

ELECTRONIC ARBITRATION IN LEBANON – OVERVIEW AND TRENDS

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Abstract

Electronic arbitration (E-arbitration) is usually defined as a method to settle disputes through online platforms providing arbitration services. It constitutes a recent process dispute resolution mechanism between economic agents through the use of information and communication technology. E-arbitration is inseparable from the growth of e-commerce and cross-border trade transactions. Contracting parties in such transactions expect a swift, cost-effective and efficient dispute resolution mechanism. It is no coincidence therefore that an increasing number of domestic legislations and international regulations adhere to the rules governing E-arbitration. The fact remains that, surprisingly, the Lebanese regulatory framework puts several obstacles to the successful implementation of E-arbitration in Lebanon. In this respect, this contribution endeavors to identify the scope of such obstacles, and discusses the solutions adopted in other legal frameworks.

Keywords: Electronic (Online) Arbitration, Lebanon, E-commerce, Domestic and International Arbitration, Globalization

Introduction

Online arbitration (also known as electronic arbitration, cyber-arbitration, cyberspace arbitration, virtual arbitration, or arbitration using online techniques) is an Alternative Dispute Resolution method (ADR), and precisely an Online Dispute Resolution technique (ODR). What makes online arbitration demanding and attractive is both its non-judicial way to settle disputes, as well as the use of electronic, technological, and innovative means to go about the process by appointing an arbitration panel vested with a binding authority and conducting the process, at least partly, on virtual platforms using the Internet. The use of information and communication technology (ICT) in this arbitration service is not an assisting tool but an

essential one to the administration and functioning of the process. In other words, electronic arbitration (E-arbitration) is a method to settle disputes through online platforms providing arbitration services.

For E-arbitration to take place as an ODR mechanism, each party submits evidence to the arbitrator via information and communication technology (mostly by e-mail or filling a standard online application on virtual platforms) and then the arbitrator(s) decide(s) the outcome. Some may perceive Electronic arbitration as a new ADR method. However it remains an Arbitration service and follows the arbitration rules and regulations relevant to each case although conducted online.

The transition to a paperless world and the expansion of E-commerce in the framework of globalization of trade has led to major E-disputes which led some scholars to argue that “Conflicts arising online should be resolved online” [D. Girsberg and D. Schramm, 2002]. This argument continues to be the subject of an international intensive debate between those practicing arbitration and the ones providing the services. One thing is certain: the fast pace of International Trade has required finding alternative ways to traditional dispute resolution methods in order to solve E-Business disputes easily, flexibly and quickly. In this context, E-arbitration may constitute a suitable tool for resolving the growing number of international disputes in a confidential, non-judicial but legally enforced manner.

Many websites already provide for an online user-friendly arbitration service that allows two or more parties to resolve business or individual disputes through experienced online arbitrators, such as: arbfile.org, netarb.com, onlinearbitrators.com and many more. In addition, there have been many attempts to initiate E-arbitration projects; some of which were successful such as the Cyber-Tribunal at the University of Montreal (Canada 1996) or WIPO (World Intellectual Property Organization- Switzerland 1967) and others with limited scope such as the Virtual Magistrate VM at the Villanova University School of Law (USA 1996).

To date, Lebanon has not been exposed to E-Arbitration. This situation may be justified by various cultural and legal reasons. The Lebanese culture is conservative and not open to swift changes and technical developments. The lebanese consumer feels safer using hard copy documents or a face-to-face transactions, rather than conduct such businesses and activities virtually with no real tangible evidence. Furthermore, Lebanon has not yet passed any laws regulating E-commerce and E-signature, even though there have been several attempts to enact such legislations such as EcomLeb, i.e. a proposed project by the Lebanese Ministry of Economy and Trade that aims to develop a complete legal framework for E-commerce. Also, the Lebanese council of Ministers has drafted a bill to amend several provisions of the Lebanese Code of Civil Procedure (LCCP) relating to

evidence to incorporate both electronic evidence and electronic signature. The bill was approved by the council of ministers on 12 July 2000 and transmitted to parliament by decree number 3553 dated 3 August 2000 but has not yet been approved by the latter.

As a consequence, Lebanon does not accept E-commerce and E-signatures as admissible evidence before the courts. All of these reasons make it hard for Electronic arbitration to infiltrate the Lebanese trade-related disputes settlement whether in Business-to-Business contracts or in Business-to-Consumers contracts.

In the context described above, this article endeavors to discuss the possibility of implementing online arbitration in Lebanon. A close-up look will be given on issues surrounding the Lebanese legal framework in force. For the sake of clarity of presentation, the following developments will be grounded on the same distinction adopted by the LCCP between domestic arbitration (Section I) and international arbitration (Sections II). These arguments will be followed by a brief conclusion.

Section I: E-arbitration in domestic arbitration

While the French Law has largely inspired the wording of the Lebanese arbitration law, the LCCP has, however, a broader scope of application. It does not restrict arbitration to commercial issues only, unlike its French Module, but also allows arbitration in civil cases when the matter in dispute may be subject to a settlement or conciliation (LCCP, arts 762 and 765, read with the Code of Obligations and Contracts, art.1037). Accordingly, very few disputes cannot be subject to arbitration, including the ones pertaining to public policy restricted to the sole jurisdiction of national courts such as criminal disputes and personal status issues.

While a large consensus emerges about the fact that E-arbitration could favor trade in Lebanon, it is also crucial that the Lebanese domestic arbitration regulatory framework does not raise barriers for resorting to electronic means in such local settlement of disputes. Unfortunately, there appears to be more hurdles to overcome than favorable factors.

A- Conditions and effects of arbitration conventions

The LCCP distinguishes between arbitration agreement and arbitration clause. It provides for different rules and conditions governing each, even though their effects are in practice the same.

Arbitration Clause is referred to in art 762 LCCP under which: “Contracting parties may insert in their commercial and civil contracts a clause providing that all disputes that may arise from the validity, performance or the interpretation of their contracts will be settled by way of arbitration”. One of the main features of an arbitration clause, which

distinguishes it from an arbitration agreement, is clearly a *ratione temporis* element: upon the signature of an arbitration clause the dispute has not yet arisen. Thus, this clause would cover all future disputes arising from the validity, performance and interpretation of the contract.

The basic conditions for the validity of an arbitration clause are:

- 1- It must be in writing, either in the main contract or in a separate instrument to which the contract refers;
- 2- It must appoint the arbitrator(s) by name or refer to their function or indicate the method of their appointment, e.g. by a reference to the rules of an arbitral institution.

If these two conditions are not satisfied, the arbitration clause shall be null and void (LCCP, art.763). It is submitted that, in application of the principle of severability, nullity under article 763 does not invalidate the whole contract.

On the other hand, under article 765 LCCP, an arbitration agreement is defined as a contract in which the parties agree to determine a dispute, capable of settlement, through the process of arbitration by one of more appointed persons. One of the main elements of an arbitration agreement is the existence of a specific dispute.

The basic conditions for the validity of an arbitration agreement are:

- 1- It must be in writing;
- 2- It must define the subject of the dispute;
- 3- It must appoint the arbitrator(s) by name or by reference to their function or prescribe the method of appointment (e.g. by reference to the rules of an arbitral institution).

The nonexistence of the written document does not mean nullity, since the agreement may be proved by other means such as admission or by deciding oath. However, failure to satisfy the second and third condition of form will invalidate the arbitration agreement.

It should be recalled that under domestic arbitration provisions, the written form of the arbitration agreement (LCCP, art.763) is required as a condition of validity (*ad validitatem*), while in agreements to arbitrate entered into following the occurrence of a dispute (LCCP, art.766), the written form is required as a condition of proof (*ad probationem*) [Nayla Comair Obeid, 2012].

Consequently, an arbitration clause made by electronic means is invalid under the Lebanese domestic arbitration legal framework. The electronic nature of this clause does not satisfy the written condition of validity, and it will be hence deemed null and void. Even if proof were found on the existence of the electronic contract by the state courts and based on the severability principle, the arbitration clause would still be inexistent for not satisfying the written condition of validity and the arbitration process

will not give rise to a negative effect of the national courts to declare their incompetence when faced with such electronic contract referring to arbitration. Therefore, disputes will not be arbitrable in presence of such electronic support. In contrast, such a clause will be valid to the extent that the online dispute settlement mechanism is referred to in a written contract meeting the conditions mentioned above.

With respect to arbitration agreements, if the parties provide written evidence of the electronic agreement, whether by fax exchange, telegrams or any other means of evidence admitted under the Lebanese Law, there should be no reason to invalidate the recourse to domestic arbitration.

B- Conditions of arbitral proceedings

The LCCP recognizes two types of domestic arbitration: ad hoc arbitration governed by the contractual instrument complemented by the Lebanese rules and regulations, and organized arbitration regulated under the rules of a legal entity such as the Chamber of Commerce. Once parties decide which type to follow, they have to choose between ordinary arbitration and arbitration by amiable composition. If they have not specified, there is a general consensus that ordinary arbitration has been elected.

As a rule, the applicable law to a dispute referred to domestic arbitration is the Lebanese law. However, the parties may agree that the dispute will be settled according to a foreign law or a foreign custom (LCCP, art.767 par.2). Nevertheless, the arbitral panel is under a legal duty to always conform to the Lebanese procedural rules pertaining to public policy and the fundamental rights of defense especially the ones stipulated in article 776 paragraph 3 LCCP. Thus the LCCP is of mandatory application.

The LCCP regulates the composition of the tribunal (LCCP, art.771), the commencement of arbitral proceedings (LCCP, art.773), the powers of arbitrators (art. 785 and 789), the time-limit to issue an award (LCCP, art.773), the joint tasks of the arbitral tribunal and evidence (LCCP, art.779), the incidence of procedure (LCCP, art.782) and so on.

In respect of evidence, there are few procedural rules expressly regulating the methods of gathering information by the arbitrators. Parties may agree not to apply strict judicial rules and resort to other means so long as they are consistent with the nature of arbitration and do not violate the fundamental procedural rules. Under the LCCP, all types of evidence are admitted (official deed, private deed, correspondence, admission, witness testimony, expert evidence, etc.). As per article 779 LCCP, arbitrators can hear witnesses without requiring them to give evidence under oath. Article 780 LCCP also gives the arbitral tribunal the power to order a party to disclose evidence in its possession, but it cannot impose any sanctions if the

party does not abide by such order. During arbitral proceedings, notifications are made according to the methods determined by the arbitral tribunal, or by any other means ensuring their effectiveness.

The LCCP does not contain any provision on determining the place and the language of arbitration proceedings. Unless expressly agreed by the parties, the place of arbitration is decided by the arbitrators, who take into account the residence of the parties and any investigations that may be required. The place of arbitration determines, in domestic arbitration, the jurisdiction of the courts over such important matters as the appointment and challenge of arbitrators, the enforcement of awards and the methods of judicial review.

Consequently, the parties may decide to conduct the arbitral proceedings online wherein the place of arbitration would be designated to one location albeit proceedings conducted virtually. With the spread of the Internet, documents can be transmitted and notified to all parties simultaneously at a modest cost. There is not a need to prove that a party has been notified of a document and to stall the proceedings until notification since on electronic platforms notification will be registered once the party opens the file on the other end of the network. Moreover, there is no reason to travel from one place to another when hearings could be conducted by video or audio conferences. These online means can highly facilitate the meetings of the parties and accelerate the time required for rendering the award, thus keeping the costs of the arbitral proceedings to a minimum. Online techniques can be used in arbitral proceedings provided that their application does not prejudice a party. The tribunal is abided by the mandatory public policy rules, and shall preserve the right of a fair and impartial trial and comply with the rights of defense. In that regard, a party is prejudiced if it has less access or know-how of the technology than the other party.

C- Conditions of arbitral awards

Following deliberation by the arbitral tribunal, an arbitral award is rendered either by unanimous or majority votes (LCCP, art. 788). The final award should end all the issues of the dispute, and thus the authority of the arbitral tribunal. Articles 790 and 791 LCCP regulate the form of the award and stipulate that the arbitral award should contain:

- 1-The name or names of the arbitrator(s);
- 2-The date and place of the award;
- 3-The names and titles of the parties, their capacity and the names of their counsel;
- 4-A summary of the parties' contentions with respect to facts, claims and evidence;

- 5-The reasoning of the award and a decision proper (*dispositif*); and
- 6-The signature of all the arbitrators.

According to article 794 LCCP, an award is *res judicata*, regardless of any registration, filing or exequatur. Thus, there is no written requirement as to form for the validity of the award. However, the written condition is for obtaining the *exequatur*. The award is not enforceable per se. The enforcement procedure (*exequatur*), together with the determination of any ancillary disputes arising from the enforcement, is reserved to the court's jurisdiction. As per to article 793 LCCP: "to obtain an enforcement order of the arbitral award, the arbitrators or the more diligent submit the original arbitral award accompanied by a certified copy of the arbitration agreement to the clerk of the competent court of first instance. The copy of the arbitration agreement must be certified by the arbitrators, the competent official authority (public notary) or the clerk of the court. The clerk of the court must draw up a minutes to confirm such submission and its date."

According to articles 795 and 796 LCCP, the president of the court of first instance grants the execution order after the examination of the award and the arbitration agreement. The execution order is affixed to the original arbitral award submitted and to the original presented by the party requesting the exequatur, which will be returned to him at once. This decision is not subject to any recourse. However, the decision that refuses to grant the exequatur must be explained and refused only for the reasons foreseen in article 800 LCCP. This decision is subject to appeal within 30 days of notification.

Therefore, the president of the court of first instance should not carry out an in-depth examination of the arbitral award, but simply verify that it is not subject to annulment. For this purpose, an award cannot be enforced without producing the original hard copy of the arbitration convention and an authenticated hard copy of the award. Consequently, E-arbitration is difficult to put in place because of its virtual electronic nature. However, no procedural rule prevents that the arbitration proceedings be conducted online and both the arbitration convention and the award be produced originally and signed on a hard copy through document exchanged by mail for the sole purpose of obtaining exequatur.

To sum up, online arbitration faces various legal obstacles under the LCCP's provisions dealing with domestic arbitration due to the written requirements as a condition of validity of the arbitration clause, and the producing of hard copies of both the arbitration convention and the award at the stage of enforcement. In contrast, there are practically no provisions under the LCCP prohibiting the conduct of arbitral proceedings virtually, especially in the case of amiable composition where procedural rules are more flexible.

Section II: E-arbitration in LCCP's provisions regulating international arbitration

The practice of international arbitration has developed to allow parties from different legal and cultural background to resolve their disputes without the formalities of their respective legal systems. There exist very few procedural rules of mandatory nature governing international arbitration where the consensus between the parties is considered the core for validity of any agreement to arbitrate, irrespective of reference to any state law.

Pursuant to article 809 LCCP inspired by the French law, arbitration is deemed international “when it involves the interests of international trade”. This definition refers to an economic criterion based on the mobility across the borders of at least one of the main elements of a contract, i.e. the goods, the services or the price. Such an approach does not seem to be tailored to the fragile Lebanese economy dependent, to a large extent, on foreign investors. The latter and the Lebanese business community would be deprived of the advantages of international arbitration if the definition of the international arbitration process was in practice kept as narrow as the French model. That is why Lebanese scholars have proposed an amendment of article 809 LCCP to provide for a wider definition of international arbitration, ideally similar to the definition found in the UNCITRAL Model Law on International Commercial Arbitration adopted in 1985 as revised in 2006.

Clearly, there are numerous options open to the parties as the scope of the LCCP provisions applicable to international arbitration are sufficiently wide to accommodate a variety of institutional and ad hoc types of arbitration. In practice, the resolution of international trade-related disputes is commonly conducted under the rules of internationally-renowned institutions, such as the ICC International Court of Arbitration (ICC), the Cairo regional Centre for International Commercial Arbitration (Cairo Centre), American Arbitration Association and its specialized bodies and rules (AAA), the London Court of International Arbitration (LCIA), the Hong Kong International Arbitration Centre, and the International Centre for the Settlement of Investment Disputes (ICSID). With regard to ad hoc arbitration, the UNCITRAL Arbitration Rules of 1976 as revised in 2010 constitute the legal reference framework.

The following will discuss the applicability of E-arbitration in view of the rules applicable to arbitration agreement, arbitral proceedings and arbitral awards under the Lebanese international arbitration regulatory framework. It will also examine the possibility of recognition and enforcement of electronic international awards on the Lebanese territory.

A- Arbitration Agreement

It is undisputed that the international arbitration agreements are more and more concluded by means of electronic transmission instead of traditional written forms. Yet the legal framework for such agreements, especially the New York Convention of 1958, was established before the Internet Age. This raises the question of validity of E-arbitration agreements conducted by e-mail or on online platforms under the NY Convention rules adopted by the majority of states for the recognition and enforcement of international arbitral awards conducted on the territories of member states.

Pursuant to article 2(1) of the NY Convention of 1958 “*Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them[...]*”. Therefore, the solution mainly depends on whether electronic transmission can satisfy the “in writing” requirement set in the NY Convention.

Article 2(2) of the NY Convention specifies that: “*the term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange letters or telegrams.*”

Also, most international and national legal frameworks require an arbitration agreement to be conducted in a written form such as article 7(2) of UNCITRAL Model Law on Arbitration: “*The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.*”

Such formalities were set forth so as to protect the will of the parties to defer their disputes exclusively before the arbitral tribunal through solid evidence. The formalities of writing and signature are based on the need for physical evidence of the will of the parties to arbitrate and the consequences it entails especially the effect of renouncing their right to refer the dispute (if it emerges) to state courts.

Clearly, article 7(2) of the UNCITRAL Model Law on Arbitration provides a broader understanding of “in writing” requirement than the one adopted in the New York convention of 1958. The phrase “agreement in writing”, contained in the NY Convention and UNCITRAL may be diversely interpreted. Some perceive that the purpose of these requirements is to confirm the integrity of the award and the identity of the arbitrators. Such

purpose can be respected by a secure electronic document. Moreover, article 8 of the UNCITRAL Model Law provides that a data message satisfies the requirement of an original when there is a reliable assurance of its integrity and when it is capable of being displayed to the person to whom it is to be presented. In this respect, the Geneva Convention of 21 April 1996 goes further and provides, through article 1, that: “In relation between states whose laws do not require that an arbitration agreement be made ‘in writing’, any arbitration agreement [can be] concluded in the form authorized by these laws.”

Recently, a new step has been taken by several modern arbitration laws towards a more flexible approach in the definition of “in writing” requirement resulting in the acceptance of any method of communication that may serve as a record of an agreement (For example: Section 5 of the English Arbitration Act of 1996, article 6 of the US Uniform Arbitration Act, and article 1031(5) of the German Code of Civil Procedure). Further, article 1316 of the French Civil Code, introduced by the law of 13 May 2000 relating to E-Evidence (*loi sur la preuve électronique*) states that the wording “writing” includes the use of new technologies for the conclusion of an agreement and that “*an electronic-based document has the same probative value as a paper-based document*”.

All in all, there seems to be a general acceptance on the following conditions required to recognize E-documents and E-signatures:

- (a) Ability to retrieve and provide a sustainable record of the communication or agreement;
- (b) Possibility of identifying the person(s) associated with such communication or agreement;
- (c) Availability of adequate technologies that secure the integrity of the communication or agreement.

Several types of electronic transmissions are used to conclude an arbitration agreement of which E-mail is considered to be the most popular mean of data transmission. But is such an agreement concluded by e-mail valid?

Many scholars compare e-mails to telegrams since the essential features of an exchange of telegrams could be reproduced through appropriate use of e-mail [Mohamed S. Abdel Wahab, 2012]. The argument underlining that fraud in e-mail is easier than in telegrams is not persuasive because security procedures such as encryption, intervention of third party certification body, or watermarks, can give the e-mail an equivalent, if not stronger, degree of security. Hard copy documents can also be subject to fraud. Thus it is reasonable to conclude that the risk of fraud cannot be presented as a valid argument against granting the status of written agreement to an arbitration agreement stipulated and accepted by e-mail

[Rafal Morek, 2008]. Moreover, the use of paper documents is unable to keep up with the fast pace of trade since it is easier to lose hard copy documents, not to mention that keeping a trade record would be much slower and more complicated.

With the adoption of E-commerce and E-signatures, emails are considered as an admissible means of evidence. In Business to Consumer Contracts (B2C), international arbitration is frequently used. Subsequently this raises the question of the validity of such arbitration agreements concluded by the click of a mouse. Usually a consumer enters into such agreements through an online offer including an arbitration clause and an invitation to accept the offer by a simple click on the “I accept” or “Yes Button”. In many cases, the user has to fill out a standard form in which an arbitration clause remains buried among numerous other general terms and conditions. It is admitted that if an arbitration clause is clear, unambiguous and visible to the consumer then it is admissible. However, if it is truly buried between numerous provisions then, in case of dispute, the arbitration agreement cannot be invoked [See Lieschke et al., v. Realnetworks, Inc, 2000].

Furthermore, some might argue that in these B2C contracts, the consent (particularly essential in international arbitration) is missing or unclear since the agreement to arbitrate appears in general terms and conditions presented to consumers. The concern is that by accepting such general terms and conditions including the agreement to arbitrate, consumers might be giving up their right to recourse state courts in case of disputes without truly understanding the effects of such denunciation.

Gradually, there have been several attempts to broaden the scope of the writing requirement and secure it, especially with the UNCITRAL Model on E-commerce (1996) and the UNCITRAL Model Law on E-signature (2001). These two regulations created a new concept of data message such as email and electronic data interchange called EDI. The latter is the electronic transfer of information from one computer to another using an agreed standard to structure the information. Article 11(1) of UNCITRAL Model Law on E-Commerce provides that: *“In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose.”*

In addition, the European Directive on E-Commerce adopted in 2000 indulges European member states to amend their legislations in order to take away formal obstacles to E contracting. Yet, to date, some courts in several jurisdictions have refused to recognize and enforce an award under the NY

Convention when the award is based on an arbitration agreement concluded by Electronic means, such as e-mail (See Norway, Court of Appeal 16 august 1999 Stockholm Arbitration Report 1999, Vol2 at 121).

In the context described above, the Lebanese legal framework has some particularities, reflecting the difficulty of the Lebanese legislator to deal with this issue. The LCCP does not distinguish between arbitration agreement and arbitration clause under the section regulating International Arbitration. The terms “arbitration agreement” and “agreement to arbitrate”, as referred to from time to time in articles 810, 811 and 812 of the LCCP, are not defined, leaving the matter to be governed by the law chosen by the parties or that determined by the arbitrator. In this respect, the legal arsenal governing international arbitration (LCCP, art. 809-821) is particularly liberal and flexible compared with provisions relating to domestic arbitration. The priority is given to the free choice of the parties and their will to choose the procedural and substantive laws that are most convenient for their transactions.

The requirements as to form under domestic arbitration are not found under the rules regulating international arbitration. Pursuant to article 812 LCCP, the requirement of writing is not mandatory in international arbitration. An agreement to arbitrate would therefore be valid even if it was made electronically. Moreover, there are no mandatory rules forcing the parties to designate the arbitrators or a method of appointment. The question rises in case of difficulty in such designation. In this case, if the place of arbitration is agreed to be in Lebanon or if the parties have chosen the Lebanese procedural law to be applicable pursuant to article 810 LCCP, and in the absence of an agreement to the contrary, the most diligent party is authorized to request an appointment from the President of the Court of First Instance whose decision is not subject to appeal, unless the arbitration agreement is void.

As a rule, the national laws of the parties govern the matter relating to their capacity. If a party is deemed to be incapable under article 5(1) of the New York Convention, the recognition of the award by the court would be denied.

While the LCCP does not require the agreement to be made in writing, there seems to be some contradiction between this liberal position and the wording of articles 814, 815 and 816 LCCP. Indeed, under articles 814 and 815 LCCP both the award and the arbitration agreement should be produced either by an original or by a certified copy as conditions for recognition and enforcement of international and foreign awards. In addition, article 816 provides that an appeal of a decision granting recognition and/ or *exequatur* of an international award is not acceptable without evidence of the existence of an arbitration agreement.

As it was, what is the actual scope of these contradictions?

The beginning of an answer is provided by Dr. Walid Abdulrahim [2012] underlining that: *“The absence of a written agreement does not imply nullity of international arbitration agreement, since the proof of the existence of agreement is governed by the rules of private international law. According to article 139 of the LCCP the proof of existence of a legal act is governed by either the law of the country, which is applied to its effects, or the law of the country in which it was made. The parties can provide in their legal act (agreement or contract) the law applicable to their legal act (the proper law of the contract), so this law is applied. If the parties did not provide such a law, then the law of the place where the legal act was made (Lex loci actus) or has its effects (the place of its execution) is applied; the determination of such law will be done in accordance with the principle of significant connection known in private international law and in the Lebanese Law. Accordingly, the absence of a written form for an international arbitration agreement does not imply its nullity under the Lebanese Law unless it is void or null under its applicable law.”*

Clearly, the agreement to arbitrate will not be nullified if not made in writing under the Lebanese law unless it is void or null under the applicable law agreed by the parties. As a result, it can be created electronically especially if the law of the state under which it was drafted adopts E-Commerce and E-signature rules.

Until Lebanon adopts the rules of E-commerce and E-signature, in order to guarantee recognition and enforcement, the arbitral tribunal and parties to a contract could produce hard copies of arbitration agreement and award for the sole purpose of enforcing the award in Lebanon wherein the entire arbitration process would be made electronically. Lebanon has not yet ratified any of UNCITRAL Model Laws and does not recognize in its procedural legal framework E-commerce rules or E-signatures. Any enforcement of international award made by means of electronic data transmission will not therefore be possible under the NY Convention of 1958 if it is not consistent with the writing and hard copy requirements set forth in the Lebanese law, especially article 814 LCCP.

B- International arbitral proceedings

The parties are free to choose any type of international arbitration they deem necessary whether ad hoc or organized arbitration compatible with their financial caliber. When choosing ad hoc arbitration, UNCITRAL rules are the most widely used in international arbitration. In organized arbitration, most of the Lebanese jurists refer to the rules of the ICC mainly because of the historical connection between Lebanon and France.

Further, article 811 LCCP allows the party to choose the applicable procedural law. In this case, the parties have three options:

- 1- They may agree on the applicable procedural rules and incorporate them in the arbitration agreement, or
- 2- They may refer to pre-set arbitration rules of international arbitration institutions, or
- 3- They may refer to any procedural state law.

There is no provision in the LCCP preventing parties from combining any of the above-mentioned options in the same dispute. The very existence of these options indicates that the LCCP has followed at least two modern trends: a possible choice of a procedural law other than that of the law of the place of arbitration; and a possible choice of a procedural law different from the substantive law, the latter being expressly provided for in article 813 LCCP. If the parties fail to specify the procedural rules, it is up to the arbitral tribunal to specify which rules to follow (LCCP, art. 811 *in fine*). Although not specified in the LCCP, the arbitrators are bound by the fundamental rules such as the right of defense and the equal treatment of the parties, which, if not complied with, would lead to setting aside the award and affect its enforcement.

A similar approach is adopted as to substantive law since the parties are free to choose the substantive law governing the dispute (LCCP, art. 813).

Moreover, Except for two specific provisions, namely one relating to the appointment of arbitrators involving the intervention of Lebanese courts (LCCP, art.810) and another relating to the free choice of procedural law (LCCP, art.811), The LCCP's provisions regulating international arbitration do not refer to the rules regulating the start of proceedings, powers of arbitrators, place of arbitration, time-limit for making the award, evidence and incidents of procedure, etc. This may allow the multiplicity of international rules, applicable state laws and arbitral tribunals' orders to come to the fore, when appropriate.

There is no rule in the Lebanese procedural law prohibiting the conduct of the arbitral proceedings virtually so long as the place of arbitration is specified for the sake of court intervention instances. Thus, parties are free to decide the manner in which such proceedings would take place and the rules of admissibility of evidence. As far as the tribunal ensures fairness and equality in treating the parties, online techniques should be fully admissible.

Pursuant to article 19(2) of the UNCITRAL Model Law on International Commercial Arbitration of 1985, the parties are "free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings [...]. Failing such an agreement, the arbitral tribunal may,

subject to the provisions of this Law, conduct the arbitration in a manner considered appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence”. The same trend is adopted in article 3(2) of the ICC rules that specifically authorizes electronic communications with the Court and the Secretariat within the ICC.

Nevertheless, there are two major problems in conducting the proceedings electronically. Firstly, technical resources are currently accessible only at high cost so that the transmission would not be of top quality since delays and interruptions cannot often be avoided and witnesses might not be clearly seen or heard. Secondly, it also needs to examine the efficiency of certain types of evidence produced online, especially when the arbitral tribunal cannot require witnesses to give evidence under oath in cases where the Lebanese procedural law is governing the dispute (LCCP, art. 779). Some scholars have argued that a trusted third party could be involved such as a local arbitral institution or a notary to guarantee a fair conduct of electronic hearings and to assess the credibility of a witness [Julia Hornle, 2003].

Another difficulty relates to the place of arbitration. If the arbitral proceedings are conducted entirely online with parties and arbitrators in distinct places, it seems impossible to determine the place of arbitration. Given the importance of specifying such a place, especially that the court intervention and the judicial review process are dependent on it, it is of major importance to deal with this matter.

For this purpose, article 20 of the UNCITRAL Model law on International Commercial Arbitration, followed by several modern domestic arbitration laws, authorizes parties to freely choose the place of arbitration. If the parties agree on institutional arbitration, the choice of the place of arbitration is usually set forth in the internal applicable arbitration rules of the institution. If the parties fail to specify the seat of arbitration, it is up to the arbitral tribunal to decide on that matter taking into consideration the convenience of the parties. It is noteworthy that the case law in the field international arbitration allows the place of arbitration to be a strictly legal concept first depending on the will of the parties [Rafal Morek, 2008]. As a way of illustration, under the ICC arbitration cases, statistics have demonstrated that parties decide the place of arbitration in more than 80% of the ICC arbitration cases.

To summarize, the current Lebanese regulatory framework governing international arbitration allows the use of electronic means to conduct arbitral proceedings. Of course, some parameters are taken into account when resorting to electronic arbitration, especially in specifying the place of arbitration so as to avoid legal uncertainties and allow state courts to

intervene when needed. Although more guarantees are required to ensure effectiveness, confidentiality and equal treatment between the parties, the Lebanese traders should not hesitate using this ODR out of fear of non-admissibility and unenforceability of the arbitral proceedings, especially as the Lebanese legal framework provides for some precautions aiming to avoid the nullity of these proceedings.

C-Recognition and enforcement of international arbitral awards

Prior to determining whether an electronic international arbitral awards can be recognized and enforced under Lebanese law, it is necessary to analyze the validity of an arbitral award issued electronically.

There is no definition of an award in the international arbitration rules so the applicable procedural domestic law to a dispute governs the matter. Notwithstanding the absence of specific provisions regulating foreign and international awards, the LCCP has set out basic conditions that should be met in a foreign and international award to be granted an exequatur in Lebanon. This indirectly points to some basic rules regarding the form and substance to be complied with in an award.

While most of the international arbitration rules provide that an award must be in writing, the New York Convention of 1958 does not require that an arbitral award be made in writing but only that parties seeking its enforcement produce a duly authenticated original award (art. 4 NY Convention). If the original is not produced, the NY Convention system cannot be invoked and thus the award will not be enforced. In view of the absence of any original document in a virtual world, how can such requirement be satisfied if the award was made electronically? \

Given the latest technological advancements especially with the creation of watermark, we can today talk of an original copy of an electronic document where we can distinguish between an original and a mere duplicate [Maurice Schellekens, 2011]. Furthermore, since the function of an original is to be a point of reference and a mean of measuring fidelity of the award, an e-file under certain conditions can be considered an original. In practice, it is sufficient for the arbitrators to apply their electronic signature to the document, with a certification authority guaranteeing that the pair of keys belongs to the arbitrator. It would be paradoxical not to accept as original an electronic award guaranteed in this way, while elsewhere states admit as authentic acts performed by electronic means [O. Cachard, 2003].

Some states, including Canada and France, as well as the UNCITRAL Model Law on International Commercial Arbitration require that the award be made in writing, whereas other states such as England (sect 52(1) of the English Arbitration Act of 1996) and the United States of America (art. 19 of the revised Uniform Arbitration Act of 2000), do not

require such conditions and leave it up to the parties to decide on such matter.

This difficulty would soon disappear when Electronic documents and signatures are commonly accepted, namely with the ratification of E-Commerce and E-signature. Once notification by electronic communication means is secure, timed and simultaneous to all parties, more effectiveness will be provided in the notification process of the award when many time limits shall start (i.e. correction, interpretation and appeals against the award).

Apart from the definition of an award in the LCCP's provisions governing international arbitration, it should be mentioned that there is no formal definition in the LCCP of foreign awards and international awards in the context of recognition of awards and exequatur. A tentative definition may only be inferred from the title given to articles 814 and 815 LCCP. The absence of a statutory definition of foreign and international awards leads us to believe that the Lebanese legislator has aimed at widening the scope of the notion of awards eligible for recognition and exequatur. In this respect, one may note that arbitral awards rendered electronically have all the attributes of a traditional arbitral award: it is authoritative, binding, final and subject to an action for setting aside under limited grounds set out in the applicable law.

However, article 815 of the LCCP, dealing with international and foreign awards, refers to articles 793-7 regulating domestic arbitration, which apply, *mutatis mutandis*, to international and foreign awards. Most of these provisions are procedural. The arbitration agreement and the foreign awards should be produced through either original copies or certified copies. If the award and/or the arbitration agreement are made in a foreign language, which is likely to happen when the award is made abroad, the LCCP, article 814, prescribes that both documents must be translated by a sworn translator.

With regard to the substantive conditions, the award should not be seen, *prima facie*, as manifestly breaching a rule of international public policy. It is submitted that the violation is expected to appear on the face of the award and should not transpire from any extraneous documents, such as briefs, memoranda or other documents submitted in the arbitral proceedings. In practice, the decision granting recognition or enforcement of the award is generally obtained through *ex parte* proceedings. In such circumstances, the judge will only verify:

- (i) The existence of the award; and
- (ii) That recognition of the award is not manifestly contrary to the Lebanese international public policy (LCCP, articles 795, 814, 815, 816 and 819).

The grounds to resist enforcement are those set out in articles 814, 817 and 819 LCCP.

Such an approach is consistent with article 5(1) of the New York Convention of 1958 providing that recognition and enforcement of an award may be refused “(d) [if] the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such an agreement, was not in accordance with the law of the country where the arbitration took place [...]”

As mentioned, the LCCP does not put forward any formal requirement on rendering the award other than the mutual consent of the parties. The written requirement necessary in case of the arbitration clause in the domestic arbitration is not demanded here. However, in order to obtain leave for enforcement, a hard copy of the decision together with a hard copy of the agreement to arbitrate (see supra) must be submitted to the president of the court of first instance which has jurisdiction in the place where the award was made if the international arbitration award was rendered in Lebanon (LCCP, art.815). However, had the award been rendered outside Lebanon, request for exequatur would be submitted to the President of the Beirut Court of first instance (LCCP, art.810).

We believe that recognizing such an award is very hard in Lebanon without an original authenticated hard copy of both the agreement to arbitrate and the arbitral award submitted to the Lebanese national courts. Until Lebanon adopts the UNCITRAL Model Laws on E-Commerce and E-Signature, Electronic arbitration will remain very challenging to implement within our legal system. Yet it is possible to create such copies for the sole purpose of submitting them to the Lebanese courts to obtain leave of enforcement for the arbitral award after conducting all proceedings online.

Conclusion

In conclusion, the above discussion suggests at least two observations.

E-arbitration is a phenomenon inseparable from the growth of e-commerce and the proliferation of cross-border trade. Its entrenchment in both national and international legal frameworks is an inevitable process, even if it requires from the competent authorities to reformulate the traditional approach on arbitration.

Previous developments have also demonstrated that the Lebanese regulatory framework has a significant delay in this area. Businesses and Consumers face numerous legal and technical barriers to accede to such a dispute resolution mechanism, with adverse effect on the attractiveness of Lebanese legislation. The challenge for the Lebanese legislator will consist in ensuring a balance between the specifics surrounding online arbitration

proceedings and the requirements of transparency, confidentiality and protection of the rights of defense.

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