Summary of a Doctoral Dissertation with the Title

Arbitration Agreement and Enforcement in Arab States

A study of the Laws of Egypt, the United Arab Emirates and Multilateral Treaties

Alexander Tobias Hiller

This document contains summaries of a PhD thesis submitted to the Faculty of Law of Ruprecht-Karls University Heidelberg in the Summer of 2020 and published by Nomos in July 2021.

Part A (pages 2 to 11) is a revised English translation of the German summary submitted to the faculty. The German original is available at:

http://archiv.ub.uni-heidelberg.de/volltextserver/30070/

The Part A summary does not follow the structure of the thesis, but of the presentation made at its defence. It aims to provide a high-level overview of the main findings and add details where appropriate. Wherever recent developments warrant a qualification of statements made in the thesis, this is noted in the footnotes.

Part B (pages 12 to 23) contains the main findings originally published on pages 371 to 379 of the thesis with slight modifications, translated to English and reproduced with the kind permission of the publisher.

Further information (in German) can be found on the final page of this summary and on the publisher's website at:

https://www.nomos-shop.de/nomos/titel/schiedsvereinbarung-und-vollstreckung-in-arabischen-staaten-id-100027/.

Part A.

Summary of the Thesis

Introduction

It has become a commonplace that arbitral tribunals have emerged as a significant actor and moderator of cross-border trade in the second half of the twentieth century. Certainly, criticism of arbitration is growing louder in the global north (as unwelcome competition to state jurisdiction, or as untransparent private bodies judging sovereign acts taken in the public interest). Notwithstanding this criticism, Arab states are working to establish themselves as international arbitration hubs. The establishment and promotion of arbitral institutions, reforms of arbitration laws and an increasing number of arbitral awards and related jurisprudence are visible proof. These developments of the last decades call for a re-examination of the *status quo* and the relationship between the state and the arbitrator.

I.
Scope and structure of the thesis

1.1. Territorial scope. First of all, no consideration of Arab law can avoid a study of the Egyptian parent legal system. This is particularly true in arbitration, which has been significantly influenced by Egyptian law. In 1984, Egypt was the first Arab state to establish an arbitral institution, the *Cairo Regional Centre for International Commercial Arbitration,* which can still be described as the regional leader. In 1994, Egypt was the first Arab state to transpose the UNCITRAL Model Law into national law. Egyptian jurisprudence and

doctrine on neighbouring legal areas (such as civil, civil procedural and administrative law) are also widely adopted in the Arab region.

Second, the growing economic and foreign policy aspirations of the United Arab Emirates (UAE) have not spared the laws governing cross-border dispute resolution. In May 2018, after more than ten years of preparations, the Emirati Arbitration Law came into force. In December of the same year, the review and reform of almost the entire code of civil procedure was completed. In addition to the provisions on the enforcement of foreign judgments and arbitral awards, this includes the provisions on *ex parte* proceedings.

Finally, a discussion of international arbitration law cannot disregard the sources of international law. Going beyond the New York and Washington Conventions, regional conventions have facilitated the recognition of foreign enforceable instruments. These include the Arab League Convention of Riyadh and the Gulf Cooperation Council Convention of Muscat. The discussion is completed with the two regional investment protection conventions of Amman and Baghdad (the latter better known as the OIC agreement).

1.2. Subject matter. The thesis deals with the arbitration agreement and with rendering the arbitral award enforceable. For the sake of linguistic brevity, the declaration of enforceability is simply referred to as "enforcement". This corresponds to the practice of Arabic jurisprudence and doctrine, where the declaration of enforceability is commonly referred to as "enforcement" (Arabic: *at-tanfīḍ*) and should not be confused with the procedure of compulsory enforcement (Arabic: *at-tanfīḍ al-ǧibrī*).

The arbitration agreement is an expression of party autonomy as the basis of the arbitration proceedings. If it is not validly concluded, the basis for any further procedural step is withdrawn and the state courts may, by default, claim jurisdiction. At the same time, this means that

the arbitral tribunal's decision-making power may not go beyond the subject matter of the arbitration agreement. In other words, the arbitration agreement sets the outer limit of the arbitral proceedings *ratione materiae* and *ratione personae*. The arbitration agreement usually determines the place of arbitration or the applicable arbitration law, as well. It thereby defines the legal system in which the arbitral proceedings are embedded.

The declaration of enforceability creates an instrument which can be executed against the will of the losing party – even with physical coercion, if necessary. Physical coercion, however, is subject to the state monopoly on the use of force. The arbitral award, being a purely private legal act at first, therefore requires the *exequatur,* through which the state accepts the award as part of its own legal order.

1.3. Structure. The thesis discusses these issues in four parts. The first part presents the sources of contemporary arbitration law and how it interfaces with compulsory enforcement. The first part also draws the lines between the various legal texts. The second part covers the validity of the arbitration agreement, in particular its form and the concept of arbitrability. The third part is devoted to the scope of the arbitration agreement *ratione materiae* and *ratione personae*. The scope *ratione temporis* is briefly dealt with in the introduction to the second part. The final main part discusses the arbitration agreement with a specific view to the enforcement of the award. Here, the individual obstacles (or conditions) are distinguished and examined with a view to burden of proof and the applicable law.

II.
Fundamental tensions

Two opposing approaches to the state's handling of arbitration emerge during the discussion repeatedly: The "traditional school" is fundamentally sceptical of arbitration, whereas the "modern school" endeavours to facilitate arbitration and render it as effective as possible.

2.1. Traditional School. The traditional school is based on the consideration that, functionally speaking, arbitration is a judicial activity. In principle, the state has monopolised this activity – like any other form of state power. This monopoly has a corollary in the state's responsibility towards the citizen: The state must grant a right of access to the judiciary, but also secure this right through procedural guarantees. These guarantees include, for example, the right to an appeal and the right to be heard, to be heard in public and to be heard in Arabic. Minimum qualifications for judges can also be counted among those guarantees. Since arbitration does not provide these guarantees to the same extent (according to the traditional school) there is an increased risk of errors. Arbitration thus jeopardises the substantive legal position of the parties and should therefore only be permitted as an exception. The parties must be protected from "gambling away" their substantive legal position in arbitration proceedings.

The traditional school is rooted in the twentieth century civil procedure laws, which – on their face – regulate the procedure rendering foreign awards enforceable. They date back to the former Italian Code of Civil Procedure, which was largely adopted by the Egyptian legislator. The Egyptian Code of Civil Procedure in turn provided the template for significant parts of today's legislation in the Arab world. This includes, for example, the reformed civil procedure law of the UAE, but also the Conventions of Muscat and, at the outset, Riyadh. The scepticism

towards arbitration is not as much expressed in the provisions remaining today as in the spirit in which they were written. The notion of the primacy of a sovereign state found its way into the jurisprudence of the courts. This jurisprudence has persisted, along with some rules carried over into modern arbitration laws. The topos of the exceptional nature of arbitration continues to shape jurisprudence to this day. *

2.2. Modern School. The modern school, on the other hand, points out that arbitration has in fact become the common way of settling disputes in transnational legal relations. According to the modern school, it is in the interest of every state to facilitate arbitral justice as far as possible and to organise it efficiently in order to participate in international trade and to increase national prosperity.

This the wish to promote arbitration underlies, in particular, the New York Convention and the UNCITRAL Model Law. These sources were adopted by Arab states – early on in both cases by Egypt, rather recently by the UAE – in order to attain the objectives proclaimed by the modern school. The thesis makes use of the metaphor of the legal transplant examine whether this project succeeded in view of the conflicting goals of the two schools.

III.
Resolving tensions

When considering the issues surrounding the arbitration agreement and the enforcement of arbitral awards in Arab states, it becomes clear that a certain "natural order" has emerged over time. Within this order, each of the schools can contribute to its respective objective without

* A recent example is the amendment of the Egyptian Supreme Court Law which was approved by parliament in June 2021. The amendment purports to empower the Supreme Constitutional Court to review international investment awards.

jeopardising the functioning of arbitration. It imposes a relatively strict regulation of access to arbitration (Section 3.1.), allowing for a relatively speedy issuance of an enforceable instrument by state courts (Section 3.2.).

3.1. Traditional School. The traditional concept, shaped by its focus on the nation state, dominates where access to arbitration is regulated or restricted. The arbitration agreement is conceived as, in essence, a partial waiver of the substantive legal position. The validity of the arbitration agreement is thus linked to the validity of a hypothetical disposition of the right it covers. As a result, there is no differentiation between objective and subjective arbitrability with a view to the validity of the arbitration agreement (similar to the discussions of the pre-1997 German arbitration law).

3.1.1. Substantive contract. The arbitration agreement may have only procedural effect; yet for the purpose of its effectiveness, it is treated like any other substantive contract. In most cases, any prohibition of a given disposition does not only render void the disposition as such, but also an arbitration agreement relating to it. The many restrictions on the transfer of real property in Egyptian law may be taken as an example: Not only do they render void the sale of real estate owned by the state, situated on desert land or sold to foreigners; the same applies to an arbitration agreement relating to it. Thus, the autonomy of the arbitration agreement, which is recognised in principle, is also subject to a significant restriction: there is, to the contrary, a causal between the nullity of the substantive legal transaction and the nullity of the arbitration agreement.

The similarity of the arbitration agreement and a substantive disposition is reflected in certain ("subjective") restrictions of dispositions. For instance, a legal representative often requires a special, express power of attorney for a waiver, or to conclude a settlement – or an arbitration agreement. Similarly, an Egyptian

insolvency administrator requires the approval of the insolvency court for such transactions. In those cases, the arbitration agreement is equated by law with a unilateral waiver of substantive rights.

3.1.2. State Contracts. The arbitrability of state contracts is, of course, a special case. The requirement of the approval of arbitration agreements by cabinet-level officials is a classic example. Such a requirement was introduced for administrative contracts in Egyptian legislation and, subsequently, adapted for the BOT and PPP laws. The characterisation of these requirements is made more complicated by the fact that they are criticised in domestic and foreign doctrine and subjected to various limitations. In addition, the emergence of a uniform interpretation is hampered by the division of legal review, which is shared between the ordinary (international commercial arbitration) and administrative courts (domestic or non-commercial arbitration). Under the current state of jurisprudence, there is agreement that such authorisation requirements are to be understood as a question of legal representation.* There is still disagreement as to whether they are only to be considered when raised by a party or, due to a link to public policy, on its own motion.

3.1.3. Interpretation. It is worth noting that the restrictive interpretation of the arbitration agreement has undergone a functional shift: While it was originally an instrument to protect the party from itself, it increasingly protects third parties and the public. This is obvious in courts' reluctance to extend the arbitration agreement to parent companies or shareholders. Similarly, if the arbitration agreement serves to circumvent fiscal interests of the state, the courts – even at the request of the public prosecutor's office – set

* This statement is called into question by the Egyptian Court of Cassation's recent judgment in *DIPCO v. Damietta Port Authority* dated 8 July 2021, cases no. 1964 and 1968, 91st judicial year.

it aside for lack of the (substantive) requirement of an admissible *causa*.

The functional shift of the restrictive approach is also revealed when viewing the transfer of the arbitration agreement to another party. According to the prevailing view, the transfer takes place by applying the rules for **ancillary** collateral *par analogiam* (despite the **autonomy** of the arbitration agreement). Accordingly, the recipient must at least be aware of the existence of an arbitration agreement. A special case is the bill of lading: Here, the assigned right is securitised in such a way that the paper does not contain the arbitration agreement *verbatim*. Instead, it only refers to the arbitration agreement contained in standard terms. However, the bill of lading must refer to the arbitration clause explicitly for the arbitration agreement to be valid. This protects the recipient of the bill of lading from being bound to an arbitration agreement unknowingly.

On the other hand, access to arbitration is sometimes handled more liberally where no third-party interests are involved:

- Courts for all Emirates consider a claim for performance of a real estate purchase agreement to be inarbitrable. They do, however, consider a claim for repayment of the purchase price to be a valid subject of an arbitration.

- In Egypt as well as in the UAE, courts have confirmed arbitration agreements in cases where a power of attorney has not specifically covered the conclusion of an arbitration agreement. In the courts' point of view, it was sufficient that the powers of attorney proved the intention to confer the broadest possible scope of authority.

- The objection of a lack of authority is rejected by courts of all Emirates if the contract does not expressly name the authorised

person: Here, the principles of apparent authority apply – a taboo, according to the traditional view!

3.2. Modern School. The modern, ("pro-arbitration") approach has the upper hand on the procedure for the declaration of enforceability. Instead of the full-fledged *exequatur* action once provided for in the codes of civil procedure, domestic and foreign arbitral awards are rendered enforceable by court order (*ordonnance sur requête*). This has considerable advantages for the award creditor – saving costs and, above all, time. Pursuant to the general rules, an action requires service of the statement of claim and usually at least two hearings. On top of that, the action initiated only the first of up to three instances of litigation, in which the first instance judgment was not even capable of provisional enforcement. Today's procedure only requires an *ex parte* order of the court, creating a provisionally enforceable instrument. Only by filing an appeal against the order – possibly combined with a request for stay of enforcement – can the debtor assert those objections which the court did not consider on its own motions.

The background appears to be that legislators recognise that modern arbitration laws and current arbitral practice do, in fact, offer sufficient procedural guarantees. This is confirmed by a general look at the Emirati Arbitration Law. The law puts an emphasis on the role of arbitral institutions and has a densely woven net of (mostly non-mandatory) procedural rules – especially in comparison with the rather rudimentary and now-repealed provisions of the Emirati Code of Civil Procedure. Due process is ensured in the arbitration itself so that there is no longer a need for comprehensive judicial proceedings at the enforcement level.

IV.
Conclusion

A comprehensive consideration and assessment of such a complex topic is not without limitations and contradictions: Even though rather consistent case law has developed in many places, it is not free of divergent decisions; the fact that domestic law does not sharply distinguish between objective and subjective arbitrability becomes a problem when the New York Convention makes precisely this distinction.

Some might say that jurisprudence and doctrine in Egypt and the UAE have not proven to be capable of resolving the tensions between traditional and modern schools. Yet they have certainly provided a framework for the complex legal situation and for making the multi-layered interests behind them practically manageable.

Part B.

Main Theses

General Observations

Arbitration between private autonomy and the monopoly on violence

1. The arbitration law of the states subject to research is caught between the restrictive approach of traditional legal thought and the increasing practical role of arbitration in commercial and investment contracts. The New York Convention has proven its capability to alleviate the tension between the two approaches so that the procedure of declaring an award enforceable is as liberal as possible, while the state retains substantial discretion to restrict barriers to recognition and enforcement.

2. The focal point of the traditional concept is the "exceptional character" of arbitration. This concept is based on the idea that, functionally, the arbitrator exercises judicial authority which forms part of the state monopoly on violence and is thus within the reserved domain of state courts. This monopoly is mirrored by an individual right to seek redress before state courts. Thus, arbitration requires both the exercise of private autonomy and its approval by the state.

3. The arbitration agreement is the manifestation of party autonomy. Under the laws subject to the study, it is a substantive contract and thus subject to the general validity requirements for contracts. These requirements are (i) the consent of the parties, (ii) a specific object, and (iii) an actual, admissible *causa*. The state rejects the will of the parties to arbitrate where the general requirements for contracts are not met (arbitrability *latu sensu*) or by introducing specific obstacles for arbitration agreements (arbitrability *strictu sensu*). One example for (non-)arbitrability *latu sensu* are disputes relating to the sale of real estate in Egypt. Arbitration agreements

on such contracts is qualified as an attempt to circumvent mandatory provisions and are therefore invalid for lack of an admissible *causa*.

4. The declaration of enforceability serves to safeguard the state monopoly on violence. The arbitration is examined with a view to minimum standards, especially the consent of the parties and the "approval" of the state. Only then may the private arbitral award be enforced through the means of monopolised state power. Since the legislators have abolished the exequatur action in favour of an *ordonnance sur requête*, the arbitral award can be understood as a pre-form of the enforcement measure to be taken. Metaphorically speaking, the state utilises the arbitral tribunal for rendering a decision which has *res iudicata* effect and cannot, as a matter of principle, be changed by the courts. However, the state reserves the right to deny the advantages of using monopolised state power.

Arbitration law as a legal transplant

5. When making modern arbitration law, Arab legislators have aimed to adhere to international standards, e.g. by acceding to international treaties or adopting soft law instruments, thus creating legal transplants. The transplant interfaces with the existing body of law through general clauses (e.g. *ordre public*) and doctrinal concepts (e.g. "contract" or "arbitrability"). The legislator has modified the transplant to the extent deemed necessary, and the courts interpret and apply international sources within a domestic context.

6. One example for such modification is the concept of "internationality" in Egyptian arbitration law. At the outset, "internationality" is equated to a "link to international commerce", as in French law. At the same time, "internationality" is determined pursuant to the list contained in the UNCITRAL model law (with modifications). The resulting challenge to reconcile both criteria is best met by taking the list as a set of examples for a link to

international commerce. This includes arbitration relating to international administrative contracts with a commercial character, which are withdrawn from the control of administrative courts. The administrative courts remain competent for domestic arbitrations relating to administrative disputes.

Rules to be applied when rendering an award enforceable

Conflict between treaties

7. The determination of the legal basis for the procedure of rendering an award enforceable is subject to manifold difficulties. Generally speaking, a distinction can be made between traditional and modern texts, regardless of the date of their entry into force. "Traditional" texts are those which go back to an earlier version of the Italian code of civil procedure and treat foreign arbitral awards as foreign judgments. This includes the Egyptian and the Emirati codes of civil procedure (the latter being amended by Federal decree no. 10/2017 and Cabinet decision no. 57/2018) and the Muscat Convention. "Modern" codifications are those laws and treaties which target arbitral awards specifically, i.e., the arbitration laws and the New York Convention. The Riyadh Convention shows elements of both approaches.

8. Provisions in regional treaties stating that such treaties do not apply to awards whose enforcement would violate international treaties, are not conflict rules pursuant to Article 30(2) of the Vienna Convention on the Law of Treaties. Such provisions address international obligations of the enforcement state beyond recognition and enforcement, e.g. regarding immunities.

9. The New York Convention will usually take priority over the Riyadh Convention based on the provisions in both treaties aimed at maximising effectiveness. It also supersedes the Muscat convention based as *lex specialis* since it contains specific rules on foreign arbitral awards rather than foreign decisions in general.

10. Both the Egyptian and the Emirati arbitration law provide for their extraterritorial application in certain instances. This term refers to the application on arbitral proceedings seated outside the respective state. The Egyptian arbitration law provides for extraterritorial application in international commercial arbitrations where the parties have chosen the application of the Egyptian arbitration law. The Emirati arbitration law also applies extraterritorially if substantive Emirati law applies.

11. In the latter case, the extraterritorial application of the Emirati arbitration law should be confined to cases where (i) Emirati law governs the substance of the dispute and (ii) internationally mandatory provisions are decisive.

12. From the point of view of the New York Convention, however, the primary connecting factor for the domestic or foreign character of an award is the seat of the arbitration determined by the parties. Domestic law may treat domestic awards as foreign pursuant to the second sentence of Article I(1), unless the second sentence of Article III(2) or Article VII have an effect to the contrary.

13. Where domestic law treats arbitral awards as domestic even though they were rendered by a tribunal seated abroad, awards cannot, in principle, be set aside and denied enforcement under the domestic law. They must be enforced pursuant to the New York Convention. The state which treats a foreign award as domestic may only set aside an award and consequently deny enforcement pursuant to Article V(1)(e) of the New York Convention if the courts at the seat of the arbitration lack jurisdiction to do so under their own law.

Conflicts within domestic legislation of the enforcement state

14. Article VII(1) of the New York Convention only demands the application of the more enforcement-friendly domestic law if such domestic law regulates the enforcement of foreign awards. The

equal treatment of domestic and foreign awards, by contrast, is subject to Article III(2).

15. Contrary to popular opinion, the term "conditions" in Article III(2) does not only refer to the "rules of procedure" referred to in Article III(1). Instead, the term "conditions" encompasses all circumstances of enforcement, including conditions for admissibility of the application and the grounds for its refusal.

16. In order to examine whether a provision of domestic law regarding the enforcement of foreign arbitral awards complies with the New York Convention, it must be determined (i) if the provision complies with the minimum requirements of the New York Convention and (ii) if it is substantially more onerous than the provisions for domestic awards.

17. Accordingly, and contrary to the legislators' original conception, the procedure for the enforcement of foreign awards is not the *exequatur* action anymore, but the *ordonnance sur requête*. This was confirmed by the Egyptian Court of Cassation in 2005, and codified by the Emirati legislator in 2018.

18. Regarding the grounds for refusal of enforcement, Article V of the New York Convention remains the relevant standard. Contrary to an opinion voiced in both Egypt and the UAE, the principle of reciprocity under domestic law cannot be applied. This is because neither state has made the reservation pursuant to Article I(3) of the New York Convention.

Arbitrability

Arbitrability and Disposability

19. The conception of the Egyptian and Emirati legislator equates arbitrability with the ability to dispose of the right subject to the dispute. At times, this is justified with a need to protect the parties from a procedure with fewer procedural safeguards; at others, with the protection of the state or third parties from the circumvention

of mandatory law. Factually, prohibitions to dispose of the subject matter of the dispute is equated with inarbitrability and a severe restriction of the autonomy of the arbitration agreement. Regardless, jurisprudence in Egypt and the UAE withstand doctrinal demands to give up this restrictive stance.

20. The author's understanding of the extraterritorial application of the Emirati Arbitration Law (see above, paragraph 11) is confirmed by the finding that mandatory law restricts arbitrability: the result of a mandatory provision prohibiting the disposal of a right is the inarbitrability of a dispute of that right. As a consequence, the application of internationally mandatory provisions only means that, from a point of view of Emirati law, the dispute is only arbitrable domestically.

21. Objective arbitrability relates to provisions which are connected to the subject matter of the dispute; subjective arbitrability relates to provisions which relate to the party as such. If a provision relates to objective and subjective criteria, a distinction must be made between Article V(1)(a) and V(2)(a) of the New York Convention. For that purpose, neither a distinction between general and individual interests, nor an examination from a conflict of laws perspective is helpful. Instead, the qualification under domestic law from which the provision originates is decisive.

22. From an analytical point of view, the general equation of an arbitration agreement and the disposal of a right makes it artificial to distinguish (i) between objective and subjective arbitrability, as well as (ii) between arbitrability and the validity of the arbitration agreement.

Arbitrability of government contracts

23. Pursuant to Article 1(2) of the Egyptian arbitration law, arbitration agreements of administrative contracts require the approval of the competent minister. Only in cases where a public agency is not under the supervision of a ministry (such as the Court of Auditors),

the approval of the head of the agency is required. The minister acts as the statutory representative of the agency for arbitration agreements.

24. Since the approval of the minister represents the consent of the public agency, it must comply with the "in writing" requirement for arbitration agreements.

25. The same observations apply, *mutatis mutandis*, regarding the approval of arbitration agreements on public-private partnerships by the Supreme Commission for Public-Private Partnerships.

26. The requirement of ministerial approval applies in international arbitration, as well. However, it should be restricted to domestic awards even if the arbitration law applies to foreign awards, as well (see above, paragraph 17). This cannot be considered as illegitimate "cherry picking". As opposed to Article VII(1), Article III(2) of the New York Convention does not require the application of domestic law in its entirety. Rather, Article III(2) substitutes domestic law only to the extent that its treatment of foreign awards is "substantially more onerous" than domestic awards.

27. Administrative arbitration with the Emirati federal government is subject to review of the Ministry of Justice in coordination with the Ministry of Finance, pursuant to Cabinet decision no. 406/2 of 2003. Contrary to its current application in practice, the wording and legal nature suggest that this is merely an internal formality which does not affect the validity of the arbitration agreement.

28. In the emirate Dubai, arbitration concerning contracts with government entities is only allowed in the territory and under the laws of Dubai.

Miscellaneous issues of arbitrability

29. According to the Egyptian Court of Cassation, the exclusive international jurisdiction only refers to the jurisdiction of state

courts.[*] Exceptions are made for the exclusive jurisdiction for commercial agency contracts, in which arbitration is prohibited. Emirati courts, by contrast, view their exclusive jurisdiction as a prohibition to arbitrate. In addition, both jurisdictions prohibit arbitration in cases where the prosecution authorities are entitled to intervene, as well as cases relating to non-financial rights and sovereign acts.

30. In order to confer power of attorney to enter into an arbitration agreement, the power of attorney must, in general, explicitly state that it encompasses the conclusion of an arbitration agreement. This requirement is less stringent for the statutory representations of commercial companies: in Egypt, the scope of the authority is determined (rather untypically) with a view to the will of the parties. In the UAE, the courts have developed a doctrine of a rebuttable presumption in favour of the authority to enter into arbitration agreements.

Scope of the arbitration agreement

Scope in general

31. In Egypt, the scope of the arbitration agreement *ratione materiae* is usually determined strictly objectively with a view to the wording of the agreement. In the UAE, subjective elements play a greater role, and the trial courts enjoy wide discretion.

32. Third-party effects of an arbitration agreement are possible in the following cases: (i) by way of agency, especially in the context of joint creditors and collective contracts; (ii) by way of the third party's implicit acceptance of a contract negotiated between the parties of the arbitration agreement, such as in cases of *promesse*

[*] This statement has become questionable in light of the Egyptian Court of Cassation's judgment in *DIPCO v. Damietta Port Authority* dated 8 July 2021, cases no. 1964 and 1968, 91st judicial year; see the note of the Author, to be published in ASA Bulletin vol. 40, issue 1 (March 2022), pp. 75-91.

de porte-fort and contracts to the benefit of the third party; (iii) through succession; and (iv) where the third party is estopped from refusing to arbitrate.

Scope *ratione personae*: Assignment

33. The assignee of a contract is bound to an arbitration clause contained in it according to the jurisprudence of Egyptian and Abu Dhabi courts. In Dubai, by contrast, there is a double rebuttable presumption: First, a presumption in favour of the will of the parties to assign the arbitration clause along with the rights and obligations of the contract; second, the third party's awareness of the arbitration agreement, which is the basis of that will.

34. The presumption of the third party's awareness is based on the form of the arbitration agreement. The assignee's awareness of the content of the contract can be presumed if the assignee accepts all rights and obligation of the assignor. In such a case, the assignee is presumed to be aware of an arbitration agreement contained in the contract. By contrast, the claimant in an arbitration would have to prove the assignee's awareness of a separate submission agreement.

35. As a result of the assignment of a claim, the arbitration agreement is transferred to the assignee even if the assignee was not aware of the agreement, according to Egyptian jurisprudence. This is because the arbitration agreement constitutes an ancillary defence. This approach is problematic because the arbitration agreement is not a (substantive) defence against the claim as such. In addition, the assignee's knowledge of defences relating to the right he acquires is irrelevant only because such defences only function in his favour. Therefore, the assignee can be presumed to accept such additional right without knowing of it, and he can choose to waive or not to exercise it. This is not the case for an arbitration agreement, which commits the assignee to arbitration and deprives him of the right to seize state courts.

36. Emirati jurisprudence, in line with most doctrinal writing, treats the arbitration agreement as an accessory security. This is justified (although in contrast to the autonomy of the arbitration agreement) by the fact that the underlying substantive contract is both object and *causa* of the arbitration agreement, as the arbitration agreement serves to enforce the underlying contract.

37. As a result, the arbitration agreement is autonomous in its existence, but accessory regarding its scope *ratione personae*.

Scope *ratione personae*: Extension

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38. Emirati jurisprudence does not allow the extension of an arbitration agreement on the shareholders of a legal entity. Egyptian arbitral tribunals have extended arbitration agreements in cases where the parties have not distinguished between the company and its shareholders or where the shareholders have misled the other party. In most cases, tribunals tend to conduct an extensive examination of the facts rather than an in-depth legal analysis.

39. After the landmark decision of the Egyptian Court of Cassation in the *al-Khatib* case, an extension is possible if (i) the third party intervenes in the performance of the contract or causes confusion as to the identity of the party to the arbitration agreement; and (ii) that the conditions of a joinder of the third party are met.

40. An "intervention" is the direct factual performance of contractual obligations; an indirect intervention is conceivable if the third party gives instructions to the contracting party in relation to the contract. A third party cannot be said to "cause confusion" if it utilises instruments which are common in groups of companies. It is only if (even unintentionally) it becomes impossible to the other party to identify its counterparty, that the third party's refusal to arbitrate can be considered to be in bad faith.

41. The conditions for a joinder of the third party, however, are a largely unsuitable criterion for an extension of an arbitral agreement to a

third party. In that regard, it suffices that the third party either risks incurring damages itself as a result of the arbitration, or that a party to the arbitration has a legitimate interest in a consistent and binding decision regarding all parties.

42. When applying these criteria to state-owned entities, only the criterion of "causing confusion" can be relevant. The intervention of a state, in the sense of an involvement in the conclusion of the contract and the arbitration agreement, is predetermined by law and administrative practice without necessitating the state to be a party itself.

Enforcement

43. Awards based on electronic arbitration agreements should be considered as enforceable under the New York Convention in Egypt and the UAE. The relevant domestic provisions regarding the electronic written form modify Article II of the New York Convention, as adopted into domestic law.

44. If the arbitration agreement is concluded by e-mail, it can be expected that a printout of the e-mails suffices as an exhibit to the application to declare the award enforceable. If necessary, the court must assess the integrity of the e-mail conversation.

45. The meaning of Article 53(1)(c) of the UAE arbitration law is ambiguous from a semantic and systematic point of view. The analysis of the other grounds for refusal of recognition suggest that this provision only relates to subjective arbitrability *strictu sensu* (cf. above, paragraphs 3 and 21).

46. Arbitral awards relating to administrative disputes cannot be enforced under the Riyadh and Muscat Conventions.

Final outlook

47. The "transplantation" of modern laws has not rendered traditional concepts unfunctional. However, traditional concepts have

undergone a functional shift: Restrictions on arbitration do not serve to "protect" the parties from a procedure with little protection and high risk of judicial errors. Instead, emphasis is placed today on the protection of uninvolved third parties and the general public.

Schiedsvereinbarung und Vollstreckung in arabischen Staaten

Eine Untersuchung zum Recht Ägyptens, der Vereinigten Arabischen Emirate und multilateraler Übereinkommen

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For the outside observer, arbitration in Arab states is an Enigma. Though some issues are discussed in general terms in western scholarship, there is no systematic account taking into consideration the latest seismic shifts. This book analyses Arab language jurisprudence and scholarship in the context of global standards. It focusses on the arbitration agreement and discusses the exequatur with its links to general civil procedure and compulsory enforcement. It shows that though international standards and traditional ideas coexist, that coexistence causes friction and today's dominant views require revision.

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Waldseestraße 3–5 | D-76530 Baden-Baden | www.nomos.de