

# Enforcement of Foreign Arbitration Awards in the Middle East

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## Identifying Where the Problem Is and How to Fix It

It is often argued that arbitration has always existed in the Middle East, having been practiced in pre-Islamic times and recognized under the Sharia Law. Yet it is questionable whether, despite this heritage, the Middle East is a leader in the field of arbitration, and in particular, whether it is a leader in the enforcement of foreign arbitration awards.

The purpose of this article is to explore the challenges of enforcing a foreign award in the Middle East and how these challenges may be overcome. This is a subject which has been discussed and debated for decades and, though some progress has been made, the Middle East still has a long way to go to improve its standing in the world of arbitration, especially in respect of the enforcement of foreign awards.

The Middle East does not lack talent, resources or growth. Most of the agreements drawn up in the Middle East (especially the Gulf region, Egypt and Lebanon) provide for arbitration in a variety of commercial transactions (even those local in nature). The Middle East has for years been referring cases to leading arbitration institutions within and outside of its regional borders, such as the International Court of Arbitration of the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the Dubai International Arbitration Centre (DIAC) and the Cairo Regional Centre for International Commercial Arbitration (CRCICA).

With the exception of Iraq, Libya, Sudan and Yemen, all Arab countries have acceded to the New York Convention. Nonetheless Middle Eastern countries still conjure up a number of odd judgments whereby enforcement of a foreign award is refused on incredulous grounds. These reasons appear to have no local basis either and are in complete violation of the New York Convention.

There are at least four possible reasons for this: Lack of political will to enforce foreign awards or apply the New York Convention fully.

1. Lack of legislative platforms to support arbitration and the enforcement of foreign awards.
2. The judicial system's inexperience and lack of understanding of international arbitration.
3. Arbitrators' general lack of understanding of local laws and culture when delivering an international award which is likely to be enforced in a Middle Eastern country.

None of the above reasons are justifications for refusing to enforce an award under the New York Convention. They are instances where the State has failed to fulfill its international obligations and the end result is that the country loses its international reputation, its status and any claim it might have had to be an arbitration-friendly jurisdiction.

## Political Will

A country's political will is an important constituent for the recognition and enforcement of arbitration awards, especially international awards. It also serves to develop arbitration and adds to the progress of

the country's judicial system, legislation, training and education.

Though important, it is not enough to publically acknowledge that arbitration is deeply rooted in Islam. Resources must be invested and efforts made to develop arbitration properly, to absorb arbitration into the country's culture and establish a platform such that the country will be recognized as an arbitration-friendly State.

Of course it is understood that the State's judicial system must be fully independent from the political system. However the political will to develop and invest in arbitration has a huge influence on the attitude of a country's judicial system. The recognition of arbitration goes beyond the judicial system to deal with a number of essential elements that create an arbitration-friendly environment. It is wise to look around and see which countries are following this today and thereby ascertain whether the political will in these countries has paid off. It is not a coincidence that Paris and London are leading venues for arbitration and that the ICC and LCIA are leading international arbitration centers. Singapore and Brazil are investing tremendous efforts into the development of their countries as arbitration-friendly States which recognize the need for arbitration, attract users to their arbitration centers and welcome international arbitrators to associate themselves with their countries. Bahrain has likewise taken great strides to develop arbitration on a judicial and autonomous level at its arbitration center, the Bahrain Chamber for Dispute Resolution (BCDR-AAA).

It is no secret in the world of international arbitration that a government can do a lot for the recognition and development of arbitration. It is as simple as investing in proper arbitration centers, formulating drives and initiatives for legislators to come up with world-class arbitration laws, encouraging the proper running of arbitration centers, promoting independence, providing the support needed, working with the judicial authority to train judges specialized in arbitration and finally introducing arbitration at all levels of training institutes and law schools. Governments should further encourage and welcome the use of arbitration and the country as a venue for international arbitration. While these principles are well recognized, simple to learn and easy to implement, few Middle Eastern countries have taken the move to give arbitration the political backup that is much needed. The idea is there, but what is lacking is the fuel, drive and a leader to implement the process.

## **Legislation**

Most Arab countries (with the exception of Iraq, Libya, Sudan and Yemen) have adopted the New York Convention into their national laws, and as an international treaty the Convention takes precedence over whatever previous national laws existed regarding the enforcement of foreign awards. Many Arab countries have also adopted specific laws dealing with arbitration which are modeled on the UNCITRAL Model Law on International Commercial Arbitration ('Model Law') with some modifications. Such modifications vary from one Arab State to another. Some Arab countries (including Iraq, Kuwait, Qatar and the United Arab Emirates) have a section within their civil procedural law which deals with arbitration, but which is not compliant with the Model Law, though it covers many of the same issues.

The most recent arbitration law is that of Saudi Arabia, which was passed in 2012. It is yet to be seen if Saudi's judicial system will enforce foreign arbitration awards, especially those which apply foreign laws or involve aspects relating to Sharia Law.

New challenges have arisen in Egypt due to the adoption of a Ministerial Decree which created serious doubt regarding the Arbitration Law enacted in 1994. In 2008 Egypt's Ministry of Justice introduced Ministerial decree 8310/2008, making the process of enforcing arbitration awards cumbersome in terms of substance and (more importantly) internal procedure. The regulations make the initial deposit of an award for enforcement subject to approval of the Ministry of Justice, which approval shall be withheld in cases dealing with title to real property or where the award contradicts public policy or concerns family/personal status amongst other things.

This is a clear instance of where an Arab State adopted the New York Convention, but then stymied its

effect by issuing a local law that makes it difficult to enforce a foreign arbitration award. It can sometimes be construed as a total contradiction of the country's obligations under the New York Convention. A common issue is where the country requires the foreign award to have been ratified in the State in which it was rendered (a requirement done away with under the Convention), or where the enforcement process is so lengthy and riddled with appeals and challenges that it takes many years and great expense to enforce.

In addition, Qatar recently decided to annul a local and foreign arbitration award on the grounds that the award was not delivered in the name of His Highness, the Emir of Qatar. In this incident, Qatar applied its local law to a foreign award, essentially requiring a private arbitration undertaken in a foreign country to comply with domestic Qatari procedural law.

The UAE's judicial system has also applied local law to foreign arbitration awards. Last year the UAE Court of Cassation declined to enforce a foreign award on the grounds that there were no apparent assets of the defendant in the jurisdiction. The court applied local law used in litigation cases, by which an attachment against an asset or an enforcement of judgment against an asset can only be executed if the defendant is a domicile of UAE; it is not enough to show assets are available in the UAE without the defendant also being domiciled in the UAE. This is entirely contrary to the Convention, as well as the UAE's Arbitration Law (Articles 235-238 of the UAE Procedural Law).

The lack of a proper dedicated arbitration law (based on the UNCITRAL Model Law) could be the factor for those States that seem to be unfriendly to foreign arbitration awards or unpredictable when it comes to enforcing them. Lack of well-developed laws and practices creates a huge vacuum, provides no assistance to the judicial system and definitely establishes uncertainty on the enforcement of foreign arbitration awards, even with the New York Convention having been adopted.

It is evident that certain countries face fewer problems after adopting a proper arbitration law, even more so if the law is based on the UNCITRAL Model Law. Having said this, even those countries that have adopted the UNCITRAL Model Law are still working to improve their attitudes towards arbitration and lengthy legal processes which continue to impact upon the enforceability of foreign awards.

## **Judicial Authority**

The judicial system is the most important factor for the success of arbitration in a society, as it is the gateway for arbitration to enter any State and to flourish. Although arbitration predates the establishment of the judicial system, it is now settled side-by-side with the judicial system to help parties resolve disputes, assist with attracting foreign investments, local investments and the private sector.

Arbitration provides an excellent recourse to justice by settling the parties' disputes and giving them a choice of venues, institutions and arbitrators, in addition to more powerful rights to enforce awards in foreign jurisdictions courtesy of the Convention. It is not enough to have an independent judicial system or a judicial system that is friendly towards arbitration. That will certainly help, but it is also important for the judicial system to be operating efficiently.

In a survey which I carried out as part of my preparation for this article, participants from each of the jurisdictions involved in the survey were asked to identify the most fundamental challenge for the enforcement of foreign arbitration awards within their jurisdictions. Almost all of the Middle Eastern States agreed that the biggest challenge remains the judicial process and its misuse by parties even where the State has adopted the New York Convention and UNCITRAL Model Law. The judicial authority and its treatment of arbitration is an extremely important factor impacting the progress of arbitration in general and the enforcement of foreign awards in particular. The judicial authority has a strong and key role to play in the development of arbitration and the successful emergence of a State as a leader in arbitration whether in terms of knowledge and expertise or venue.

Education systems and curricula are very similar throughout the universities in the Middle East from North Africa to Yemen, with text books and learning programs being almost identical. The training processes for

the judiciaries are also identical, with certain recent exceptions in some of the GCC countries in and Egypt, Lebanon and Tunisia, which have revised their trainings or partnered with an international institute.

Most of the judges in the Middle East tend to gradually develop their judicial skills through a very similar path of progression. They become judges either through the prosecutor process or the judicial-training process. None of the lawyers in the private sector have the opportunity to become judges in the Middle East. The judicial system therefore is the main source of experience and work tends to be government-related practice or academic with very little exposure to the private sector. Those judges who have raised the bar in the Middle East tend to have done so on account of personal interest and private initiative taken by themselves to progress and exchange knowledge with others locally or internationally. The system itself, however, does not provide a judge with the opportunity to get exposed to different types of cases through a number of years of experience.

If there is to be an adjustment within Middle Eastern countries in respect of arbitration in general or the interpretation of the relevant New York Convention articles relating to enforceability of foreign arbitration awards, the adjustment must come either by developing the education standard at the university level or by overhauling the training of judges. It is time to make substantial changes to the way in which the system currently operates in order to improve the judicial system's approach to arbitration and, more importantly, the process by which disputes move through the judicial system.

These changes are needed across the Middle East at all levels of the judicial system, from court clerks to judges, and whether relating to an application to nullify an arbitration award or to enforce an arbitration award pursuant to a country's obligations under the New York Convention. The clash between applying the local law or the New York Convention to foreign arbitration awards is not only unacceptable, it also damages the private sector and foreign investment in that country.

Any argument that the judicial authority is trying to protect public order or policy of that country is a mere sham. History has proven, and we continue to see, that countries which are very protective of their jurisdictions and prove to be unfriendly to arbitration always lose more than they gain in protecting 'public order'. Parties have the choice of venue, and they choose those States which are arbitration friendly. A country's negative attitude towards arbitration also does not benefit the local legal community, as young arbitrators in the country will be prevented from emerging and developing in the arbitration community.

### **Lack of Support from International Arbitrators**

It is a fact that legislators, judicial authorities and inadequate training are reasons for the lack of progress in arbitration in the Middle East, particularly with the challenges that international awards face when it comes to enforcement.

Nonetheless some responsibility falls on the shoulders of leading international arbitrators for failing to make significant contributions to the progress of arbitration in the Middle East, with the exception of a few international arbitrators who do contribute. Such a responsibility is two-fold: (1) contributing to the progress of arbitration; and (2) helping to enhance understanding of enforcement of international awards in the region.

The first one, which I believe is most important, has to do with the fact that most international arbitrators' contact and engagement with the Middle East has generally been self-centered, with only a few exceptions. Such engagements are usually initiated for marketing and business-development purposes to generate work and to secure nominations by local centers and businesses in the region, when in fact responsibility to the community and region goes far beyond this.

International arbitrators have been reluctant to candidly criticize the system in the Middle East, and have rarely engaged in lobbying or public-relations campaigns, nor have they volunteered to work on any review of or commentary on laws enacted in the region (unless they are paid in full). Very rarely do arbitrators or leading international arbitration firms engage young Middle Eastern trainees, lawyers or arbitrators to

undergo training in their law firms. If it does happen, it is usually an exception to the rule and is done for the benefit of the practice rather than to contribute to the Middle Eastern arbitration community as a whole.

This is surprising considering the startup, growth and development of numerous international law firms in the Middle East. By way of example, in Dubai itself just a handful of local trainees, lawyers or arbitrators are hired by the arbitration departments of international firms, let alone by the firms in their entirety.

Though international arbitrators can properly diagnose the problems of foreign arbitration awards in the Middle East, even if it slightly varies from country to country, they are reluctant to contribute to a solution. No constructive investment of time, money or travel has been made to resolve such issues even though these arbitrators are actively involved in Middle Eastern arbitrations and frequently sit on arbitration panels in the region. International law firms have similar responsibilities but do not onboard this investment and in fact allow these issues to drag on, even though they understand that contribution can be as little as a simple training or some active lobbying.

The second responsibility is that international arbitrators need to be sensitive to, or rather culturally savvy about, Middle Eastern issues. Trivial though these issues may seem to be, they have to be recognized and considered when sitting as arbitrators locally or internationally.

This is the responsibility of the tribunal as well as the counsel who appear before the tribunal.

International arbitrators who arbitrate cases in a European region can focus on the European standards or style. However, when it comes to serving as arbitrator in cases relevant to the Middle East, these arbitrators need to be aware of local issues while hearing cases or drafting final awards to ensure that the awards will be enforceable. It is internationally recognized that arbitrators are responsible for ensuring their arbitration awards are enforceable and that they should not limit their work to hearing cases and rendering awards.

This responsibility should be elevated and the bar should be moved up to a higher tier to ensure that international arbitrators meet such challenges. Refraining from acting arrogantly and instead carrying out the necessary due diligence about the region must be included in the basic responsibilities of an individual when he/she sits in as an arbitrator in the Middle Eastern region or conducts a case.

Most local requirements are generally simple and trivial, and they deal with procedural issues that need to be handled during the hearing or when rendering the award. Some examples are as follows:

- Checking a power of attorney and the power granted to the party
- Agreements on extension of time
- Giving the parties the right to represent themselves and ensuring that there is no violation of due process in the arbitration
- Having a witness swear an oath before questioning and documenting the same in the process
- Asking the parties whether they wish to grant the arbitrators the power to award advocacy fees (by agreement of the parties) or any similar agreements between the parties on changes or issues that need to be addressed during the process or at the time of the award. These should be documented in the minutes of the meeting or in the terms of reference.

I am not suggesting that arbitrators follow the judicial process and become so technical that the arbitration process becomes bureaucratic, slow and similar to a court proceeding. What I am suggesting is that international arbitrators who are highly qualified need to recognize and understand the jurisdiction which they are in and its defects, and do not therefore operate in isolation of such facts while conducting the arbitration, as if those facts have no relevance to the jurisdiction.

Working without acquainting themselves with the region is a big flaw in the process of international arbitration which contributes to the frequency of challenges to international arbitration awards.

International arbitration and arbitrators should accept the responsibility of overcoming these challenges, which can be accomplished most of the time through simple processes (such as recording some of those issues in the minutes of the hearing) or by requesting the parties to consent to certain agreements which can be obtained easily.

## **Conclusion**

If the Middle East is interested in becoming a leader in international arbitration, or in being a valued part of the international arbitration community, it must recognize that it has a number of problems that prevent it from emerging as an arbitration-friendly jurisdiction.

For the Middle East to assume leadership in international arbitration, it must start with the political will to recognize the importance of arbitration, accompanied by specific actions to reform judicial and educational institutions within five years.

Introducing new updated legislation, reforming existing laws, training arbitrators and the judiciary, establishing and supporting (both financially and with manpower) fully independent arbitration centers, encouraging the development of local and international arbitration communities – these are all important and necessary steps that need to be taken. Moreover, resolving the issues affecting the enforcement of arbitration awards will not only develop arbitration within the region but will lead to local practitioners being recognized as major players in the field.

These steps cannot be completed overnight, but they can be done with the political will and a solid five-year plan. The reforms also need support and contributions from the international community, whether on a legislative or training level, so as to achieve best practice.

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