



Arbitration as an Alternative Justice: From Customary Justice to International Arbitration

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When a dispute arises, individuals and companies traditionally turn to the national courts as the primary means of enforcing their rights. Yet slow proceedings, multiple levels of appeal, procedural complexity and the difficulties of cross-border commercial disputes have for centuries led parties to look for a faster route that better suits the nature of their disagreement. This article traces arbitration from its historical roots to its modern form in international trade contracts, and then examines the arbitral proceedings, the award, the remedies against it and its enforcement.

A. The Concept of Alternative Dispute Resolution (Arbitration) in General

Alternative dispute resolution covers every method by which the parties agree to settle a dispute outside the national courts, including negotiation, amicable settlement, conciliation, mediation and binding expert determination. The most powerful of these is **arbitration**: the parties' agreement to refer an existing or future dispute to one or more arbitrators, chosen by them or in a manner they determine, who decide it by a binding award carrying the force of *res judicata* (Art. 55 of Arbitration Law No. 27 of 1994 on Arbitration in Civil and Commercial Matters, "the Arbitration Law").

Arbitration differs from mediation and conciliation in that a mediator has no power to decide, so the dispute ends only if the parties accept the proposed solution, whereas an arbitrator issues a binding award even if one party does not accept it. Arbitration rests on three pillars:

1. **A written arbitration agreement**, whether a clause in the underlying contract or a separate submission agreement concluded after the dispute arises; otherwise it is null and void (Arts. 10 and 12).
2. **Capacity to dispose of the right** in dispute on the part of each party, whether a natural or a legal person (Art. 11).





3. **Arbitrability of the subject matter:** arbitration is not permitted in matters that cannot be settled by compromise (Art. 11).

The arbitrator derives authority from the parties' agreement, not from the State, and therefore has no coercive power. The parties must turn to the national courts for an order enforcing the award by compulsion and for measures that require coercion.

B. The History of Customary Justice

Customary justice predates the formal courts of the modern State by many centuries:

- **Ancient civilizations:** communities resorted to the tribal chief, the sage or the priest, and the Greeks and Romans knew the arbiter whom the parties accepted to decide between them.
- **Pre-Islamic Arabia:** the "judges of the Arabs", such as Aktham ibn Sayfi and Amir ibn al-Zarib, were renowned, and it is related that the Quraysh accepted the Prophet Muhammad (peace be upon him) as arbiter in placing the Black Stone before the beginning of his mission.
- **Islam:** the Holy Qur'an endorsed arbitration in marital discord (4:35) and in submitting to an arbiter whom the parties accept (4:65); Banu Qurayza accepted Sa'd ibn Mu'adh as arbiter; and arbitration took place between the Companions after the Battle of Siffin. The Ottoman Mecelle (*Majallat al-Ahkam al-Adliyya*) devoted a chapter to arbitration.
- **The Middle Ages:** merchants' customs (*Lex Mercatoria*) emerged in markets, ports and guilds, and traders submitted disputes to their peers for speed and because those peers applied trade usage rather than the general rules of civil law.
- **The modern era:** inter-State arbitration began with the Jay Treaty of 1794 between Britain and the United States, followed by the *Alabama* claims arbitration of 1872, and the 1899 Hague Convention established the Permanent Court of Arbitration.





- In Egypt: arbitration was regulated by Articles 501 to 513 of the Code of Civil and Commercial Procedure (Law No. 13 of 1968), until the Arbitration Law No. 27 of 1994 replaced them.

C. Forms of Customary Justice as an Alternative to Litigation

Forms of alternative justice vary according to the force of what each produces. The most important are:

Form	Description	Effect of the outcome
Customary councils	Family elders, village heads and sheikhs convene to reconcile the disputants, especially in rural areas, Upper Egypt and Bedouin communities	A settlement contract binding on its parties; not a judicial judgment
Settlement and conciliation	Efforts by the parties or an official body to bring positions closer, including the conciliation committees for disputes with government bodies (Law No. 7 of 2000) and the family dispute settlement offices (Law No. 10 of 2004)	A settlement contract (Art. 549 of the Civil Code)
Mediation	A neutral mediator brings the parties together without power to decide	A settlement agreement that depends on the parties' consent
Binding expert determination	A technical expert gives a decision on a technical issue under a prior agreement, including the dispute boards in international construction contracts (FIDIC)	Binding on the parties as agreed





Form	Description	Effect of the outcome
Arbitration	A tribunal chosen by the parties decides the dispute after proceedings that guarantee the right of defence and equal treatment	A binding award carrying <i>res judicata</i> , enforceable by compulsion through a court order
Trade usages	Customs of the trade and profession applied by arbitrators in deciding (Art. 39(4))	A source of rules for deciding the dispute, not a stand-alone method

D. The Global Trend to Codify Customary Justice and Conclude International Conventions Adopting Arbitration

Arbitration is no longer left to custom alone; it has moved from usage to international and national texts. The main milestones are:

- The 1923 Geneva Protocol and the 1927 Geneva Convention on recognition of arbitration clauses and enforcement of awards.
- The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the most successful instrument in this field, with 172 States Parties; Egypt acceded on 9 March 1959.
- The 1961 European Convention on International Commercial Arbitration and the 1987 Amman Arab Convention on Commercial Arbitration.
- The 1965 Washington (ICSID) Convention, which established the International Centre for Settlement of Investment Disputes and which Egypt has ratified.
- The 1985 UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006) and the UNCITRAL Arbitration Rules, which inspired many national laws, including Egypt's.
- The 2019 Singapore Convention on Mediation, which extended the same trend to settlements resulting from mediation.





E. The Trend of States to Adopt Arbitration as an Alternative Means of Dispute Resolution and to Enact Dedicated Laws

Many States have enacted stand-alone arbitration laws, among them the US Federal Arbitration Act (1925), the English Arbitration Act (1996, amended by the Arbitration Act 2025), Singapore's International Arbitration Act (1994), the chapter on international arbitration in the Swiss Private International Law Act (1987) and Book Ten of the German Code of Civil Procedure (1998). In the Arab region, dedicated laws exist in Egypt (1994), Jordan (2001), the United Arab Emirates (Federal Law No. 6 of 2018) and Bahrain (2015), alongside national and regional arbitration centres such as the Cairo Regional Centre for International Commercial Arbitration (CRCICA, 1979) and the Dubai International Arbitration Centre.

In Egypt, [Arbitration Law No. 27 of 1994](#) is modelled on the UNCITRAL Model Law. It applies to arbitration between parties who are persons of public or private law, whatever the nature of the legal relationship, where the arbitration takes place in Egypt, or where it is an international commercial arbitration taking place abroad whose parties have agreed to subject it to the Law (Art. 1). A 1997 amendment permitted arbitration of disputes arising from administrative contracts with the approval of the competent minister or his delegate.

F. Ad Hoc Arbitration and Institutional Arbitration

Arbitration takes one of two forms, depending on who administers it:

Point of comparison	Ad hoc arbitration	Institutional arbitration
Administration	Run by the parties and the arbitrators themselves, possibly under the UNCITRAL Rules	Administered by a permanent institution under its rules, such as the ICC, the LCIA, CRCICA or the SIAC





Point of comparison	Ad hoc arbitration	Institutional arbitration
Appointment of arbitrators	By agreement of the parties; failing agreement, the competent court appoints them (Art. 17)	The institution appoints them in case of disagreement, from its lists or beyond
Flexibility and cost	Greater flexibility and lower administrative fees	Higher administrative fees in return for a ready-made framework
Risks	May stall if a party obstructs, and requires a carefully drafted arbitration agreement	Bound by the institution's rules, deadlines and procedures
Review of the award	No body reviews the draft award	Some institutions scrutinize the draft award as to form before issue (such as the ICC)

In either form, a sound arbitration agreement is the foundation of everything that follows. It should state clearly the institution or rules applied, the seat of arbitration, its language, the number of arbitrators and the law governing the contract. An unclear or contradictory clause, such as one naming a non-existent institution, is what scholars call a "pathological clause" and leads to a dispute over jurisdiction before the merits are even reached.

G. Why Companies Resort to Arbitration in International Trade Contracts

1. **Neutrality:** a foreign company will rarely agree to submit to the courts of its counterparty's country; arbitration offers a neutral tribunal and a neutral seat.
2. **Specialized expertise:** the parties choose arbitrators who are specialists in construction, energy, shipping and banking, rather than generalist judges.
3. **Cross-border enforcement:** arbitral awards are enforceable in more than 170 States under the New York Convention, a reach that foreign court judgments do





not enjoy to the same degree.

4. **Flexibility:** the parties choose the language, seat, law and rules of evidence, and can design the procedure to suit the dispute.
5. **Privacy:** hearings are not public, and an award may not be published without the consent of both parties (Art. 44(2)).
6. **Finality:** arbitral awards are not subject to appeal or other ordinary remedies (Art. 52), so the dispute is closed at a single level.

H. The Extent to Which Arbitration Is Used in International Trade Contracts and the Problems It Raises

Arbitration has become the prevailing means of resolving international trade disputes, particularly in construction, energy, maritime trade, commodities and investment. The leading institutions receive hundreds of new cases every year, and the preference is borne out by periodic international surveys by universities and research bodies. Nevertheless, arbitration in these contracts raises problems, the most important of which are:

- **Cost:** arbitrators' fees, institutional fees and the costs of experts and counsel may far exceed what is at stake in smaller disputes.
- **Delay:** arbitration is not always faster than litigation, since numerous applications and hearings prolong the dispute. Egyptian law sets a time limit for the award of 12 months from the start of the proceedings, extendable by six months, unless the parties agree otherwise (Art. 45).
- **Pathological clauses:** vague or contradictory drafting of the arbitration agreement, or inconsistent dispute resolution clauses across related contracts.
- **Multiple parties and contracts:** a non-signatory is not bound by the arbitration agreement, so it is difficult to join third parties or consolidate multiple claims in one proceeding.





- **Independence and impartiality:** an arbitrator must disclose any circumstance that raises doubts as to impartiality and may be challenged (Arts. 16 and 18), yet disputes over conflicts of interest still arise.
- **Interim measures:** a tribunal has no coercive power over third parties, so recourse to the courts is needed to enforce measures requiring compulsion (Arts. 14 and 24).
- **Limited review:** an error in assessing the facts or applying the law is not a ground for annulment, so a flawed award may become final.
- **Disputes with States:** the immunity of State assets obstructs enforcement in many cases.
- **Conflicts of jurisdiction among courts:** some enforcement proceedings in Egypt have been delayed by the multiplicity of competent courts.

I. The Arbitral Proceedings, the Arbitral Award and Recourse Against the Award

1. The arbitral proceedings

- **Commencement:** arbitral proceedings begin on the day the respondent receives the request for arbitration, unless the parties agree otherwise (Art. 27).
- **Constitution of the tribunal:** the parties agree on one or more arbitrators; failing agreement on the number, there are three, and the number must be odd, otherwise the arbitration is void (Art. 15).
- **Jurisdiction:** the tribunal rules on objections that no arbitration agreement exists or that it has lapsed or is void, and the arbitration clause is separable from the contract that contains it (Art. 22).
- **Equality and the right of defence:** the parties are treated equally and each is given a full and equal opportunity to present its case (Art. 26), and each submits its pleadings and documents within the agreed time limits (Art. 30).





- **Seat and language:** the parties agree on the place and language of arbitration, failing which the tribunal determines them (Arts. 28 and 29).
- **Applicable law:** the tribunal applies the rules chosen by the parties, failing which it applies the substantive law most closely connected with the dispute, and it takes into account the terms of the contract and the usages of the trade (Art. 39).
- **Settlement:** if the parties agree on an amicable settlement during the proceedings, the tribunal records it in a decision carrying the force of an arbitral award (Art. 41).

2. The arbitral award

- The award is issued in writing after secret deliberations, by majority vote in a multi-member tribunal (Art. 40).
- The award must state reasons, unless the parties agree otherwise or the applicable law does not require reasons, and it must contain the details of the parties and arbitrators, the arbitration agreement, the operative part, the reasons, the date and place of issue and the arbitrators' signatures (Art. 43).
- Each party receives a signed copy of the award, which may not be published without both parties' consent (Art. 44).
- A party may request interpretation of any ambiguity in the operative part, correction of clerical errors, and an additional award on claims the tribunal failed to decide (Arts. 49 to 51).
- The award carries the force of *res judicata* and becomes an enforceable instrument once an order for its enforcement is issued (Art. 55).

3. Recourse against the award

An arbitral award is not subject to appeal or to any other ordinary remedy (Art. 52). The only route to setting it aside is an **action for annulment** before the competent court of appeal, which in international commercial arbitration is the Cairo Court of





Appeal unless the parties agree on another Egyptian court of appeal (Art. 54). The time limit and grounds are as follows:

- **Time limit:** 90 days from the date the award is notified to the party against whom it was made; a party's waiver of the right to bring the action before the award is issued does not bar its admissibility (Art. 54).
- **Exhaustive grounds (Art. 53):** no arbitration agreement, or one that is void or has lapsed; a party lacking or having limited capacity; a party being unable to present its defence because it was not properly notified or for a reason beyond its control; the award excluding the law the parties agreed to apply to the merits; a tribunal constituted or arbitrators appointed contrary to the law or to the parties' agreement; the award deciding matters outside the arbitration agreement; or a nullity in the award or in the proceedings that affected the award. The court annuls of its own motion an award that is contrary to Egyptian public policy.
- **Scope of review:** an annulment action is not a second instance, so the court does not re-examine the merits; it reviews the validity of the agreement, the proceedings and the award.
- **Effect on enforcement:** bringing the action does not suspend enforcement unless the claimant so requests in the statement of claim on serious grounds, in which case the court may order a stay and rules on the request within 60 days of the first hearing; it may require security or a bank guarantee (Art. 57).
- **Cassation:** the judgment in the annulment action may be appealed before the Court of Cassation under the general rules.

J. Enforcement of the Arbitral Award

An arbitral award is not enforceable by compulsion merely because it has been issued, since the arbitrator has no coercive power; an **enforcement order** from the courts is required. The steps are:





1. **Deposit:** the party in whose favour the award was made deposits the original award, or a signed copy, with the registry of the competent court (Art. 47), together with a certified Arabic translation if it was issued in a foreign language.
2. **Application for the enforcement order:** the application is submitted to the president of the competent court or a judge he delegates, attaching the original award or a signed copy, a copy of the arbitration agreement, the certified translation and a copy of the record of deposit (Art. 56).
3. **Conditions for the order:** the order is issued only after verifying three things: that the award does not conflict with a previous judgment of the Egyptian courts on the subject of the dispute, that it contains nothing contrary to Egyptian public policy, and that it has been properly notified to the party against whom it was made (Art. 58).
4. **Challenge to the enforcement order:** the provision barred any challenge to it, and the Supreme Constitutional Court has held that bar unconstitutional; a replacement legislative regime for such challenges is under consideration.

If the award was made in another State party to the New York Convention, it is recognized and enforced in Egypt under the Convention and may be refused only on the exhaustive grounds in Article V, chiefly: invalidity of the arbitration agreement; the respondent not being given notice or an opportunity to present its case; the award exceeding the scope of the agreement; the tribunal's constitution or procedure not conforming to the agreement; the award not yet being binding or having been set aside in its country of origin; the non-arbitrability of the subject matter; and conflict with public policy.

In practice, when contracting, the seat of arbitration should be chosen with care, because the courts of the seat hear the annulment action, and before signing one should verify that the counterparty's assets are located in a State where arbitral awards are enforced.





Our message: If your company is about to conclude an international commercial contract, or faces a dispute under a contract containing an arbitration clause, do not hesitate to contact us to review the arbitration clause before signing, or to prepare or defend the arbitration claim, or to challenge or enforce the award. The earlier the review, the lower the risk.

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