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MIDDLE EAST AND AFRICA ARBITRATION REVIEW 2023

The European Arbitration Review 2023 contains insight and thought leadership from 15 preeminent practitioners from the region. It provides an invaluable retrospective on what has been happening in some of Europe's more interesting seats.

This edition also contains think pieces on human rights in arbitration, the mechanism's growing use in technology disputes, damages in investment disputes and the use of statistical samples.

All articles come complete with footnotes and relevant statistics.

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Preface

Welcome to *The Middle Eastern and African Arbitration Review 2023*, 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 such as our Arbitrator Research Tool, and repository of arbitral awards (Primary Sources).

In addition, assisted by external contributors, we curate a series of regional reviews 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 one such review. 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 260-plus pages, they capture and interpret the most substantial recent international arbitration developments from around Africa and the Middle East, 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, Morocco, Mozambique, Nigeria, Rwanda, Saudi Arabia and the UAE, and has overviews on energy, renewables, mining, virtual hearings and the importance of the date of valuation.

A close read of these reviews never disappoints. On this occasion, for this reader, the nuggets I stashed included that:

- the Russia–Ukraine war will likely increase political risk in Africa, as grain shortages lead to price rises and thereafter to civic unrest;
- tighter foreign exchange controls are starting to ramify for some investments;
- sandstorms, caused by climate change, are proving a bigger-than-expected problem for some solar projects;

- the first renewables-related disputes have already broken out, usually because of underperforming technology;
- Mozambique is about to modernise its arbitration law;
- Saudia Arabia now performs very creditably against the CIArb's 'London' principles; and
- Kuwait's courts, on the other hand, remain betwixt and between on some key jurisdictional points.

And many, many more. I particularly noted the description of different countries' renewables pipelines for future reference.

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.

David Samuels
Publisher, Global Arbitration Review
April 2023

Egypt

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In summary

This article outlines the main features of Egypt's arbitration legal framework and covers key developments in the arbitration field during 2022, including for the Cairo Regional Centre for International Commercial Arbitration (CRCICA). It provides a brief overview of the new laws issued and developments in state-involved arbitrations. It also highlights the main arbitration principles established by the courts in 2022 concerning, among other things, IBA guidelines application by Egyptian courts, criteria for determining international arbitration and the unconstitutionality of article 69 of the Sports Law.

Discussion points

- Legal framework for arbitration in Egypt
- Key developments in the arbitration regime in Egypt
- New competencies added to the Supreme Arbitration Committee
- Arbitration related principles established by the Egyptian courts in 2022
- The CRCICA's role in international arbitration

Referenced in this article

- Egyptian Arbitration Act No. 27 of 1994
- Civil and Commercial Procedures Law No. 131 of 1948
- Sports Law No. 71 of 2017
- Prime Minister Decree No. 3218 of 2022 amending the competencies of the Supreme Arbitration Committee
- Minister of Justice Decree No. 8 of 2022 establishing the Egyptian Arbitration Act Reform Committee
- Alexandria Court of Appeal, Circuit (5), Challenge No. 6 of JY 76 dated 20 April 2022
- Cairo Court of Appeal, Circuit (3) Commercial, Challenge No. 40 of JY 138 dated 24 January 2023
- Court of Cassation, Challenge No. 9568 of JY 91 dated 12 May 2022

The Egyptian Arbitration Act

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 the general law governing arbitration in Egypt, there are other laws that govern certain aspects of arbitration regarding 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 traditionally 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 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]

To date, a total of 46 investment treaty cases have been registered against Egypt as a respondent state (including 38 ICSID cases).[9,10] Of these 46 cases, 11 are currently pending (including seven ICSID cases),[11] 15 were settled, 13 were decided in favour of Egypt, five were decided in favour of investors and in one case liability was found but no damages were awarded.[12]

A total of six cases have been registered with Egypt as the home state of the claimants. Of these six cases, one case is currently pending, two were settled and two were decided in favour of the host state.[13]

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/member-state-details?state=ST43.
8 https://investmentpolicy.unctad.org/international-investment-agreements/countries/62/egypt?type=bits.
9 https://icsid.worldbank.org/cases/case-database.
10 https://investmentpolicy.unctad.org/investment-dispute-settlement/country/62/egypt/investor.
11 https://icsid.worldbank.org/cases/case-database.
12 https://investmentpolicy.unctad.org/investment-dispute-settlement/country/62/egypt/investor.
13 ibid.

In the first quarter of 2022, the Minister of Justice issued Decree No. 8 of 2022 establishing the Egyptian Arbitration Act Reform Committee. The Committee includes scholars and practitioners, including the co-authors of this article. The main role of the Committee is to study and propose amendments to the Arbitration Act, if needed.[14]

The arbitration agreement

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.[15] Since 2005, the Cairo Court of Appeal (the Court of Appeal) has held that an arbitration agreement is considered to be the constitution of an arbitration and determines the scope, extent and subject of the arbitration, and grants the arbitrators their powers, resulting in excluding the dispute from the jurisdiction of the courts.[16]

An agreement to arbitrate may take three different forms:

- the arbitration agreement may be embodied as a clause or an annex to the agreement between the parties before a dispute arises between them;
- the parties may enter into a 'submission agreement', which is an arbitration agreement that the parties agree to after a dispute has risen – if so, the parties must define in the arbitration agreement the matters or disputes subject to arbitration, otherwise the agreement shall be null and void; or[17]
- the arbitration agreement may be incorporated by reference.

However, the validation of this incorporation requires explicit reference to an existing document with a valid arbitration agreement therein.[18] Pursuant to article 10(3) of the Arbitration Act and Egyptian jurisprudence, the following conditions must be satisfied:

- reference should be made to an existing document or contract that includes an arbitration clause;
- the document or contract that reference is made to should be known to all the parties against whom that document or contract and the included arbitration clause will be invoked; and
- reference should be explicitly made to the arbitration clause itself and to the fact that it is an integral part of the contract (general reference to the existing document or its terms is not sufficient).[19]

14 Minister of Justice Decree No. 8 of 2022 establishing the Egyptian Arbitration Act Reform Committee.
15 Article 10(1) of Arbitration Act No. 27 of 1994.
16 Cairo Court of Appeal, Circuit 91 – Commercial, Case No. 95 of120 JY, dated 27 April 2005.
17 Article 10(2) of Arbitration Act No. 27/1994.
18 Article 10(3) of Arbitration Act No. 27/1994.
19 Court of Cassation Judgment, Challenge No. 495/72 J, session dated 13 January 2004.

In terms of the scope of the arbitration agreement, the Court of Appeal has held that the arbitration agreement scope excludes disputes related to the execution of the applicable contract, if the arbitration agreement is drafted in a manner that would only empower the arbitral tribunal to hear disputes arising out of the difference in interpreting the provisions of the agreement. The Court of Appeal decided that the tribunal would only be competent to hear disputes relating to the interpretation, not performance, of the contract.[20] However, the Court of Appeal found that even if the tribunal exceeded its mandate and the scope of the arbitration agreement without any objection by the parties, this would not be a ground for annulment of the award as long as the party making the claim for annulment did not make any objection in this respect during the arbitration proceedings.[21] In another judgment, the Court of Appeal[22] found that rendering an award for tort liability falls outside the jurisdiction of the tribunal. In that case, the tribunal awarded compensation for the abuse of using a trademark that was categorised by the tribunal itself as tortious liability, which was considered by the Court to fall outside the scope of the arbitration agreement.

Conditions of validity of the arbitration agreement

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: (1) the arbitration agreement must relate to matters that are amenable to compromise;[23] and (2) the arbitration agreement must be in writing, otherwise it shall be null and void.[24]

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.[25] Silence may be considered as acceptance of the arbitration agreement if there are previous continued transactions between the parties where the arbitration agreement is included,[26] or where proceedings are initiated without objection from the opposing party.[27]

20 Cairo Court of Appeal, Challenge No. 3 of 136 JY, session dated 27 May 2019.
21 Cairo Court of Appeal, Circuit (1), Challenge No. 15 of JY 137, dated 8 July 2020.
22 Cairo Court of Appeal, Circuit (1), Challenge No. 39 of JY 136, dated 10 September 2020.
23 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).
24 Article (12) of Arbitration Act No. 27 of 1994.
25 Fathy Waly, *Arbitration Act in Theory and Practice*, 2021, Vol. 1, p. 238-239.
26 Professor Mahmoud El Briery, International Commercial Arbitration, Fourth Edition 2010, Dar El Nahda El Arabi'a, p. 59.
27 Cairo Court of Appeal, Circuit (50), Challenge No. 59 of 135 JY, session dated 28 November 2018.

Defective arbitration clauses have been repeatedly held by the Cairo Court of Appeal as valid arbitration agreements and were interpreted to favour arbitration over courts.[28]

Enforcement of arbitral awards in Egypt

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.[29] 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.[30] The enforcement order must 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.[31] The enforcement of foreign arbitral awards in Egypt is governed by the Convention on the Enforcement of Foreign Arbitral Awards (the New York Convention),[32] and as such, are subject to the same enforcement rules applicable to national arbitral awards under the Arbitration Act.[33]

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 must 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[34] and required that the interim measure:

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

Article 24 of the Arbitration Act allows a court to order the enforcement of interim measures decided by arbitral tribunals in arbitrations that are subject to the Arbitration Act.[35]

28 Cairo Court of Appeal, Circuit (8), Challenge No. 55 of 134 JY, session dated 16 September 2018 and Cairo Court of Appeal, Circuit (50), Challenge No. 59 of 135 JY, session dated 28 November 2018.
29 Article (55) of Arbitration Act No. 27 of 1994.
30 Article (56) of Arbitration Act No. 27 of 1994.
31 Article (58) of Arbitration Act No. 27 of 1994.
32 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.
33 Cairo Court of Appeal, Circuit (7), Challenge No. 55 of JY 135, dated 6 February 2019.
34 Cairo Court of Appeal, Circuit (7), Challenge No. 44 of JY 134, dated 9 May 2018.
35 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,

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).[36] Annulment proceedings could only be brought within 90 days of the valid notification of the award debtor,[37] and the 90 days will not commence even if the counterparty became aware of the award through other means.[38]

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.[39]

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

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.'

36 Cairo Court of Appeal, Circuit (1), Challenge No. 65 of JY 137, dated 4 February 2021.
37 Alexandria Court of Appeal, Circuit (5), Challenge No. 6 of JY 76, dated 20 April 2022.
38 Cairo Court of Appeal, Circuit (3), Challenge No. 56 of JY 135, dated 24 June 2020.
39 Cairo Court of Appeal, Challenge No. 78 of JY 131, dated 4 May 2015.

not contradict the Arbitration Act regarding the right to request annulment,[40] overturning a previous Court of Appeal judgment.[41]

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 as the annulment lawsuit is not an appeal.[42]

Key developments in the arbitration regime

The Supreme Arbitration Committee – new competencies added in 2022

In 2019, the Supreme Arbitration Committee (the Committee) was established by Prime Minister Decree No. 1062 of 2019. State entities and public companies became obliged to refer matters related to an arbitral dispute to the Committee before taking any action.[43]

In the second half of 2022, the competencies of the Committee were amended to include reviewing any contract between state entities or public companies and foreign investors, and contracts that includes a clause that allows parties to resort to international arbitration. Further, state entities and public companies must not amend, rescind or terminate any contract concluded with a foreign investor without consulting the Committee.[44]

Moreover, the Committee's opinion is generally required for any contract concluded with a foreign investor, even if this contract does not include an arbitration agreement.[45]

The Committee is empowered to review all arbitration cases that the state or any state-related entities are involved in.[46]

40 Cairo Court of Appeal, Circuit (62), Challenge No. 39 of JY 130, dated 6 August 2018.
41 Cairo Court of Appeal, Challenge No. 39 of JY 130, dated 5 February 2014.
42 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.
43 Prime Minister Decree No. 1062 of 2019 establishing the Supreme Arbitration Committee.
44 Article 6 of Prime Minister Decree No. 3218 of 2022 amending the competencies of the Supreme Arbitration Committee.
45 Article 2 of Prime Minister Decree No. 3218 of 2022 amending the competencies of the Supreme Arbitration Committee.
46 Prime Minister Decree No. 1679 of 2022 amending the competencies of the Supreme Arbitration Committee.

New competencies added to the Supreme Constitutional Court

In the second half of 2021, the Egyptian Parliament debated a draft amendment to the Egyptian Supreme Constitutional Court Law. The final text of the amended law makes it the Court's jurisdiction to review decisions of international organisations and bodies, and foreign court judgments to be enforced against Egypt, but did not include foreign arbitral awards as earlier drafts did.[47] The amended law also granted the Prime Minister the power to request that the Court discard these decisions and judgments, and the obligations resulting from them, if they are found to violate the Constitution.[48]

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 the application of 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.

Owing to growth in 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.[49]

Recently, the head of the Financial Regulatory Authority amended the Decree to permit any dispute arising from the consumer finance contract to be resolved by arbitration under the rules of the Egyptian Centre for Optional Arbitration and Settlement of Non-Banking Financial Disputes.[50]

The same was applied to financial leasing and factoring contracts, and the factoring contract for the financial rights arising from buying marginal securities.[51]

47 Article 1 of Law No. 137 of 2021 amending the Egyptian Supreme Constitutional Court Law No. 49 of 1979.
48 ibid.
49 Head of the Financial Regulatory Authority Decree No. 869 of 2021.
50 Head of the Financial Regulatory Authority Decree No. 1305 of 2022.
51 ibid.

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.[52] The past statute differentiated between domestic disputes and disputes that include a foreign element.[53] 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,[54] while international disputes (with foreign elements) can be referred directly to the CAS.[55]

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,[56] the statute regulating agreements concluded by the Nuclear Energy and Electricity Generation Authority[57] and the statute regulating agreements concluded by the Egyptian National Railways Authority[58] all provide for an option for the parties to agree to resort to arbitration.

Some state-owned companies are also allowed to agree to arbitrate with third parties as an alternative mean to settle disputes. The statutes of Egyptair Holding Company[59] and the Egyptian Holding Company for Airports and Air Navigation[60] include an option to agree to resort to arbitration. In 2022, their subsidiaries also provided the same option; such as the statutes of:

- Cairo Airport Company;[61]
- Aviation Information Technology (AVIT);[62]
- National Air Navigation Services Company;[63]
- Egyptian Airport Company;[64]
- Egyptair Air Services;[65]
- Egyptair Cargo;[66]

52 Article 13 of the President of the Egyptian Olympics Committee Decree No. 329 of 2017.
53 Article 69 of the President of the Egyptian Olympics Committee Decree No. 20 of 2021.
54 ibid.
55 ibid.
56 The Minister of Housing, Utilities and Urban Communities Decree No. 576 of 2021.
57 The Minister of Electricity and Renewable Energy Decree No. 44 of 2021.
58 The Minister of Transportation Decree No. 191 of 2021.
59 The Minister of Civil Aviation Decree No. 874 of 2021.
60 The Minister of Civil Aviation Decree No. 875 of 2021.
61 The Minister of Civil Aviation Decree No. 157 of 2022.
62 The Minister of Civil Aviation Decree No. 154 of 2022.
63 The Minister of Civil Aviation Decree No. 156 of 2022.
64 The Minister of Civil Aviation Decree No. 155 of 2022.
65 The Minister of Civil Aviation Decree No. 135 of 2022.
66 The Minister of Civil Aviation Decree No. 133 of 2022.

- Egyptair Airlines;[67]
- Egyptair Maintenance & Engineering;[68]
- Egyptair Tourism & Duty Free (Al Karnak);[69]
- Egyptair Ground Services;[70]
- Egyptair Medical Services;[71] and
- Egyptair Supplementary Industries.[72]

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.[73] The power to approve the arbitration agreement may not be delegated.[74] The approval of the competent minister for the validity of an arbitration agreement is a matter of public policy.[75] Egyptian courts had held that the absence of ministerial approval invalidates the arbitration agreement.[76]

Principles from the Egyptian Courts of Appeal issued in 2022

Arbitration and the right to litigate

The Cairo Court of Appeal emphasised that it is established that there is no conflict between the right to litigate as an original constitutional right and between regulating this right legislatively, provided that the legislator does not use the regulation as a way to limit this right or violate it.[77] It further established that the grounds for annulling an arbitral award under article 53 of the Arbitration Act fall within the discretionary power of the legislator; thus, challenging the constitutionality of articles 52 and 53 of the Arbitration Act (which are not grounds for annulment under the Arbitration Act) is a moot issue that the Court decided to disregard.[78]

67 Minister of Civil Aviation Decree No. 130 of 2022.
68 Minister of Civil Aviation Decree No. 131 of 2022.
69 Minister of Civil Aviation Decree No. 134 of 2022.
70 Minister of Civil Aviation Decree No. 132 of 2022.
71 Minister of Civil Aviation Decree No. 136 of 2022.
72 Minister of Civil Aviation Decree No. 137 of 2022.
73 Article (1) of the Arbitration Act as amended by Law No. 9 of 1997.
74 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.
75 Administrative Judiciary Court, Investment and Economics Disputes Section, 7th Section, case No. 11492 of JY 65 JY, dated 7 May 2011.
76 CRCICA Arbitration Case No. 676 of 2010, award dated 21 August 2011, *Journal of Arab Arbitration*, Issue No. 17, pp. 263–264.
77 Cairo Court of Appeal, Circuit (4) Commercial, Challenge No. 38 of JY 138, dated 2 January 2022.
78 ibid.

Competent court to hear disputes related to arbitration matters

The Cairo Court of Appeal established that while the Egyptian Arbitration Act governs domestic and international arbitration, it distinguishes between the competent court that has jurisdiction over arbitration-related matters referred to the Egyptian judiciary. Parliament granted jurisdiction over domestic arbitration-related matters to the court with prime jurisdiction, while it granted the Cairo Court of Appeal jurisdiction over international arbitration-related matters.[79]

Determining international arbitration

The Cairo Court of Appeal, in interpreting article 3 of the Egyptian Arbitration Act, which sets the criteria to distinguish between international and domestic arbitration, followed the common interpretation adopted by other Egyptian courts and found that two cumulative conditions are required for an arbitration to be considered international arbitration under the Egyptian Arbitration Act. First, the matters in dispute must be related to international trade represented in the transfer of individuals or capital, or the exchange of goods and services, between parties across borders. Second, one of the cases mentioned in article 3 of the Act must exist, which are:

- the main places of business of the parties to an arbitration are different states at the time of the conclusion of the agreement to arbitrate;
- the parties agreed to opt for a permanent arbitral organisation or an arbitration centre located in or out of Egypt;
- the subject matter of the dispute included within the scope of the agreement to arbitrate relates to more than one state; and
- the main places of business of the parties to an arbitration are the same state at the time of concluding the agreement to arbitrate, yet one of the following places is located outside of this state:
    - the seat of arbitration;
    - the place that a substantive part of the obligations resulting from the commercial relation between the parties was performed; and
    - the place that is most connected to the subject matter of the dispute.[80]

Tacit waiver of an agreement to arbitrate

One recent case related to a sale of land contract under which the parties agreed on resorting to arbitration to resolve disputes related to this contract. Despite the existence of this arbitration clause, the buyer asked the court to

79 Cairo Court of Appeal, Circuit (4) Commercial, Challenge No. 22 of JY 138, dated 4 January 2022.
80 ibid.

reduce the price of the land, and the court awarded the buyer its claim against the seller. Afterwards, the seller filed a suit requesting the termination of the contract. However, the court dismissed the case because of the existence of an arbitration agreement. Then, the seller resorted to arbitration claiming the termination of the contract on account of the buyer's delay in settling the remainder of the land price, and the tribunal rendered its decision with the termination of the contract. The buyer challenged the validity of this arbitral award on several grounds, including the waiver of the right to arbitrate by participating in the court proceedings filed by the buyer. In this respect, the Cairo Court of Appeal found that parties to an arbitration agreement have the right to waive their agreement to arbitrate at any time. A waiver of an agreement to arbitrate could be either explicit or tacit. A tacit waiver could be indicated from the circumstances surrounding such a waiver. An example of a tacit waiver is referring the dispute to the national judiciary and refraining from making any objection concerning the existence of an agreement to arbitrate. Thus, the Court annulled the arbitral award on these grounds.[81]

Economic Court's jurisdiction over telecommunication arbitration disputes

In a set aside suit related to a telecommunications dispute, the Cairo Court of Appeal referred the suit to the competent Economic Court because, according to the law establishing the Economic Court, it is the court with jurisdiction over disputes arising out of Telecommunication Law No. 10 of 2003.[82]

The effect of insufficient or lack of reasoning on the validity of an arbitral award

In one of its judgments, the Cairo Court of Appeal stated that it is undisputed that judgments must be reasoned to allow judicial review over judgments. The same applies in the arbitral award nullity suit context: a nullity court needs arbitral awards to be reasoned to ascertain the non-existence of any of the setting aside grounds under the Arbitration Act. The Court established that, generally, an insufficient reasoning in a judgment includes distorted, vague or generic reasoning valid for each claim. An example of which, according to the Court, is when a judge decides that a claimant has proved its disputed ownership over property without stating the evidence that it relied upon. Similarly, if a judge committed an error in his or her reasoning or if his or her reasoning was incomplete or unrealistic. The Court established that lack of reasoning is a

81 Cairo Court of Appeal, Circuit (1) Commercial, Challenge No. 44 of JY 138, dated 7 February 2022.
82 Cairo Court of Appeal, Circuit (2) Commercial, Challenge No. 47 of JY 138, dated 28 February 2022.

formal fault that renders a court judgment null and void. The Court found that the same rules apply to arbitral awards.[83]

In another judgment, the Cairo Court of Appeal highlighted that lack of reasoning provided by the arbitral tribunal is not related to public policy because article 43 of the Arbitration Act permits agreeing to exempt the arbitral tribunal from reasoning in the issued award.[84]

Conditions for setting aside an award on grounds of exclusion of the applicable law

According to article 53(d) of the Egyptian Arbitration Act, one of the grounds for setting aside an arbitral award is the exclusion of the applicable law chosen by the parties by the arbitral tribunal. This is because it implies an excessive use of the arbitrators' powers and violation of the party autonomy principle, which is the foundation of any arbitration. Setting aside an arbitral award on this ground requires an explicit agreement between the parties on the applicable law. Thus, if the parties did not explicitly choose a specific law and the tribunal applied the rules of the law that are most related to the dispute, this application does not invalidate the award even if the tribunal committed was at fault.[85]

Arbitral tribunal not required to include the arbitration agreement in awards

According to the Court of Appeal, the arbitral tribunal is not required to include the arbitration agreement in its award. Reference to the arbitration agreement in the award is sufficient. It satisfies the purpose laid down by the legislature.[86]

Effects of the arbitration agreement in relation to non-signatories

Arbitration agreements must be in writing. The Court of Appeal ruled that arbitration agreements have a relative effect. They binds only their signatories and do not extend to third parties. If the arbitral tribunal has extended the arbitration agreement to a third party that was not a party to the original contract containing the arbitration agreement, the award shall be partly void as to the decisions related to the concerned third party.[87]

83 Cairo Court of Appeal, Circuit (1) Commercial, Challenge No. 61 of JY 138, dated 4 July 2022.
84 Cairo Court of Appeal, Circuit (3) Commercial, Challenge No. 1 of JY 129, dated 27 April 2022.
85 ibid.
86 Cairo Court of Appeal, Circuit (1) Commercial, Challenge No. 61 of JY 138, dated 4 July 2022.
87 Cairo Court of Appeal, Circuit (5), Challenges Nos. 37 and 41 of JY 137, dated 7 December 2022.

Annulment of arbitral award

The Court of Appeal decided to set aside an arbitral award worth US$1.5 billion issued against a sovereign state. In this case, the Court of Appeal affirmed very foundational principles in arbitration practices in Egypt. First, the Court highlighted that the 90-day time limit to file an annulment lawsuit against an arbitral award starts from the day of serving an official legal notification with a copy of the award on respondent. The Court highlighted that notifying the respondent by unofficial means, including serving an e-mail on the respondent, is not sufficient to start the annulment suit time limitation period. Further, the Court confirmed that the respondent's unofficial prior knowledge of the arbitral award is not enough to start this period.

The Court also established that the arbitral tribunal jurisdiction to rule on its jurisdiction (ie, Kompetenz-Kompetenz) allows it only to review the validity of the arbitration agreement and not the validity of the agreement itself.

Further, the Court held that the arbitration agreement is the source of the arbitrators' mandate, as the parties' mutual consent is the essence of any arbitration, and this agreement cannot be presumed. Accordingly, the Court held that the arbitral tribunal in question does not have jurisdiction over the dispute as the arbitration agreement (despite its generic wording) does not include disputes related to termination of the agreement.

In addition, the Court established that there is no agreement to arbitrate as the agreement in question does not include an arbitration agreement, nor does it refer to the arbitration agreement in the main agreement (despite the fact that the arbitration agreement in the main agreement refers to disputes arising out of subsequent agreements).

The Court of Appeal established that the arbitral tribunal does not have the jurisdiction to decide in a matter that was decided by a foreign domestic court as this violates the res judicata effect of the previous judgment.[88]

Principles from the Egyptian Cassation Court issued in 2022

The appellant should not be harmed by its appeal

The Court of Cassation reversed a Court of Appeal decision to annul an arbitral award on the grounds that the appellant should not be harmed by its appeal. The facts of the case in question are that the appellant, whose favour the arbitration award was issued in, filed a nullity lawsuit asking the Court to decide on the claims that were dismissed by the arbitral tribunal. However, the Court of Appeal decided to set aside this award completely. The Court of Cassation reversed this

88 Cairo Court of Appeal, Circuit (3) Commercial, Challenge No. 40 of JY 138, dated 24 January 2023.

decision on the ground that it is an established rule that the appellant should not be harmed by its appeal even if the cause of the annulment is an issue related to public policy.[89]

Only signing the last page of the arbitral award

The Court of Cassation refused to annul an arbitral award when only its last page was signed. The Court found that the law does not require signing every page of the award, because the rationale behind requiring the award to be signed is to ensure that all the members of the tribunal have deliberated before issuing the award; and the deliberation was evidenced by signing its last page.[90]

Challenging arbitrators

The Court of Cassation refused to annul an arbitral award that applied CRCICA rules on the challenge of the arbitrator. In this case, the appellant requested to set aside the arbitration award because the arbitral tribunal refused to refer the challenge to the Court of Appeal, and referred it to one of the CRCICA's committees. The Court denied this request on the grounds that applying institutional rules could not be a breach of the *locus standi* rules as long as the institution respected the principles of confrontation and the right of defence.[91]

Filing an annulment lawsuit

In a recent judgment, Court of Cassation held that a party to whom an arbitral award was issued in solidarity with other debtors cannot file an annulment lawsuit without making the other debtors in solidarity parties to this annulment suit. The general prosecutor claimed that this annulment lawsuit should be dismissed because the party who raised it did not include the other debtors in solidarity in the arbitral award parties in the lawsuit. The Court of Cassation accepted this request and added that it is a public policy rule in Egyptian procedural law to make the other debtors in solidarity parties in the appeal. However, this rule is applicable only if the arbitral award is decided in an indivisible dispute.[92]

89 Court of Cassation, Challenge No. 4698 of JY 84, dated 3 January 2021.
90 Court of Cassation, Challenge No. 1681 of JY 91, dated 16 February 2022.
91 Court of Cassation, Challenge No. 1681 of JY 91, dated 16 February 2022.
92 Court of Cassation, Challenge No. 18550 of JY 85, dated 21 February 2022.

An IBA guidelines case

One case related to the impartiality and independence of a presiding arbitrator from the counsel of the parties on account of his failure to disclose the existence of consanguinity with a partner in the firm that handled the case. The appellant in the case alleged that such consanguinity was discovered after the issuance of the award, by a coincidence. The Court of Cassation refused to set aside the arbitral award because of the presence of consanguinity between the presiding arbitrator and one of the parties' counsel. Further, the Cassation Court relied on the International Bar Association Guidelines on Conflict of Interests in International Arbitration in making decisions on impartiality and independence.

The Court of Cassation ruled that the arbitrator's obligation to disclose circumstances that could raise real danger of bias or justifiable doubts as to the arbitrators' impartiality towards one of the parties is a legal obligation that is necessary for arbitration proceedings with integrity and impartiality. Further, it established that the review of the arbitrator's failure to fulfil this disclosure duty is subject to the discretion of an annulment court. This review process is subjective in nature and varies from one case to another, requiring a case-by-case review. The Court also held that the partiality must have a tangible form. Thus, the mere existence of consanguinity does not qualify as a reason for an arbitrator's disqualification, as the essential condition is whether there is an actual breach of the impartiality duty by the arbitrator or not.

The Court found that the presiding arbitrator in the case in question had no ties that connected him to the firm of the counsel or its managers, nor did he have financial interests with them, nor they have an influence on him. Further, the Court mentioned that this consanguinity might be common knowledge that the parties might have already known. Thus, the Court ruled that this consanguinity per se did not disqualify the presiding arbitrator from chairing the tribunal.[93]

Applicability of the Arbitration Act

The Court of Cassation has applied the Arbitration Act, despite its conflict with the Civil and Commercial Procedures Law. In applying the Act, the Court held that the general Civil and Commercial Procedures rules are not applicable if the matter is regulated by specific rules. Consequently, given that article 58 of the Arbitration Act regulates the deadlines for judicial petitions, the provisions of the Civil and Commercial Procedures Law that regulate this cannot be applied.[94]

93 Court of Cassation, Challenge No. 13892 of JY 81, dated 22 February 2022.
94 Court of Cassation, Challenge No. 17886 of JY 91, dated 16 March 2022.

Not signing the arbitral award

In a recent judgment, the Court of Cassation refused to set aside an arbitral award that was not signed by one of the arbitrators. The Court found that deliberation took place between all of the arbitrators, and there was no evidence that one of arbitrators was not a part of this deliberation. Moreover, the Court found that one of the arbitrators refusing to sign the award and providing the reasons behind the refusal to sign proves that there was deliberation.[95]

Criterion used in determining international commercial arbitration

The Court of Cassation, in a recent judgment, refused the appellant's argument that the arbitration was international because it was conducted under the umbrella of the Cairo Regional Centre for International Commercial Arbitration (CRCICA). The Court elaborated that resorting to the CRCICA alone is not sufficient to consider an arbitration international. An arbitration is considered to be international if it satisfies two conditions: (1) the subject matter of the dispute must be related to international trade; and (2) the existence of one of the cases prescribed under article 3 of the Arbitration Act, which includes the parties agreement opting to a permanent arbitral organisation or an arbitration centre located in or out of Egypt – the CRCICA, for instance. Thus, the Court dismissed the appellant claim as the arbitration in question was not related to international trade.[96]

Non-constitutionality of article 69 of the Sports Law

On 14 January 2023, the Supreme Constitutional Court found article 69 of the Sports Law unconstitutional concerning the competence of the Egyptian Olympic Committee's board of directors to issue the statute of the Egyptian Sports Settlement and Arbitration Centre, as well as the executive regulation of the Egyptian Sports Settlement and Arbitration Centre itself.[97]

The Court declared its unconstitutionality because article 69 gave the Olympic Committee, not the legislature, the authority of issuing the statute of the Centre in violation of articles 84 and 101 of the Constitution. The Court emphasised that resorting to arbitration in this field is valid and in accordance with international standards. Yet, the Constitution authorises only the legislature to regulate sports affairs and the right to litigate; and this authority cannot be delegated to any other entity, such as the Egyptian Olympic Committee. Therefore, given that article 69 of the Sports Law delegated the board of directors of the Egyptian Olympic Committee to issue the statute of the Egyptian Sports Settlement and Arbitration Centre, depriving the legislature from regulating it, article 69

95 Court of Cassation, Challenge No. 8199 of JY 80, dated 22 March 2022.
96 Court of Cassation, Challenge No. 9568 of JY 91, dated 12 May 2022.
97 Supreme Constitutional Court, Judgment No. 61 of JY 42, dated 14 January 2023.

of the Sports Law is unconstitutional, as is the statute of the Egyptian Sports Settlement and Arbitration Centre.

Egyptian arbitration centres in 2022: an overview

CRCICA

The CRCICA is the leading arbitral institution in the region. 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.

In 2022, the CRCICA maintained its second-highest number of annual registrations since 2016 for the second year in a row. A total of 83 cases were filed with the CRCICA in 2022, including 12 ad hoc proceedings administered by it.[98]

The CRCICA's caseload in 2022 involved disputes related to a variety of sectors, including: construction (17 per cent of cases), tourism and hospitality (14.5 per cent of cases), banking and finance (8.5 per cent of cases), real estate development (8.5 per cent of cases), oil and gas (7 per cent of cases), corporate restructuring (6 per cent of cases), media and entertainment (6 per cent of cases), sports (5 per cent of cases), medical and hospital (5 per cent of cases), retail (5 per cent of cases), and agriculture and civil aviation.[99]

The CRCICA also highlighted that 62 arbitration cases were conducted in Arabic, (ie, 74.5 per cent of cases), whereas 20 cases, (ie, 24.5 per cent) were conducted in English. The CRCICA also registered its first case conducted in French (ie, 1 per cent of cases) in 2022. The French version of the CRCICA Rules was issued on 31 March 2017.[100]

During 2022, the CRCICA registered five mediations compared to six in 2021. The CRCICA also registered three dispute board cases in 2022, equal to the number of dispute board cases in 2021, following the issuance of the Dispute Board Rules on 1 August 2021.[101]

Since it was established, the CRCICA has adopted, with minor modifications, the UNCITRAL Arbitration Rules. The CRCICA amended its Arbitration Rules in 1998, 2000, 2002, 2007 and 2011. The amendments of 2011 were based on the

98 CRCICA Caseload 2022 – Number of Cases Registered Remains Steady, retrieved from https://crcica.org/news/caseload-2022-number-of-cases-registered-remains-steady/, accessed 23 February 2023.
99 ibid.
100 ibid.
101 ibid.

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.

Throughout 2022, 129 hearings took place using CRCICA's hearing facilities. Eighty-nine of the hearings related to cases brought under the CRCICA Arbitration Rules, 30 hearings related to ad hoc cases administered by the CRCICA, eight hearings related to non-CRCICA proceedings, including the ICC, and two hearings related to mediation proceedings.

Of those 129 hearings, 15 were held remotely, representing 12 per cent of hearings; three hearings were held in a hybrid format, representing 2 per cent of hearings; and 111 hearings were held physically, in compliance with the CRCICA's social distancing guidelines, representing 86 per cent of hearings.[102]

* *The authors would like to thank Ms Eman Hussein, Mr Mohammed A El-Sherif and Mr Mohamed Magdy, associates at Matouk Bassiouny, for their support and research in the preparation of this article.*

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102 ibid.

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John Matouk is the co-founder of Matouk Bassiouny and heads the firm's dispute resolution and commercial groups. A New York-qualified lawyer and dual national, John has been practising in Cairo for over 15 years and is consistently recognised in industry publications as a leading lawyer in Egypt. John is also an associate professor of practice in the department of law at the School of Public Affairs and Global Policy at the American University in Cairo. John's disputes work encompasses a large and varied practice across the Middle East and North Africa. His recent experience includes representing parties in high-value complex commercial arbitrations, oil and gas disputes, and investment disputes.

Matouk Bassiouny & Hennawy is a full-service independent MENA law firm with offices in Algeria, Egypt, Sudan and the UAE. We specialise in advising multinationals, corporations, financial institutions and governmental entities on all legal aspects of investing and business in the MENA region. Our team of 27 partners and over 170 fee earners are trained both locally and internationally and are fully conversant in English, Arabic and French.

The firm prides itself on its in-depth understanding of cross-border cultural and business practices and on providing a commercial problem-solving approach to its legal services.

Headed by F John Matouk – co-founder of the firm – the dispute resolution group consists of seven partners, one of counsel, three counsels and 12 senior associates and 42 fee earners. Grounded in both common and civil law jurisdictions, our team provides our clients with comprehensive dispute resolution services in Arabic, English and French. Our primary goal is to effectively manage risk and resolve disputes pursuant to clients' strategic interests – whether through amicable negotiation, litigation, arbitration or other ADR mechanisms.

Matouk Bassiouny & Hennawy's arbitration team headed by Dr Amr A. Abbas is active in CRCICA, ICC, CAS, LCIA, DIAC and ICSID arbitral proceedings governed by different laws, including Algerian law, Egyptian law, Saudi law and UAE laws. We represent clients in high-value, high-profile disputes in a diverse range of sectors, including automotive, construction, heavy industry, manufacturing, maritime, oil and gas, pharmaceutical, real estate, telecommunications, media and entertainment, and tourism.

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