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Preface

Welcome to *The Middle Eastern and African Arbitration Review 2022*, one of Global Arbitration Review's annual, yearbook-style reports.

Global Arbitration Review, for those not in the know, is the online home for international arbitration specialists everywhere. We tell them all they need to know about everything that matters.

Throughout the year, GAR delivers pitch-perfect daily news, surveys and features, organises the liveliest events (under our GAR Live and GAR Connect banners) and provides our readers with innovative tools and know-how products.

In addition, assisted by external contributors, we curate a series of regional reviews – online and in print – that go deeper into the regional picture than the exigencies of journalism allow. *The Middle Eastern and African Arbitration Review*, which you are reading, is part of that series. It recaps the recent past and provides insight on what these developments may mean, from the pen of pre-eminent practitioners who work regularly in the region.

All contributors are vetted for their standing before being invited to take part. Together they provide you the reader with an invaluable retrospective. Across 290 pages, they capture and interpret the most substantial recent international arbitration developments, complete with footnotes and relevant statistics. Where there is less recent news, they provide a backgrounder – to get you up to speed, quickly, on the essentials of a particular seat.

This edition covers Angola, Egypt, Ghana, Kuwait, Lebanon, Mozambique, Nigeria, Qatar, Saudi Arabia and the UAE, and has overviews on energy arbitration, investment arbitration, mining arbitration, damages (from two perspectives) and virtual hearings.

A close read of these reviews never disappoints. Among the nuggets this reader noted were:

- African governments are keener than ever to advance mining projects, for various reasons. To that end, some seem more willing to settle disputes;
- China's investment in renewables infrastructure exceeded its investment in fossil fuels in 2021;
- Egypt is home to a new sports-arbitration provider;
- someone with a criminal record can sit as an arbitrator in Egypt – if all parties agree;
- Egypt's court of cassation has reversed a worrying appeal court ruling that had seemed to allow annulment of awards where damages were disproportionate to the harm suffered;
- courts in Kuwait are growing more resistant to the 'no authority to sign an arbitration clause' defence;
- Chinese investment in Lebanon is on the increase;
- Nigeria's Supreme Court has gone out on a limb to decry frivolous challenges to arbitral awards – calling it a 'disturbing trend', obiter dicta;
- 84 teams took part in the most recent running of the Saudi Center for Commercial Arbitration's Arab Moot Competition; and
- although it's not fully clear-cut, Abu Dhabi onshore courts may be falling in line with case law from Dubai on 'apparent authority' to conclude arbitration agreements, which would be helpful. As ever though in both emirates the picture is a bit mixed.

And much, much more – I particularly commend this year's overviews, which are packed with useful stuff.

We hope you enjoy the review. I would like to thank the many colleagues who helped us to put it together, and all the authors for their time. If you have any suggestions for future editions, or want to take part in this annual project, GAR would love to hear from you. Please write to insight@globalarbitrationreview.com. Please note all the content in this volume predates unfortunate events in Ukraine – so you won't see mention of that.

David Samuels
Publisher, Global Arbitration Review
April 2022

Egypt

Amr Abbas and John Matouk*
Matouk Bassiouny & Hennawy

IN SUMMARY

This article outlines the main features of Egypt's arbitration legal framework and covers key developments in the arbitration field during 2021, including for the Cairo Regional Centre for International Commercial Arbitration (CRCICA). It provides a brief overview of the new laws issued on the jurisdiction of the Constitutional Court and developments in sports arbitration. It also highlights the main arbitration principles established by the courts in 2021 concerning, among other things, pathological arbitration clauses, annulment of orders issued by arbitral tribunals and limitations on the application of the estoppel doctrine.

DISCUSSION POINTS

- Legal framework for arbitration in Egypt
- The CRCICA's role in international arbitration
- Sports arbitration developments
- Arbitrations where state organs and companies are parties
- Arbitration principles established by the Egyptian courts

REFERENCED IN THIS ARTICLE

- Egyptian Arbitration Act
- Civil and Commercial Procedures Law
- Sports Law No. 71 of 2017
- Law No. 137 of 2021 amending the Egyptian Supreme Constitutional Court Law No. 49 of 1979
- Court of Cassation, challenges Nos. 1964 and 1968 of JY 91, dated 8 June 2021
- Cairo Court of Appeal, Circuit (3), challenge No. 16 of JY 137, dated 25 February 2021
- Court of Cassation, challenge No. 6887 of JY 77, dated 23 January 2021
- Court of Cassation, challenge No. 12262 of JY 90, dated 24 June 2021

Egypt was one of the first countries in the region to introduce an arbitration law. It enacted the Egyptian Arbitration Act No. 27/1994 (the Arbitration Act) based on the UNCITRAL Model Law on International Commercial Arbitration (1985). It applies to arbitrations conducted in Egypt or in cases where the parties to an international commercial arbitration conducted abroad agree to subject the arbitration to the Arbitration Act.[1] While the Arbitration Act is regarded as being the general law governing arbitration in Egypt, there are other laws that govern certain aspects of arbitration in respect of certain legal relationships. For example, technology transfer contracts, sport arbitrations, investments under the investment law and contracts of public entities.

Egypt has become more arbitration-friendly through the courts' repeated findings that defective arbitration clauses are valid arbitration agreements,[2] and through legislation widening the scope of the matters that may be resolved by compromise, including matters that are classically regarded as matters of public law – for example, tax disputes,[3] custom disputes[4] and certain crimes under the Investment Law of 2017,[5] as well as the Criminal Procedural Law.[6] Egypt signed the New York Convention on 2 February 1959 and it entered into force on 8 June 1959. Egypt has signed and ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) in 1972[7] and is a party to 115 bilateral investment treaties (BITs), 28 of which are not yet in force and 15 of which have been terminated.[8] In 2021, three new investment treaty cases were registered with the International Centre for Settlement of Investment Disputes (ICSID) against Egypt. To date, a total of 38 cases against Egypt have been registered with ICSID. Of these 38 cases, nine are currently pending.[9]

1 Article 1 of Arbitration Act No. 27 of 1994.
2 Cairo Court of Appeal, Circuit (8), challenge No. 55 of JY 134, dated 16 September 2018 and Cairo Court of Appeal, Circuit (50), challenge No. 59 of JY 135, dated 28 November 2018.
3 Article (138) of Tax Law No. 91 of 2005.
4 Article (64) of the New Customs Law No. 207 of 2020.
5 Articles (90) and (93) of Investment Law No. 72 of 2017.
6 Article (18)-bis (a) of the Criminal Procedural Law.
7 https://icsid.worldbank.org/about/member-states/database-of-member-states.
8 https://investmentpolicy.unctad.org/international-investment-agreements/countries/62/egypt?type=bits.
9 https://icsid.worldbank.org/cases/case-database.

The Arbitration Act defines an arbitration agreement as an agreement in which the parties agree to resolve, by arbitration, all or part of a dispute that arose or may arise between them in connection with a specific legal relationship, contractual or otherwise.[10] Since 2005, the Cairo Court of Appeal (the Court of Appeal) has held that the arbitration agreement is considered to be the constitution of an arbitration and determines the scope, extent and subject of arbitration, and grants the arbitrators their powers, resulting in excluding the dispute from the jurisdiction of the courts.[11]

In addition to the general requirements for the validity of contracts, such as consent, capacity and the existence of a legal relationship, the following requirements, as well as any further requirements mandated by a specific provision of law, must be satisfied for there to be a valid arbitration agreement:

- the arbitration agreement must relate to matters that are amenable to compromise;[12] and
- the arbitration agreement must be in writing, otherwise it shall be null and void.[13] It will be deemed written if it is included in written communication exchanged between the parties. This requirement is widely interpreted to include an arbitration agreement concluded by exchanging offers and acceptance through electronic means.[14]

The Arbitration Act grants parties the freedom to choose the procedural law that will be applied by the arbitral tribunal, including their right to subject the arbitration to the applicable rules of any institution or arbitration centre in or outside Egypt. However, if the parties fail to agree on this matter, the arbitral tribunal will be granted the freedom to select the applicable procedural law.[15] It is established through judgments

10 Article 10(1) of Arbitration Act No. 27 of 1994.

11 Cairo Court of Appeal, Circuit 91 – Commercial, Case No. 95 of120 JY, dated 27 April 2005.

12 Article (11) of Arbitration Act No. 27 of 1994. Public policy matters are not subject to compromise and are therefore non-arbitrable (see article 551 of the Egyptian Civil Code). Non-arbitrable matters include, inter alia, the personal status of individuals, criminal matters, bankruptcy claims, public assets and for the sole purpose of requesting interim measures (see Cairo Court of Appeal judgment, case No. 29 of JY 117, dated 25 February 2002).

13 Article (12) of Arbitration Act No. 27 of 1994.

14 Fathy Waly, *Arbitration Act in Theory and Practice*, 2014, p. 162.

15 Article (25) of the Arbitration Act No. 27 of 1994.

of the Egyptian courts that, except for rules related to public policy, arbitral tribunals are not bound by norms considered mandatory in domestic litigations,[16] except where these norms are considered 'basic guarantees of adjudication'.[17]

Enforcement of arbitral awards

Pursuant to article 55 of the Arbitration Act, all arbitral awards rendered in accordance with the provisions of this law have the authority of *res judicata* and shall be enforceable in conformity with its provisions.[18] The enforcement of domestic arbitral awards is governed by article 56 of the Arbitration Act, which requires a request for enforcement to be submitted to the president of the competent court, along with the required documents.[19] The enforcement order shall be submitted after the lapse of the 90-day period prescribed for filing the nullity action and it will be issued after verifying that certain conditions have been met.[20] The enforcement of foreign arbitral awards in Egypt is governed by the Convention on the Enforcement of Foreign Arbitral Awards (the New York Convention),[21] and, as such, are subject to the same enforcement rules applicable to national arbitral awards under the Arbitration Act.[22]

The Court of Appeal previously rendered a judgment enforcing a foreign arbitral interim measure that was issued by an International Chamber of Commerce (ICC) tribunal. The judgment found that arbitral interim measures are to be applied according to the same legal procedures as those for enforcing a final arbitral award – that is, by an order on application without notification of, or hearing, the parties. The court went further and required the interim measure:[23]

- to be final, and to be considered final if rendered by a competent arbitral tribunal;
- to be based on a valid arbitration agreement;
- to have offered both parties the opportunity to present their case; and
- not to be against public policy.

16 Court of Cassation, challenge No. 547 of JY 51, dated 23 December 1991; Court of Cassation, challenge No. 1259 of JY 49, dated 13 June 1983.

17 Court of Cassation, challenge No. 145 of JY 74, dated 22 March 2011.

18 Article (55) of Arbitration Act No. 27 of 1994.

19 Article (56) of Arbitration Act No. 27 of 1994.

20 Article (58) of Arbitration Act No. 27 of 1994.

21 Some jurists take the view that the Arbitration Act and the Egyptian Civil and Commercial Procedures Law No. 131 of 1948 (articles 296–301) also apply.

22 Cairo Court of Appeal, Circuit (7), challenge No. 55 of JY 135, dated 6 February 2019.

23 Cairo Court of Appeal, Circuit (7), challenge No. 44 of JY 134, dated 9 May 2018.

It is worth mentioning that article 24 of the Arbitration Act allows the court to order the enforcement of interim measures decided by arbitral tribunals in arbitrations that are subject to the Arbitration Act.[24]

Under article 54(2) of the ICSID Convention, the recognition and enforcement of an award may be obtained from the competent court or other authority designated by a contracting state on presentation of a copy of the award certified by the Secretary-General of ICSID. The Ministry of Justice has been designated by Egypt as the competent authority for the recognition and enforcement in Egypt of arbitral awards rendered pursuant to the ICSID Convention. Execution of the award is, in accordance with article 54(3) of the ICSID Convention, governed by the law on the execution of judgments in force in the country where execution is sought, which in Egypt is the Civil and Commercial Procedures Law (CCPL). According to article 55 of the ICSID Convention, ICSID awards should be enforced in Egypt without prejudice to the Egyptian law provisions regarding the immunity of Egypt or any foreign state from execution. Article 87 of the Egyptian Civil Code provides that public assets of the Egyptian state are immune from enforcement and attachment procedures.

Setting aside arbitral awards

Pursuant to article 53 of the Arbitration Act, arbitral awards can only be challenged by annulment proceedings. An award may be annulled for several reasons including that it contradicts public policy, there was no valid arbitration agreement, the tribunal did not apply the law agreed upon by the parties, one of the party's right of defence was violated or, as is the case more recently, there is a complete absence of reasoning (unless the parties agree not to provide any reasoning).[25] Annulment proceedings could only be brought within 90 days of the valid notification of the award debtor, and the 90 days will not commence even if the counterparty became aware of the award through other means.[26]

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24 Article (24) of the Arbitration Act states that: '1. Both parties to the arbitration may agree to confer upon the arbitral tribunal the power to order, upon request of either party, interim or conservatory measures considered necessary in respect of the subject matter of the dispute and to require any party to provide appropriate security to cover the costs of the ordered measure. 2. If the party against whom the order was issued fails to execute it, the arbitral tribunal, upon the request of the other party, may authorise the latter to undertake the procedures necessary for the execution of the order, without prejudice to the right of said party to apply to the president of the court specified in Article 9 of this Law for rendering an execution order.'

25 Cairo Court of Appeal, Circuit (1), challenge No. 65 of JY 137, dated 4 February 2021.

26 Cairo Court of Appeal, Circuit (3), challenge No. 56 of JY 135, dated 24 June 2020.

The Supreme Constitutional Court held that the right to bring annulment proceedings against arbitral awards is a constitutional one. Additionally, the Court of Appeal held that if the parties agreed in the arbitration clause that the arbitral award is final and no party may challenge it, this cannot prevent either party from filing a nullity suit. However, waiver of an annulment lawsuit after the issuance of the arbitral award is permitted under Egyptian law.[27]

Egyptian courts opined on whether an international commercial arbitration award rendered in Egypt in the context of an international treaty could be subject to annulment proceedings before Egyptian courts, where the treaty seems to prohibit challenging the award. The Court of Cassation took the view that annulment proceedings are allowed under the treaty and that the treaty does not contradict the Arbitration Act regarding the right to request annulment,[28] overturning a previous Court of Appeal judgment.[29]

There is a consensus among Egyptian courts that an annulment claim may not extend to reviewing the substance of the arbitral award to determine its convenience or to review the determination of the arbitrators in understanding the facts or applying the law since the annulment lawsuit is not an appeal.[30]

CRCICA in 2021

The CRCICA is the main arbitral centre in Egypt and is one of the leading arbitral institutions. It was established in January 1978 by a decision of the 19th session of the Asian–African Legal Consultative Committee. It is an independent, non-profit international organisation. The Court of Appeal considered the CRCICA's status as a non-profit international organisation to be that of an international body enjoying judicial immunity in practising its role as an arbitration institution; and thus it may not act as defendant in challenging its arbitration-related function.

27 Cairo Court of Appeal, challenge No. 78 of JY 131, dated 4 May 2015.

28 Cairo Court of Appeal, Circuit (62), challenge No. 39 of JY 130, dated 6 August 2018.

29 Cairo Court of Appeal, challenge No. 39 of JY 130, dated 5 February 2014.

30 Court of Cassation, challenge No. 11713 of JY 89, dated 27 February 2020. See also: Court of Cassation, challenge No. 18309 of JY 89, dated 27 October 2020. See also, Cairo Court of Appeal, Circuit (1), challenge No. 7 of JY 137, dated 8 September 2020.

In 2021, the CRCICA recorded its second-highest number of annual registrations since 2016. A total of 83 cases were filed with the CRCICA in 2021, including 17 ad hoc proceedings administered by the Centre.[31]

The CRCICA's caseload in 2021 involved disputes related to construction, corporate restructuring agreements, banking and finance, oil and gas, investment treaty claims, telecommunications, tourism, hospitality, export–import, media and entertainment, legal representation, real-estate development, business development, lease agreements and apartment purchase agreements.[32] The CRCICA has also highlighted that Arabic was used more than English in cases in 2021, with a ratio of 3:1.[33]

In August 2021, the CRCICA launched its Dispute Board Rules.[34] It registered its first dispute board case in 2021, in which it will act as the appointing authority.[35]

Since it was established, the CRCICA has adopted, with minor modifications, the arbitration rules of UNCITRAL. The CRCICA amended its arbitration rules in 1998, 2000, 2002, 2007 and 2011. The amendments of 2011 are based on the UNCITRAL Arbitration Rules as revised in 2010, with minor modifications, and apply to arbitral proceedings commenced after 1 March 2011. The CRCICA is currently discussing amendments to its 2011 Arbitration Rules.

The CRCICA continued its responsiveness to the covid-19 outbreak in 2021. Its promotion of remote hearing solutions has led to a diversification of the types of hearings held at the CRCICA. The Centre saw an increase in the use of virtual hearings; in the second quarter of 2021, there were 13 physical hearings, 18 fully remote hearings and eight hybrid hearings.[36]

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31 Alison Ross, Cairo centre reveals 2021 case numbers, published in *Global Arbitration Review* (9 February 2022).

32 CRCICA Caseload Report 2nd Quarter 2021 available at: https://crcica.org/news/2021/07/01/caseload-report-2nd-quarter-2021-crcica-registers-a-record-number-of-cases-in-a-first-half-of-a-year/. Alison Ross, Cairo centre reveals 2021 case numbers, published in *Global Arbitration Review* (9 February 2022).

33 Alison Ross, Cairo centre reveals 2021 case numbers, published in *Global Arbitration Review* (9 February 2022).

34 CRCICA Dispute Board Rules available at: https://crcica.org/pageDetails.aspx?Id=ElseXXlz2FA=.

35 Alison Ross, Cairo centre reveals 2021 case numbers, published in *Global Arbitration Review* (9 February 2022).

36 CRCICA Caseload Report 2nd Quarter 2021 available at: https://crcica.org/news/2021/07/01/caseload-report-2nd-quarter-2021-crcica-registers-a-record-number-of-cases-in-a-first-half-of-a-year/.

Key developments in 2021

New competencies added to the Supreme Constitutional Court

In the second half of 2021, the Egyptian Parliament debated a draft amendment of the Egyptian Supreme Constitutional Court Law, which grants the Court the jurisdiction to review the constitutionality of international organisations' and bodies' decisions, foreign court judgments and foreign arbitral awards to be enforced against Egypt. The final text of the amended law limited the Court's review to the decisions of international organisations and bodies, and foreign court judgments to be enforced against Egypt, but did not include foreign arbitral awards.[37] The amended law also granted the Prime Minister the power to request the Court to discard these decisions and judgments or the obligations resulting from them if they are found to violate the Constitution.[38]

Non-banking financial disputes

The Regulation on Non-Banking Financial Markets and Instruments provides for the establishment of an arbitration centre by a presidential decree to resolve disputes arising out of the application of the laws governing non-banking financial transactions, subject to the parties' agreement on arbitration. Presidential Decree No. 335 of 2019 was issued in this regard, establishing the Non-Banking Financial Disputes Arbitration Centre (the NBF Centre). The NBF Centre is competent in all disputes that arise from application of the laws concerning non-financial transactions, in particular disputes between shareholders, partners or members of companies and entities that work in the non-banking financial markets.

Due to the growth of the number of companies offering consumer finance, the head of the Financial Regulatory Authority issued Decree No. 869 of 2021, requiring that the agreement to resort to arbitration in consumer finance contracts should be a separate agreement between the parties.[39]

37 Article 1 of Law No. 137 of amending the Egyptian Supreme Constitutional Court Law No. 49 of 1979.

38 Article 1 of Law No. 137 of 2021 amending the Egyptian Supreme Constitutional Court Law No. 49 of 1979.

39 The Head of the Financial Regulatory Authority Decree No. 869 of 2021.

Sports arbitration

The Sports Law No. 71 of 2017 (the Sports Law) was enacted to regulate sports matters. It is considered to be the first comprehensive sports law in Egypt, where sports matters were previously regulated under different laws. The Sports Law established the Egyptian Sports Arbitration Centre (the Sports Centre) for settlement of any sports disputes subject to the parties' respective agreement or sports regulations.

Article 66 of the Sports Law provides the mechanisms to settle any dispute arising in relation to sports. It includes mediation, conciliation and arbitration in cases where an arbitration clause is included in a contract or regulation binding on the parties of the dispute.[40]

The president of the Egyptian Olympics Committee issued a decision regarding a draft amendment of the statute of the Committee. The amendment changed the name of the Egyptian Sports Arbitration Centre to the Egyptian Sports Settlement and Arbitration Centre; it also vested the Olympic Committee with responsibility for promoting the principles of the Olympic Charter in dispute resolution and affirmed that the Egyptian Sports Settlement and Arbitration Centre has the exclusive jurisdiction to settle sports disputes according to the Sports Law and the principles of the Olympic Charter.

According to the Sports Law, the Sports Centre shall consider the Olympic Charter and the international criteria of the relevant sports' associations. Furthermore, the Centre shall consider the fundamental procedural guarantees and principles of the CCPL. The Sports Law empowered the Olympic Committee to issue its own mediation and arbitration rules, which are set out in Decision No. 88 of 2017. As per the Sports Law, absent a provision in it or in the Sports Centre's rules, the Arbitration Act shall apply.[41]

Recent amendments were made to the statute of the Sports Centre setting the rules for the enforcement of the awards and orders as per the exequatur procedures of the Arbitration Act.[42]

Sports federations maintained their position regarding including arbitration in their statutes as a means to settle the disputes of the respective sport. The statutes were approved by the president of the Egyptian Olympics Committee in 2021. The new sports federation statutes that incorporated settlement of disputes via arbitration in

40 Article (66) and article (67) of the Sports Law No. 71 of 2017.

41 Article 70 of the Sports Law No. 71 of 2017.

42 Article 1 of the President of the Egyptian Olympics Committee Decree No. 4 of 2021.

2021 included the statute of the Muay Thai Federation,[43] the amended statute of the Fencing Federation,[44] the statute of the Paralympic Volleyball Federation,[45] the statute of the Dragon Boat Federation,[46] the statute of the Baseball and Softball Federation (under establishment),[47] the statute of the Roll ball Federation,[48] the statute of the Jeet Kune Do Federation[49] and the new statute of the Football Federation.[50]

Settlement of Football Federation disputes

The former statute of the Football Federation provided for the jurisdiction of the Court of Arbitration for Sport (CAS) for all football-related disputes.[51] The new statute now differentiates between domestic disputes and disputes that include a foreign element.[52] Domestic disputes must be referred to the Egyptian Sports Settlement and Arbitration Centre as a last resort after exhausting all internal dispute settlement channels. Awards rendered by the Sports Centre may be challenged before the CAS,[53] while international disputes (with foreign elements) can be referred directly to the CAS.[54]

Annulment of Sports Centre awards

Several annulment proceedings were brought in respect of arbitral awards rendered under the Sports Law. The Egyptian courts' jurisprudence is not consistent on whether such annulment proceedings can be brought forward under the Arbitration

43 The President of the Egyptian Olympics Committee Decree No. 24 of 2019. (Published on 10 February 2021.)
44 The President of the Egyptian Olympics Committee Decree No. 13 of 2020. (Published on 22 April 2021.)
45 The President of the Egyptian Olympics Committee Decree No. 9 of 2021.
46 The President of the Egyptian Olympics Committee Decree No. 12 of 2020. (Published on 1 August 2021.)
47 The President of the Egyptian Olympics Committee Decree No. 17 of 2018. (Published on 15 December 2021.)
48 The President of the Egyptian Olympics Committee Decree No. 27 of 2019. (Published on 28 December 2021.)
49 The President of the Egyptian Olympics Committee Decree No. 3 of 2020. (Published on 29 December 2021.)
50 The President of the Egyptian Olympics Committee Decree No. 20 of 2021.
51 Article 13 of the President of the Egyptian Olympics Committee Decree No. 329 of 2017.
52 Article 69 of the President of the Egyptian Olympics Committee Decree No. 20 of 2021.
53 Article 69 of the President of the Egyptian Olympics Committee Decree No. 20 of 2021.
54 Article 69 of the President of the Egyptian Olympics Committee Decree No. 20 of 2021.

Act. In some cases, the Court of Appeal decided that such proceedings are subject to the annulment procedures defined under the Sports Centre's rules, which are given precedence over the Arbitration Act by the Sports Law.[55] In the same vein, the Court of Appeal has also adopted the view that an appeal cannot be lodged against an arbitral award issued by the Sports Centre, as the Sports Law does not provide for such an appeal mechanism.[56]

In contrast, there were other judgments by the Court of Appeal holding that sports arbitration awards are subject to the annulment procedures stipulated in the Arbitration Act.[57] Confirming the same view, the Court of Appeal set aside a sports arbitration award because it was made by three arbitrators, while the default clause of the rules of the Sports Centre requires, in the absence of an agreement, that the tribunal is composed of a sole arbitrator; and because the award was not signed by the three arbitrators.[58]

Arbitrations where state organs and companies are parties

Several decrees of 2021 show that state organs are generally accepting of arbitration. For example, the statute regulating agreements concluded by the Social Housing and Real Estate Financing Fund,[59] the statute regulating agreements concluded by the Nuclear Energy and Electricity Generation Authority[60] and the statute regulating agreements concluded by the Egyptian National Railways Authority[61] all provide for an option for the parties to agree to resort to arbitration.

55 Cairo Court of Appeal, Circuit (7), challenge No. 40 of JY 135, dated 5 December 2018, Cairo Court of Appeal, Circuit (62), challenge No. 22 of JY 135, dated 2 July 2018, and Cairo Court of Appeal, Circuit (1), challenge No. 6 of JY 138, dated 9 December 2021.

56 Cairo Court of Appeal, Circuit (8), challenge No. 45 of JY 135, dated 20 January 2019. See also, Cairo Court of Appeal, Circuit (7), challenge No. 73 of JY 135, dated 4 May 2019.

57 Cairo Court of Appeal, Circuit (50), challenge No. 47 of JY 135, dated 25 November 2018.

58 Cairo Court of Appeal, Circuit (91), challenge No. 9 of JY 136, dated 9 April 2019. Also, Cairo Court of Appeal, Circuit (50), challenge No. 46 of JY 135, dated 27 January 2019.

59 The Minister of Housing, Utilities and Urban Communities Decree No. 576 of 2021.

60 The Minister of Electricity and Renewable Energy Decree No. 44 of 2021.

61 The Minister of Transportation Decree No. 191 of 2021.

Some state-owned companies are now also allowed to agree to arbitrate with third parties as an alternative mean to settle disputes. The statutes of Egyptair Holding Company[62] and the Egyptian Holding Company for Airports and Air Navigation[63] now include an option to agree to resort to arbitration.

However, to arbitrate in administrative contracts, the arbitration agreement must be approved by the competent minister or by whomever assumes his or her authority with respect to independent public authorities.[64] The power to approve the arbitration agreement may not be delegated.[65] The approval of the competent minister for the validity of an arbitration agreement is a matter of public policy.[66] Egyptian courts had held that the absence of ministerial approval invalidates the arbitration agreement.[67]

Principles from the Egyptian courts issued in 2021

Derogation from the public policy law applicable to the dispute

The dispute in question arose out of a build-operate-transfer (BOT) contract in Damietta Port that ended with a multimillion ICC award in favour of a major investor against Damietta Port Authority (DPA). The dispute mainly revolved around the validity of a settlement agreement approved by the Cabinet of Ministers, which the ICC tribunal found to be invalid. By applying the rules of private law, the arbitral tribunal classified the contract as a contract for works and unanimously refused the enforcement of the amicable settlement agreement and its annexes. The DPA then filed an annulment lawsuit before the Court of Appeal,[68] which dismissed the challenge and considered the award valid. However, the Court of Cassation reversed the decision[69] and decided to set aside the ICC award. The Court considered the BOT agreement to be an administrative contract. As such, there are some stages that require

62 The Minister of Civil Aviation Decree No. 874 of 2021.

63 The Minister of Civil Aviation Decree No. 875 of 2021.

64 Article (1) of the Arbitration Act as amended by Law No. 9 of 1997.

65 CRCICA ad hoc arbitration case No. 793 of 2012, award, Sharkawy, International Commercial Arbitration – Legal Comparative Study, 2011, Dal El Nahda Al Arabia, p. 81; Abdel Aziz Abdel Mena'em Khalifa, Arbitration in Contractual and Non-Contractual Administrative Disputes, 2011, Monsha'at El Ma'aref, p. 127.

66 Administrative Judiciary Court, Investment and Economics Disputes Section, 7th Section, case No. 11492 of JY 65 JY, dated 7 May 2011.

67 CRCICA Arbitration Case No. 676 of 2010, award dated 21 August 2011, *Journal of Arab Arbitration*, Issue No. 17, pp. 263–264.

68 Court of Appeal, Circuit (1), Appeal No. 48 of JY 137, dated 9 December 2020.

69 Court of Cassation, challenges Nos. 1964 and 1968 of JY 91, dated 8 June 2021.

the administration (the DPA) to take some procedures to conclude, amend or even terminate the agreement. These procedures include the issuance of administrative decisions by the competent authorities, which include decisions by the Cabinet of Ministers. The Court found that although these decisions are connected to the agreement, they are administrative decisions that are not within the contract and could only be challenged by a cancellation lawsuit that falls within the exclusive jurisdiction of the state counsel. Furthermore, the Court concluded that the arbitral tribunal applied the rules of private law to an administrative contract. The Court considered that applying the rules of private law instead of public law (administrative law) to an administrative contract (concession agreement) constitutes a violation of public policy as the application of administrative law to an administrative contract is a public policy matter. The Court reasoned that the administration has exceptional authority related to its power to regulate, amend and terminate an administrative contract to operate public utilities. The Court further found that the arbitral tribunal's application of private law amounted to an exclusion of the applicable law (which requires application of the administrative law to administrative contracts). Unlike the finding of the Court of Appeal, the Court of Cassation found that the DPA cannot waive the rights it had because they are not financial rights and obligations, and they are not subject to compromise. The Court added that treating both parties equally would be against public policy as the administration (the DPA) should have exceptional powers and authorities in management of the public utility (Damietta Port).

Competent court to decide on the enforceable award when two arbitral awards are in conflict

In October 2021, the Supreme Constitutional Court[70] decided that it is not competent to decide on which arbitral award that should be enforced if two arbitral awards are in conflict. The Court found that it is only competent to decide on the enforcement of specific judgments if more than one is issued by courts of different judicial bodies (eg, ordinary courts and state counsel). It held that awards issued by different arbitral tribunals are considered to be issued by the same judicial body because all tribunals are regulated by the same legislative instrument (the Arbitration Act). Finally, the Court determined that the court stipulated in article (9) of the Arbitration Act is the competent court to determine which award should be enforced in case of conflict. In case of international arbitration, the Court of Appeal would be the competent court.

70 Supreme Constitutional Court, challenge No. 37 of JY 41, dated 9 October 2021.

Persons with criminal records can now sit as arbitrators in absence of any objections

Pursuant to article (16) of the Arbitration Act, any person who is a minor or who is prohibited from practising civil rights due to a judgment against him or her for a crime that relates to honour (eg, theft and counterfeiting of money) may not sit as an arbitrator. In one case, one of the arbitrators was previously imprisoned for one year for counterfeiting money, which is one of the disqualifying crimes. However, the parties were aware of this fact and none of them raised any objections during the proceedings. Thereafter, the losing party decided to file an annulment lawsuit to annul the arbitral award on the basis that one of the arbitrators is prohibited from sitting as an arbitrator for his criminal record. The Court of Cassation[71] found that the party filing the challenge was aware of that fact and had not raised any objection during the proceedings. Thus, the issued award was not annulled for this reason.

Limitations on the estoppel doctrine

The Court of Appeal has put in place some limitations on the estoppel doctrine previously established by some courts.[72] In its award, the arbitral tribunal decided that a party is estopped from claiming its right if it remained silent for 11 years. The Court of Appeal decided that this would constitute a deviation from the public policy rule of the limitation period to apply the estoppel doctrine.[73] This also constituted failure to apply the law applicable to the dispute.

Partial annulment for not allocating the arbitration costs according to the parties' agreement

In April 2021, the Court of Appeal[74] annulled an award issued by a CRCICA tribunal for applying the CRCICA's Arbitration Rules for allocation of costs of arbitration between the parties to the dispute. The parties had previously agreed in their arbitration agreement that the costs would be equally divided among them. However, the tribunal decided that the losing party would bear 75 per cent of the costs, relying on article (46) of the CRCICA Arbitration Rules that entitles the tribunal to make the losing party bear the costs. This was found by the Court to be against the arbitration agreement and it partially annulled the award with regard to the arbitration costs.

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71 Court of Cassation, challenge No. 6887 of JY 77, dated 23 January 2021.

72 Court of Cassation, challenge No. 18309 JY 89, dated 27 October 2020.

73 Cairo Court of Appeal, Circuit (7), challenges Nos. 11 and 12 of JY 137, dated 22 December 2021.

74 Cairo Court of Appeal, Circuit (3), challenges Nos. 41 and 45 of JY 137, dated 28 April 2021.

Extremely excessive and unfair compensation as grounds for annulment of arbitral awards

The Court of Cassation has previously adopted a position that an incorrect assessment of damages is not a ground for annulment because, in the eyes of the Court, the assessment of compensation is considered a question of fact and thus falls outside the scope of the action for annulment.[75] However, in 2020, the Court of Appeal[76] reviewed an annulment action for an arbitral award between an investor and the Libyan government rendered by a tribunal seated in Egypt. The tribunal in that case awarded approximately US$960 million to the investor as damages. In its judgment, the Court of Appeal found that it is necessary to find harm to order compensation. As such, compensation must be proportionate to the damage. If compensation is excessively disproportional to the damage, it would be considered extremely unjust and in violation of public policy (represented by the rules of equity and fairness). The Court held that an arbitral award may be annulled if it included – clearly and explicitly – compensation that is unjust, extremely unfair, extremely excessive in relation to the damage or disproportionate and unreasoned. Similarly, in another judgment, the Court implied that it has jurisdiction to review the tribunal's assessment of compensation if it was extremely unfair, abusive or invented.[77]

However, in 2021, the Court of Cassation[78] confirmed its stance and reversed the Court of Appeal's decision. It confirmed that even if the arbitral tribunal is wrong in its assessment of compensation, this is a discretionary matter that does not amount to a ground for annulment of the arbitral award because it is not one of the grounds of annulment exclusively stipulated in article 53 of the Arbitration Act.

Annulment for issuing arbitral awards 'in the name of the people'

The Court of Appeal[79] recently annulled an award for being issued 'in the name of the people'. The Court found that only courts can, by virtue of the constitution and the law, issue judgments 'in the name of the people'. It is yet to be seen if this judgment will be upheld by the Court of Cassation.

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75 Court of Cassation, challenge No. 3299 of JY 86, dated 13 March 2018. See also, Court of Cassation, challenge No. 414 of JY 71, dated 8 January 2009.

76 Cairo Court of Appeal, Circuit (1), challenge No. 39 of JY 130, dated 3 June 2020.

77 Cairo Court of Appeal, Circuit (1), challenge No. 61 of JY 134, dated 12 August 2020.

78 Court of Cassation, challenge No. 12262 of JY 90, dated 24 June 2021.

79 Cairo Court of Appeal, Circuit (8), challenge No. 55 of JY 136, dated 18 February 2021.

Pathological arbitration clauses could be valid

In a case in 2021, the parties agreed on the right of any of the parties to resort to arbitration, in accordance with the Arbitration Act, with the Cairo Centre, the Alexandria Centre for International Arbitration or the Alexandria Economic Court. Accordingly, one of the parties referred their dispute to the CRCICA. The Court of Appeal[80] considered this to be an agreement between the parties to authorise the party that commences the proceedings to choose the dispute resolution method, whether before the Cairo Centre or the Alexandria Centre, or to resort to courts. As such, this agreement of the parties should be respected.

Liquidation of letters of guarantee

In a recent judgment, the Court of Appeal[81] held that, if the underlying contract includes an arbitration agreement, the Court is competent to cease liquidation of a letter of guarantee until the arbitral tribunal decides the case.

Non-suspension of the arbitral proceedings pending a challenge before the constitutional court is not a reason for annulment

The Court of Appeal[82] refused to set aside an arbitral award on the grounds that the arbitral tribunal refused to suspend the proceedings pending determination of the Supreme Constitutional Court on the competent court as per article 31 of the Supreme Constitutional Court Law. In these proceedings, while the arbitration proceedings were ongoing, the appealing party filed a claim before the domestic courts and then filed a challenge before the Supreme Constitutional Court for the Court to determine the competent court, which would be either the arbitral tribunal or a domestic court. The arbitral tribunal found that the challenge before the Supreme Constitutional Court was made for the sole purpose of prolonging the proceedings and refused to suspend the arbitration proceedings. The Court of Appeal confirmed the findings of the arbitral tribunal and confirmed that not suspending the arbitration proceedings pending the decision of the Supreme Constitutional Court is not a matter of public policy and not one of the grounds for annulment of arbitral awards.

80 Cairo Court of Appeal, Circuit (3), challenge No. 16 of JY 137, dated 25 February 2021.

81 Cairo Court of Appeal, Circuit (3), challenge No. 60 of JY 137, dated 27 January 2021.

82 Cairo Court of Appeal, Circuit (4), challenges Nos. 70 and 75 of JY 137, dated 5 December 2021.

Inexistence lawsuit must be filed before the competent court and not the Court of Appeal

The Court of Appeal[83] found that a forged arbitration award is not subject to an annulment lawsuit; rather, it is subject to a lawsuit for inexistence of the award. In this case, the Court of Appeal decided that it lacks jurisdiction over the inexistence lawsuit for an arbitral award.

Orders issued by the arbitral tribunal are not subject to annulment lawsuit

The Court of Appeal[84] decided that it is only competent with regard to the annulment lawsuit filed for final awards. Thus, awards that do not settle the dispute are not subject to an annulment lawsuit. In its reasoning, the Court stated that if it is possible to file an annulment lawsuit before the award is rendered, this will lead to distribution of the dispute between domestic courts and arbitral tribunals and would delay its resolution.

Signature of all pages of the arbitral award does not necessarily lead to its annulment

The Court of Appeal[85] refused to annul an arbitral award for not signing all the pages of the award. The Court found that the rationale behind a signature on every page of the arbitral award is to ensure that all the members of the tribunal have deliberated before issuing the award. In the case before the Court, one of the arbitrators refused to sign and issued a dissenting opinion, which the Court found as evidence that the tribunal has deliberated before issuance of the award.

Controversy over the extension of arbitration agreements to third parties

In April 2021, the Court of Appeal[86] issued a judgment that refused an annulment lawsuit filed by one of the parties for not being represented during the arbitral proceedings. That party claimed that it was not represented in the proceedings as the person claiming its representation had a power of attorney from the managing director of its Egyptian subsidiary, while the actual party was a branch of the parent company and not the subsidiary. The Court found that the parent company was correctly represented because the managing director of the Egyptian subsidiary was in fact the representative of the parent branch on the board of directors of the Egyptian

83 Cairo Court of Appeal, Circuit (4), challenge No. 19 of JY 137, dated 4 July 2021.
84 Cairo Court of Appeal, Circuit (3), challenge No. 35 of JY 137, dated 27 January 2021.
85 Cairo Court of Appeal, Circuit (2), challenge No. 100 of JY 135, dated 14 August 2021.
86 Cairo Court of Appeal, Circuit (3), challenge No. 74 of JY 137, dated 28 April 2021.

subsidiary. This could potentially mean that in certain cases the courts may be willing to pierce the corporate veil and determine that the parent company can have the same representative as a subsidiary.

In another case, the Court of Appeal[87] found that a third-party subsidiary may not be adjoined in the arbitration proceedings without its consent. In its reasoning the Court held that the arbitration agreement is limited to its parties, and none of the parties may adjoin or make claims against a third party without the agreement of the parties to the arbitration agreement and the approval of the third party.

A party that was not party to the arbitration proceedings cannot request its annulment even if it harms that party

The Court of Appeal[88] has set a principle that a third party cannot request annulment of an arbitral award regardless of the extent of damage it sustains from the issuance of the award. It confirmed that only parties to the arbitral proceedings can challenge the arbitral award.

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87 Cairo Court of Appeal, Circuit (3), challenge No. 49 of JY 137, dated 25 February 2021.

88 Cairo Court of Appeal, Circuit (1), challenge No. 53 of JY 136, dated 5 April 2021.

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