negotiation, but structured and influenced by the intervention of a neutral third party who seeks to assist the parties to reach a settlement that is acceptable to them."[20] The mediator provides solutions and makes suggestions to bridge the differences between the parties and to achieve agreement between them.

The first difference between arbitration and mediation is that the arbitral award is binding, whereas the mediator cannot oblige the parties to reach a settlement, so he assists in settling the dispute amicably. Also, unlike arbitration, the mediator sometimes needs to meet each party separately, to listen and discuss the dispute with them. After

[17] Perks, supra note 21, at 51.

[18] Marshall, supra note 12, at 7.

[19] Anthony Connerty, Documentary Credits: A Dispute Resolution System From The ICC, 56 (Journal of International Banking Law. 1999).

[20] Karl Mackie, David Miles, William Marsh, and Tony Allen, The ADR Practice Guide Commercial Dispute Resolution, 11 (2000).

that, the mediator encourages each party to consider the views of the other party, then tries to bring the parties together and asks them to achieve a compromise solution.[21]

Furthermore, the parties in mediation do not normally appoint a third party to help them to resolve their dispute, because they may perform this task themselves. In arbitration, the parties must appoint an arbitrator or arbitrators. Finally, the decisions made by the arbitrator to solve the dispute can be appealed. However, a mediation agreement cannot be appealed in the same manner.

3.5. Differences between Arbitration and Conciliation

The conciliator is a neutral party whose role is to help the parties reach an agreement. Conciliation is "an agreement between the disputants or their representatives, where they settle their disputes by relinquishing parts of their rights".[22] Reconciliation requires waiving some or all of the obligations of both parties involved in the dispute. The parties will not waive these obligations prior to an arbitrator's final decision.[23]

Another difference is that the arbitrator has a legal position that provides the authority to issue a decision binding on all parties. Unlike the arbitrator, the conciliator cannot impose his recommendations on the parties. Also, the work of the arbitrator is to provide a complete decision for all parties, while a conciliator will help to draft a contractual agreement that may be executed by the parties to end the dispute.

Conciliation is for existing disputes only, whereas arbitration can be adopted for current and future disputes. Furthermore, unlike conciliation, arbitration is like a

[21] Redfern, supra note 19, at 20.

[22] Al-Fadhel, supra note 21, at 67.

[23] Aljohani Abdulrhman, Arbitration in Saudi Arabia, 8, LLM Thesis, Chapman University (2013).

courtroom proceeding, in the sense that witnesses may be called to present evidence, and be cross-examined, transcripts are produced and legal counsel may be involved.

A reconciliation contract is not a binding contract and cannot be considered binding unless it is formalized or declared before and approved by the court. In contrast, an arbitration decision is a binding document at the time of its execution. Also, the decision of the arbitrator can be appealed according to the laws governing the arbitration procedure. In contrast, the conciliation agreement is not appealable. Finally, the cost of conciliation is normally less than that of arbitration.[24]

4. Advantages and Disadvantages of Arbitration

Of all the dispute resolution methods discussed here, parties appear to prefer attempting to resolve their disputes by arbitration rather than litigation.[25] Arbitration has distinct advantages over litigation. However there are also some disadvantages to arbitration.

I will briefly discuss the advantages and disadvantages of arbitration, starting with the advantages.

4.1. Advantages of Arbitration

Privacy: Parties to the dispute have the right to keep the matter private and avoid publicity. "Some parties prefer to know in advance that their disputes will be determined out of the public gaze"[26]

[24] Id.

[25] Stephan Balthasar, International Commercial Arbitration: International Conventions, Country Reports and Comparative Analysis, 9 (2016).

[26] D. Sutton and J. Gill, Russell on Arbitration, 2 (23nd edn, 2007).

Time*:* the disputes are resolved more quickly when the parties go to arbitration. It is "faster and more result-oriented than litigation. Litigation may involve pretrial delays due to overcrowded dockets, lengthy discovery procedures and, indeed, dilatory tactics employed by one side or the other or both".[27] For instance, section 1(a) of the English Arbitration Act 1996 holds that "The object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense."[28]

Flexibility: another important advantage of arbitration is that arbitration is flexible in procedure. The parties are free to determine the procedural rules of the arbitration. Article 25 of the New Arbitration Law confirms that "The two parties to arbitration may agree on procedures to be followed by the arbitration tribunal"[29]. Also, they can choose a tribunal and determine the language and location of the proceedings.

Enforceability of award: another benefit of arbitration comes in terms of enforcement international awards. It is easier than enforcing court judgments because there are many international conventions relating to enforcement of arbitral awards.[30]

4.2. Disadvantages of Arbitration

Cost: the cost of arbitration is higher than litigation[31]. The parties in litigation do not pay for the judge or the other court officials[32]. Furthermore, the courtrooms are

[27] Isaak Dore, Arbitration and Conciliation Under The UNCITRAL Rules: A Textual Analysis, 4 (1986).

[28] The English Arbitration Act 1996, This Act received Royal Assent on June 17, 1996 and came into effect on January 1, 1997, at art. 1-a

[29] Saudi Arbitration Law, supra note 1, Article 25.

[30] David, supra note 31, at 13.

[31] Jamieson, George, Arbitration and Conciliation for Aliment, 47 (Scots Law Times 2003).

[32] Harvey Kirish, The Arbitration of Construction Disputes, 3 Construction Law Journal, 9 (1986).

not rented and the services of a court report are provided free of charge.[33] However, "the parties (in arbitration) will have to find the fees and expensive of arbiter(s), any clerk or ancillary staff and perhaps the cost of suitable accommodation."[34]

Time: Sometimes, arbitration does not deliver what is expected of it. Some delays may occur, for example, when "in the case of a tribunal with more than a single arbitrator, or in the case of international arbitrations when the parties come from different countries, the arbitrator from a third country and all must travel to a neutral arbitral forum. Of course, the difficulties of international arbitrations tend to be compounded by the fact that they usually also feature multi-arbitrator tribunal."[35]

Another delay may arise when one party wants to settle his dispute very quickly but the other party tries to keep the issues from being settled.[36] Furthermore, another delay may arise if the arbitrator is very busy whose services are in high demand.[37]

All means of dispute resolution have advantages and disadvantages. The advantages of arbitration are clear in the context of commercial disputes. Arbitration can lead to a quicker resolution which is especially important when dealing with time-sensitive commercial transactions and deals.[38]

5. Conclusion

[33] Id.

[34] Davidson, Fraser, Arbitration, 15 (2000).

[35] Id.

[36] John Parris, Arbitration Principles and Practice 18 (1983).

[37] Marshall, supra note 12, at 4.

[38] Al-Fadhel, supra note 21, at 59.

Arbitration is a method of alternative dispute resolution. Furthermore, arbitration allows two parties or more to agree to settle an existing or potential dispute by one or more arbitrators who are appointed by the parties. In the end, the award is final and binding.

Unlike, alternative Dispute Resolution Means, the arbitral award under arbitration is binding and enforceable, while the award or the agreements resulting from negotiation, Expertise, Mediation, or Conciliation are not binding and enforceable unless accepted by all parties.

Arbitration has distinct advantages over litigation. Because of that, parties appear to prefer attempting to resolve their disputes by arbitration rather than litigation.

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