

25 Years of Model Law Arbitration in Egypt

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Grounds for Annulment – Percentage of Annulment – Egyptian Arbitration – Substantive Public Policy – IRR-Based Liquidated Damages – Optional Arbitration Agreements – Challenge of Arbitrators – Procedural Public Policy

A. The Framework of Annuling Arbitral Awards under Egyptian Law

1. Grounds for Annuling Egyptian Arbitral Awards

The Egyptian Arbitration Law No. 27/1994 enumerates an exclusive list of eight (8) grounds for annulling arbitral awards as follows:²

- i. If there exists no arbitration agreement, if it is void or voidable, or it has expired;
- ii. If either party to the arbitration agreement was, at the time of its conclusion, fully or partially incapacitated according to the law governing its legal capacity;
- iii. If either party to the arbitration was unable to present its case as a result of not being given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or for any other reason beyond its control;
- iv. If the arbitral award excluded the application of the law chosen by the parties to govern the merits;

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² Article (53) of Egyptian Arbitration Law.

- v. If the constitution of the arbitral tribunal or the appointment of the arbitrators was in violation of the applicable legal provisions or the parties' agreement;
- vi. If the arbitral award dealt with matters falling beyond the scope of the arbitration agreement or exceeding the limits of such agreement. However, in cases where matters falling within the scope of the arbitration can be separated from the part of the award which deals with matters not subject to the arbitration, nullity shall be exclusive to the latter parts only;
- vii. If the arbitral award itself is a nullity or the procedures affecting the award are null and void; and
- viii. If the arbitral award violates the Egyptian public policy.

Section (C) of this article lists a clear overview of the grounds that have been successful in annulling Egyptian arbitral awards in practice before the Court of Cassation.

It should be noted that the Court of Cassation in a recent judgment³ has defined one of the most controversial grounds concerning the annulment of arbitral awards under the Egyptian Arbitration Law, namely, ground (vii). As mentioned above, the Egyptian Arbitration Law, article (53) provides that there is an exclusive set of grounds for annulling Egyptian arbitral awards, however, this ground was interpreted – in various instances - quite expansively by some appeal circuits. For instance, this ground was used to annul arbitral awards with insufficient reasoning, or as in this case, if a sitting judge acted as an arbitrator without obtaining the prior authorization from the Supreme Judicial Council. In this case, the Court has defined what is meant exactly by this ground. The Court stated that this ground requires a *two-pronged test*⁴ as follows:

First Prong: existence of invalid arbitral procedures

Second Prong: such invalid arbitral procedures have affected the validity of the arbitral award itself.

Accordingly, the Cassation Court reversed the ruling of the appellate court and refused to annul the arbitral award on the ground that a sitting judge acted as an arbitrator without obtaining the prior authorization from the Supreme Judicial Council for failing to meet this two-pronged test.

³ Court of Cassation Challenge No 9968/ Judicial Year 81, Hearing Dated 9th of January 2018.

⁴ Exact words of the Court in English language.

2. Competent Court to hear Annulment Actions against Egyptian Arbitral Awards

In international commercial arbitrations, an annulment action against an Egyptian arbitral award should be filed before the Cairo Court of Appeal, unless the parties have agreed to another appellate court in Egypt.⁵ Further, the Supreme Constitutional Court has held that the Cairo Court of Appeal rather than the Supreme Administrative Court is the competent court to hear annulment actions against arbitral awards rendered with respect to administrative contracts⁶, as long as the arbitration in question satisfies the criteria for an international commercial arbitration as defined under the Egyptian Arbitration Law.⁷ On the other hand, an annulment lawsuit in domestic arbitrations should be filed before the territorially competent court of second instance.⁸

3. Time Limit for Filing Annulment Actions against Egyptian Arbitral Awards

An annulment action against an Egyptian arbitral award shall be brought within ninety (90) days from the date of notification of the arbitral award to the award debtor.⁹ It should be noted that the time limit for filing an annulment action against an arbitral award does not start unless it is proven that the award debtor has been notified of such arbitral award, even if it is proven that the award debtor is undoubtedly aware of such arbitral award.¹⁰

Accordingly, if the court bailiff tries to notify the award debtor and finds its home (i.e., headquarters) closed and consequently delivers the notice to the competent administrative authority (i.e., police station), the time limit for filing the annulment action would not be considered to have started just yet. The time limit for filing the annulment action would still be open in this case unless and until it is proven that the award debtor (or his/her representative) has received the notice of the arbitral award in question.¹¹

⁵ Article (9) of Egyptian Arbitration Law.

⁶ Egypt has a dual-jurisdiction judicial regime – similar to the French judicial regime – whereby disputes concerning administrative contracts or decrees are heard primarily before an independent judicial body, namely, the State Council.

⁷ Supreme Constitutional Court Case No. 47/ Judicial Year 31, Hearing Dated 15 January 2012.

⁸ Article (9) of Egyptian Arbitration Law.

⁹ Article (54) of Egyptian Arbitration Law.

¹⁰ Court of Cassation Challenge No. 431/ Judicial Year 69, Hearing Dated 22 March 2001.

¹¹ Court of Cassation Challenge No. 5765/ Judicial Year 83, Hearing Dated 14 June 2016.

4. Effect of the Annulment of Egyptian Arbitral Awards

In the event that the arbitral award is set aside by the competent court, the award would lose its *res judicata* effect and would be unenforceable. If the ground for annulling the arbitral award pertains to the arbitration agreement, the parties cannot refer their dispute once again to arbitration, unless they agree otherwise. However, if the arbitral award was annulled for other grounds, it would be possible for the parties to resort to arbitration again to settle their dispute.¹²

B. Annulment of Egyptian Arbitral Awards before the Court of Cassation in Numbers

The author has conducted a survey of all publicly available Court of Cassation judgments concerning annulment of arbitral awards seated in Egypt.¹³ The author has only included the cases rendered in light of the Arbitration Law No. 27 for the year 1994 (based on the UNCITRAL Model Law). In addition, any case concerning the regime of compulsory arbitration is not part of this analysis. Compulsory arbitration is a regime for mandatory arbitration between state-owned entities. This regime has been deemed unconstitutional in the realm of disputes between state-owned entities and private entities before the turn of the new century.¹⁴ In this regard, please find the below table:

Ratios	CRCICA	ICC	Other Institutions	Ad Hoc	Un-Identifiable	Total
Number of Cases	19	7	8	3	29	66
Full Annulment Cases	2	0	0	0	13	15

¹² Court of Cassation Challenge No. 17518/ Judicial Year 76, Hearing Dated 28 March 2017.

¹³ This includes all published decisions and some unpublished decisions. It must be noted that there are several unpublished decisions that are still unavailable to the public and therefore not part of this survey.

¹⁴ Supreme Constitutional Case No. 104/ Judicial Year 20, Hearing Dated 3 July 1999. It should be noted that the regime of compulsory arbitration is still valid in the field of disputes between state-owned entities amongst themselves, as long as they do not involve private entities.

Full Annulment Ratio	10.5%	0%	0%	0%	44.8%	22.7%
Partial Annulment Cases	2	0	0	3	1	6
Partial Annulment Ratio	10.5%	0%	0%	100%	3.4%	9.1%

C. Grounds for Annulment of Egyptian Arbitral Awards before the Court of Cassation

The below table analyses the grounds for annulling arbitral awards seated in Egypt and the frequency of appearance of such grounds:

Ground for Annulment	Details	Frequency	
		Full Annulment	Partial Annulment
Formalities of Arbitral Award	The Court of Cassation has annulled five arbitral awards ¹⁵ when the arbitral award itself did not mention the arbitration agreement under the arbitral award itself. In this regard, the Court of Cassation has reasoned that including the arbitration agreement in arbitral awards is essential to determine the scope of the arbitration agreement and the powers of the arbitral tribunal in the said arbitration.	5	0

¹⁵ Court of Cassation Challenge No. 10473/ Judicial Year 78, Hearing Dated 16 November 2016; Court of Cassation Challenge No. 3882/ Judicial Year 67, Hearing Dated 3 October 2010; Court of Cassation Challenge No. 98/ Judicial Year 79, Hearing Dated 24 December 2009; Court of Cassation Challenge No. 10635/ Judicial Year 76, Hearing Dated 27 February 2007; Court of Cassation Challenge No. 4623/ Judicial Year 66, Hearing Dated 18 December 1997.

Mini-sterial Approval Requirement	The Court of Cassation has annulled an arbitral award due to the lack of ministerial approval for the arbitration agreement in administrative contracts. ¹⁶ More importantly, the Court of Cassation has considered such a ministerial approval to be part of the Egyptian procedural public policy. ¹⁷	1	0
Appointment of Arbitrator	The Court of Cassation has annulled two arbitral awards ¹⁸ where the appointment of arbitrators was in contradiction with the procedural route for appointing arbitrators under Egyptian Law in ad hoc arbitrations. According to the court, if arbitrators are to be appointed by a court, they should be appointed by virtue of a lawsuit and not by virtue of an <i>ex parte</i> judicial order. It is essential to note that the Court of Cassation has considered such procedural route for appointing arbitrators to be part of the Egyptian procedural public policy.	2	0
Challenge of Arbitrators	The Court of Cassation has annulled an arbitral award on the ground that the arbitral tribunal did not refer the arbitrator's challenge to the competent national court. ¹⁹	1	0
Impartiality of Arbitrators	The Court of Cassation has very recently annulled a CRCICA arbitral award due to the fact that one of the arbitrators lacked the requisite impartiality to be part of the arbitral tribunal. ²⁰	1	0

¹⁶ Egypt has a dual-jurisdiction judicial regime – similar to the French judicial regime – whereby disputes concerning administrative contracts are heard primarily before an independent judicial body, namely, the State Council.

¹⁷ Court of Cassation Challenges No. 13313, 13460/ Judicial Year 80, Hearing Dated 12 May 2015.

¹⁸ Court of Cassation Challenges No. 145, 221/ Judicial Year 74, Hearing Dated 22 March 2011; Court of Cassation Challenges No. 17170, 17171/ Judicial Year 75, Hearing Dated 22 November 2007.

¹⁹ Court of Cassation Challenge No. 9568/ Judicial Year 79, Hearing Dated 14 March 2011.

²⁰ Court of Cassation Challenge No. 18166/ Judicial Year 88, Hearing Dated 11 June 2019.

Scope of Arbitration Agreement	The Court of Cassation has fully annulled an arbitral award for exceeding the scope of the arbitration agreement. ²¹ Further, the Court of Cassation has partially annulled an <i>ad hoc</i> arbitral award for exceeding the scope of arbitration agreement by ruling on the tort liability of one of the arbitrating parties despite lacking the authority to do so under the arbitration agreement. ²²	1	1
Extension to Third Parties	The Court of Cassation has partially annulled three arbitral awards ²³ (one of them was a CRCICA arbitral award) for extending the arbitration agreement to a non-signatory third party.	0	3
No Evidence of Deliberations	The Court of Cassation has annulled an arbitral award after finding that there was no evidence of deliberations by the arbitral tribunal before the issuance of the arbitral award. ²⁴	1	0
Truncated Arbitral Tribunals	The Court of Cassation decided to annul a CRCICA arbitral award issued by a truncated arbitral tribunal on the basis that arbitral tribunals must not comprise an even number of arbitrators. ²⁵	1	0
Violation of Res Judicata	The Court of Cassation has annulled an arbitral award for violating the principle of <i>res judicata</i> in respect of a prior court judgment. ²⁶	1	0

²¹ Court of Cassation Challenge No. 4223/ Judicial Year 67, Hearing Dated 25 February 2010.

²² Court of Cassation Challenge No. 86/ Judicial Year 70, Hearing Dated 26 November 2002.

²³ Court of Cassation Challenges No. 2698, 3100, 3299/ Judicial Year 86, Hearing Dated 13 March 2018; Court of Cassation Challenge No. 5765/ Judicial Year 83, Hearing Dated 14 June 2016; Court of Cassation Challenges No. 4729, 4730/ Judicial Year 72, Hearing Dated 22 June 2004.

²⁴ Court of Cassation Challenge No. 1855/ Judicial Year 66, Hearing Dated 26 May 2011.

²⁵ Court of Cassation Challenge No. 2047/ Judicial Year 83, Hearing Dated 26 May 2015.

²⁶ Court of Cassation Challenge No. 1626/ Judicial Year 74, Hearing Dated 20 April 2006.

Delay Interest Rates	The Court of Cassation has partially annulled a CRCICA arbitral award with respect to exceeding the maximum limit of delay interest rate (i.e., 7%) which was considered by the court as pertaining to substantive public policy. ²⁷	0	1
Foreign Ownership of Real Estate	The Court of Cassation has partially annulled one award ²⁸ and fully annulled another arbitral award ²⁹ for violating substantive public policy rules pertaining to the regime governing foreign ownership of real estate in Egypt.	1	1

D. Recent Trends before the Cairo Court of Appeal:

This section provides a glimpse into different three critical issues that have been recently addressed by the Cairo Court of Appeal.

1. Are Optional Arbitration Agreements Enforceable before Egyptian Courts?

In 2004, the Cairo Court of Appeal³⁰ annulled an arbitral award on the basis that the arbitration agreement in question was a pathological one. The facts of the case show that there were two clauses for resolving disputes, one called for resorting to the Egyptian Courts, and the other was an *ad hoc* arbitration agreement. One of the parties decided to refer its case to *ad hoc* arbitration, however, the other party objected such a choice. Upon reviewing the final arbitral award in this case, the Court was of the opinion that arbitration is an exceptional mode for resolving disputes and therefore should be interpreted narrowly. Accordingly, if there are two clauses, choice of Egyptian courts clause, and an arbitration agreement, the choice of courts clause should be the one that prevails.

Nearly thirteen years later, the Cairo Court of Appeal³¹ was faced with the same fact pattern once again, albeit, this time its holding was entirely different. The Court refused to annul the arbitral award as it held that any

²⁷ Court of Cassation Challenge No. 12790/ Judicial Year 75, Hearing Dated 22 March 2011.

²⁸ Court of Cassation Challenge No. 9882/ Judicial Year 80, Hearing Dated 8 October 2013.

²⁹ Court of Cassation Challenge No. 5162/ Judicial Year 79, Hearing Dated 21 January 2016.

³⁰ Cairo Appeal Challenge No. 73/ Judicial Year 120, Hearing Dated 29 November 2004.

³¹ Cairo Appeal Challenge No. 6/ Judicial Year 134, Hearing Dated 30 May 2017.

arbitration agreement has a negative effect which calls for excluding the judiciary, even if there is a choice of Egyptian courts clause in addition to the arbitration agreement.

2. How Egyptian Courts Should Review Substantive Public Policy in Egyptian Arbitral Awards?

The scope of review of arbitral awards before Egyptian Courts raises several conundrums, especially when it is claimed that the arbitral award has violated Egyptian substantive public policy rules (i.e., exceptional events theory under the Egyptian Civil Code). The focal question here is whether Egyptian Courts should review the merits of the arbitral award to determine whether the substantive public policy rule has been accurately applied by the arbitral tribunal or not. A Cairo Court of Appeal Judgment³² has eloquently elaborated this question by drawing a clear distinction between two scenarios:

	Arbitral Tribunal's Approach	Appeal Court's Scope of Review
First Scenario	The Arbitral Tribunal <u>has taken</u> the substantive public policy rule into consideration.	The court <u>should not extend</u> its scope of review to the merits of the arbitral award even if the arbitral tribunal decided eventually not to apply such substantive public policy rule
Second Scenario	The Arbitral Tribunal <u>did not take</u> the substantive public policy rule into consideration.	The court <u>should extend</u> its scope of review to the merits of the arbitral award to determine whether the substantive public policy rule should have been applied by the arbitral tribunal or not.

In this case, the arbitral tribunal's approach has – according to the Cairo Court of Appeal – mirrored the first scenario when it dealt with the application of the exceptional events theory under the Egyptian Civil Code. Accordingly, the Cairo Court of Appeal has refused to review the merits of the arbitral award concerning that aspect.

³² Cairo Appeal Challenge No. 48/ Judicial Year 130, Hearing Dated 2 June 2014.

3. Would IRR-based Liquidated Damages Violate Egyptian Public Policy Rules on Delay Interest Rates?

The parties in this case entered into a power purchase agreement (“PPA”) which provided that IRR-based liquidated damages should be paid in the event of termination of the PPA. After the arbitral award was rendered, the award debtor claimed that the IRR-based liquidated damages were in fact hiding interest rates exceeding the maximum limit of interest rates under the Egyptian Civil Code (i.e., 7%). The Cairo Court of Appeal³³ rejected this argument as it was of the view that interest rates should not be deemed as substantive public policy rules in the first place and hence any mistake with respect to interest rates is no more than a mistake of law. Therefore, the Court denied such argument as it fell outside the scope of review of arbitral awards in annulment cases.

This appeal judgment mirrors a similar conclusion that was reached by the Court of Cassation in 2009 in a case bearing a similar fact pattern³⁴. The Court of Cassation however based its conclusion on a different premise. In this case, the arbitral tribunal ordered a supplementary compensation equaling 21% of the debtor’s debt. Under the Civil Code, supplementary compensation could be ordered if two conditions are satisfied: (a) the damages have exceeded the interest rate due to the creditor; and (b) the debtor has acted in bad faith. The main question that the Court of Cassation sought to answer was whether a supplementary compensation taking the form of an interest rate is, in fact, subject to the maximum limit of 7% of delay interest rate, which in turn is considered a public policy rule under the Egyptian Civil Code.

The Court of Cassation has answered this question in the negative. The Court further explained that the maximum limit of 7% is only applicable to delay interest rates and therefore such maximum limit does not extend to other forms of compensation under the Egyptian Civil Code (i.e., supplementary compensation, or liquidated damages). In other words, the scope of application of the maximum limit of delay interest rate is limited to the case only where the debtor fails to meet its monetary obligations due to the creditor in a timely manner.³⁵ According to the analysis under both the appeal and the cassation judgments, the author can deduce that calculating a compensation on the basis of an internal rate of return (i.e., IRR) that is above 7% should not be considered as being, in any manner whatsoever, in contravention of the Egyptian substantive public policy concerning delay interest rates.

³³ Cairo Appeal Challenge No. 49/ Judicial Year 133, Hearing Dated 9 November 2016.

³⁴ Court of Cassation Challenge No. 3161/ Judicial Year 64, Hearing Dated 10 March 2009.

³⁵ Court of Cassation Challenge No. 12790/ Judicial Year 75, Hearing Dated 22 March 2011.

E. Spotlight Section: Challenge of Arbitrators in Institutional Arbitration & Egyptian Procedural Public Policy

If an arbitration seated in Egypt is an institutional one (i.e., CRCICA or ICC), and one of the parties has challenged one of the arbitrators, what should be the approach of the arbitral tribunal? Should the arbitral tribunal refer the challenge request to the institution itself or to the competent court? Also, if the arbitral tribunal is required to refer the challenge request to the competent court, when does such obligation arise? More importantly, does such court-referral route pertain to Egyptian procedural public policy? In other words, could a mistaken referral be considered a successful ground for annulling Egyptian arbitral awards?

In an extremely high-profile construction CRCICA case, the Egyptian Court of Cassation has recently answered all of these questions.³⁶ The Court made it clear that any arbitral tribunal whether institutional or *ad hoc* is under a strict obligation to refer any arbitrator challenge request to the competent court as such obligation pertains to Egyptian procedural public policy, and hence, violating such procedural route could be a successful ground to annulling Egyptian arbitral awards. However, the Court of Cassation has held that such an obligation arises only when the arbitral tribunal has been fully constituted.

Accordingly, if party (A) has chosen its party-appointed arbitrator and party (B) has also chosen its party-appointed arbitrator, then party (A) decided to challenge the arbitrator appointed by party (B), there is no obligation just yet to refer such a challenge request to the competent court. In this regard, if such request was rather referred to the institution (i.e., CRCICA) and the institution decided to accept or reject the challenge request, then no violation of Egyptian procedural public policy would have occurred.

On the other hand, if the arbitral tribunal has been fully constituted and party (A) challenged one of the arbitrators, then the arbitral tribunal (i.e., whether institutional or *ad hoc*) is under an obligation to refer such request to the competent court, unless the challenged arbitrator has recused himself/herself. Failing to do so would be considered a violation of Egyptian procedural public policy that would necessarily result in the annulment of such arbitral award.

³⁶ Court of Cassation Challenge No. 1394/ Judicial Year 86, Hearing Dated 13 June 2017.

Ibrahim SHEHATA, *25 Years of Model Law Arbitration in Egypt*

Summary

In 2019, Egypt celebrates the Silver Jubilee of the enactment of the Egyptian Arbitration Law No. 27/1994 modelled after the UNCITRAL Model Arbitration Law. In celebration of this special occasion, the author shares with arbitration enthusiasts a few intriguing numbers and recent trends in the field of arbitration in Egypt. The first three sections of this article shed the light on the regime for annulling arbitral awards in Egypt, in addition to the practice of the Egyptian Court of Cassation through the past 25 years, particularly with respect to annulling arbitral awards. The fourth section focuses on three peculiar judgments rendered by the Cairo Court of Appeal trying to identify possible future trends that could transform the landscape of Egyptian arbitration. Finally, the author dedicates a special section to the issue of challenging arbitrators in the realm of institutional arbitration in Egypt and whether the rules of the Egyptian Arbitration Law regarding this issue pertain to Egyptian procedural public policy or not.