10th
Anniversary
Edition

2016-2017

# The Baker McKenzie **International Arbitration Yearbook**

# Egypt

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## A. Legislation and rules

### A.1 Legislation

International arbitration in Egypt continues to be governed by Law No. 27 of 1994 Concerning Arbitration in Civil and Commercial Matters (the "Arbitration Law"), which came in force following years of preparatory work, discussions among jurists and practitioners, and careful examination of the draft "Law on International Commercial Arbitration" circulated by the Ministry of Justice in November 1988.[4]

In a nutshell, although the Arbitration Law is largely based on the 1985 version of the UNCITRAL Model Law, it incorporates a number of amendments and variations that range from extending its scope of application to the proceedings conducted outside Egypt to defining necessary conditions for enforcement.

In 2008, the Minister of Justice issued Decree No. 8310 of 2008, regulating the procedure of depositing arbitral awards. By the virtue of this decree, an award may not be deposited (and, therefore, may not be endorsed with the *exequatur* necessary for its enforcement) when it

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[4] See Jan Paulsson, "*Draft Law on International Commercial Arbitration as circulated by the Ministry of Justice, November 1988*" in International Handbook on Commercial Arbitration, pp. 1 - 14.

relates to: (i) matters that contravene public policy; (ii) *in rem* rights over immovable property; (iii) personal affairs; (iv) criminal cases; or (v) matters that cannot be settled amicably.

This decree has created a state of ambiguity about the enforcement of awards related to real estate matters and therefore has been criticized by the vast majority of scholars and arbitration practitioners. Under this pressure, the Minister of Justice issued Decree No. 6570/2009, amending the procedure of depositing arbitral awards, in an attempt to clarify that Article 4(1)(b) is related to a right *in rem* in an immovable property. Although the latter Decree was praised for narrowing the grounds for refusal of deposit of an award, its provisions were also subject to criticism since they restricted the arbitration of rights *in rem* in immovable property, contrary to noteworthy doctrine and the case law of the Court of Cassation.

This controversy was finally settled by a third decree (Decree No. 9739/2011 amending Decree No. 8310/2008), which limits the possibility of refusing the deposit of an award to the following two grounds: the violation of public policy in Egypt; and when the award is related to matters that are not amenable to compromise (ie, personal status or criminal matters).

Enforcement of foreign arbitration awards in Egypt has long been effected in accordance with the provisions of the New York Convention. Given Egypt has acceded to the New York Convention pursuant to Presidential Decree No. 171 of 1959, and the Egyptian courts consider the New York Convention applicable as any other law of Egypt, the Egyptian Courts comply with the terms of the New York Convention in their enforcement practice.

Therefore, on the one hand, the Cairo Court of Appeal has ruled, in several decisions, that while requests for enforcement of decisions issued abroad must be made before the courts of first instance pursuant to the provisions of the Law of Civil and Commercial Procedure, the enforcement of foreign arbitral awards and requests for enforcement of foreign arbitral awards should be made before the

Cairo Court of Appeal, as the term "rules of procedure" mentioned in the New York Convention are not limited to the Law of Procedure, but include all laws organizing proceedings such as the Arbitration Law, and the latter provides for less onerous conditions than those provided under the provisions of the Code of Procedure.[5]

On the other hand, whereas Article III of the New York Convention provides that the contracting states must not impose more onerous conditions on the enforcement of foreign arbitral awards than those imposed on the enforcement of domestic arbitral awards, the Egyptian courts ruled that the enforcement of foreign arbitral awards that were not made subject to the Egyptian Arbitration Law by the parties will be governed by Articles 55 to 58 of the Egyptian Arbitration Law[6] instead of Articles 296 to 301 of the Egyptian Code of Civil and Commercial Procedure, as the latter provides for more onerous conditions than those of the Arbitration Law.

### A.2 Institutions, rules and infrastructure

The Cairo Regional Centre for International Commercial Arbitration (the CRCICA) was established in 1979 under the auspices of the Asian African Legal Consultative Organization (the AALCO). Early on, an understanding was signed between AALCO and the Egyptian government to establish CRCICA for a trial period of three years, after which subsequent agreements were entered into to ensure that CRCICA continued to function for two additional similar periods, before being granted its permanent status. CRCICA is recognized as an international organization pursuant to the Headquarters Agreement entered into in 1987 between AALCO and the Egyptian government, and the CRCICA and its branches were endowed with all privileges and immunities to ensure their independent functioning.

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[5] See decisions by the Egyptian courts related to enforcement of foreign awards in accordance with the New York Convention available at: http://www.newyorkconvention1958.org/index.php?lvl=more_results&look_ALL=1&user_query=*&autolevel1=1&jurisdiction=14

[6] Which is the law applicable to enforcing arbitral awards issued in Egypt.

Since its establishment, CRCICA has adopted the UNCITRAL Rules of 1976 with minor modifications. Since then, CRCICA has amended its Arbitration Rules five times to ensure that they continue to meet the needs of their users and reflect best practice in the field of international institutional arbitration. The present CRCICA Arbitration Rules were last amended in 2011, with minor changes relating to the Centre's role as an arbitral institution and appointing authority.[7] These amendments were introduced with the aim of promoting greater efficiency in arbitral proceedings, to fill in some gaps that became apparent over the years and to adjust the original tables of costs to ensure more transparency in the determination of the arbitrators' fees. Some of the salient procedural changes to the CRCICA arbitration rules also include guaranteeing shared decision-making with respect to important procedural matters, such as rejecting appointments and removing and challenging arbitrators.[8]

CRCICA also adopted new mediation rules as of 1 January 2013, with the aim of providing a full set of alternative dispute resolution mechanism rules. Most importantly, the scope of services offered by CRCICA includes administering domestic and international arbitrations as well as alternative dispute resolution techniques, providing institutional arbitration services according to its rules or any other rules agreed upon by the parties, advising parties to disputes, promoting arbitration and other alternative dispute resolution techniques in the Afro-Asian region through organizing international conferences and seminars as well as publishing research serving both the business and legal communities.

In July 2012, the International Court of Arbitration for Sport (ICAS) and CRCICA entered into an agreement entitling the latter to host the first Alternative Hearing Centre (AHC) for the Court of Arbitration for Sport (CAS) in Africa. CRCICA hosted CAS AHC, which is the fourth worldwide, with the other three AHCs in Malaysia, China and

[7] See the introduction of the CRCICA Arbitration Rules available at: http://www.crcica.org.eg/rules/arbitration/2011/cr_arb_rules_en.pdf
[8] See CRCICA's Annual Report for the year 2010-2011, p. 6.

the United Arab Emirates.[9] In implementing the agreement, CRCICA hosted the first CAS hearing session on 27 March 2013.

For the first time since its inception in 1979, CRCICA issued eight Practice Notes determining the discretion and role of the Centre, as well as its policies regarding the decisions to follow CRCICA's Arbitration Rules, which have been in force since 1 March 2011.[10]

Three years ago, CRCICA celebrated the official inauguration of its new hearing centre, which was furnished with state-of-the-art technical equipment and a first-class video conferencing system to ensure high-impact visual displays. In addition to this, the latest generation of wireless audio conference systems will be installed together with a simultaneous interpretation system and voice recording services.[11]

On 25 December 2016, ICSID signed an updated Agreement on General Arrangements with CRCICA (to supersede the previous version signed on 6 February 1980), which provides for the possibility of holding ICSID hearings at the CRCICA. The Agreement also encourages cooperation and knowledge sharing between ICSID and CRCICA about arbitration, conciliation and other alternative methods of dispute resolution.

## B. Cases

### B.1 Cairo Court of Appeal adds a new ground for annulment of arbitral awards?

In a decision of 6 January 2016, the Cairo Court of Appeal annulled a USD 14 million award issued against a prominent comedian who was taken off the air for satirizing Egyptian politics. The court annulled the award against Bassem Youssef and his production company QSoft on the grounds of manifest error, ruling that a tribunal at the Cairo

[9] See CRCICA Annual Report for 2012-2013.
[10] See CRCICA Annual Report for 2013-2014.
[11] See CRCICA Annual Report for 2013-2014.

Regional Centre for International Commercial Arbitration had made its findings on damages against Youssef and QSoft without justification.

This was the first time the Cairo Court of Appeal had endorsed a request to annul an award on substantial grounds. The Court has long applied a narrow interpretation of the annulment grounds provided for in Article 53 of the Arbitration Law.

The dispute arose out of a contract dated 25 July 2012, whereby QSoft licensed Capital Broadcasting Center (CBC) to screen exclusively episodes of Bassem Youssef's satirical show starting on 11 November 2012 for the duration of predetermined screening seasons.

The satirical show, "El Bernameg" was an unprecedented success, providing humorous criticism in 2012 and 2013 of the ousted President Mohamed Morsi, who was a senior leader of the Muslim Brotherhood. Despite numerous complaints lodged by pro-Morsi activists (which led to criminal investigations against Bassem Youssef), El Bernameg's team sustained its satirical criticism until the Muslim Brotherhood regime fell as a result of the unprecedented protests that started on 30 June 2013.

After a four-month break, Bassem Youssef resumed his show in October 2013, with an episode that stirred popular criticism as it appeared to satirize the interim Egyptian president and the very popular Minister of Defence. Public opinion was divided among those who still supported El Bernameg as a matter of freedom of expression and those who disliked it for patriotic reasons. As a result, CBC decided to stop airing it on its channels and QSoft served a notice of termination of its contract with CBC.

In accordance with a clause providing for arbitration in the event of disputes, QSoft submitted a Notice of Arbitration against CBC to CRCICA. QSoft sought compensation of EGP 1.9 million (approximately USD 101,000) for the damage caused by CBC's breach of the contract and its decision to stop screening episodes.

CBC filed a counterclaim with CRCICA against both QSoft and Bassem Youssef seeking compensation of more than EGP 363 million (approximately USD 19 million) for their noncompliance with the terms of the contract, their intentional failure to submit the scripts of the remaining episodes to the channels' administration, and their breach of the channels' content/screening policies. Bassem Youssef denied the jurisdiction of the tribunal and did not submit any claim.

The arbitral tribunal issued its award on 10 November 2014. It decided, by majority, to reject Bassem Youssef's claim regarding the tribunal's lack of jurisdiction and to dismiss QSoft's claims, as well as "Bassem Youssef's claims" (though the latter did not seek any remedy save for its objection to the tribunal's jurisdiction). The tribunal decided to uphold the counterclaim and ordered that QSoft and Bassem Youssef were to each pay CBC EGP 25 million in compensation and another EGP 25 million in moral damages (a total of EGP 100 million in damages plus interest).

CBC has challenged the decision before Egyptian Court of Cassation. The court is yet to issue its decision.

### B.2 Public prosecution to challenge arbitral awards violating public policy

The Egyptian Court of Cassation empowers the Egyptian public prosecution services to challenge arbitral awards violating the regulation of foreign ownership of real estate.

The regulation of foreign ownership of real estate in Egypt, especially in the Sinai Peninsula, is a matter of national security, which is reflected in legislation and the Court of Cassation rulings. By way of example, Article 2 of Law of Integral Development of the Sinai Peninsula No. 14/2012 provides that ownership of real estate in the Sinai Peninsula is exclusive to Egyptian nationals with two Egyptian parents. The Court of Cassation rendered a landmark decision in January 2016 in line with the same trend of heavy regulation of foreign ownership of real estate.

During the years preceding the 25 January 2011 Revolution, Egypt had witnessed the phenomenon of fraudulent arbitral proceedings aiming to breach public policy rules regulating the publicity of real estate lawsuits and restricting the acquisition of real estate property by foreigners. These arbitral proceedings were characterized as fraudulent for many reasons:

The arbitral proceedings were intended to evade the requirement of Article 65(3) of the Code of Civil and Commercial Procedures (CCCP), which provides that in real estate lawsuits before local courts, the initial pleading must be notarized. The arbitration proceedings were also intended to evade payment of taxes due on such notarization.

These arbitral proceedings, under cover of the principle of confidentiality of arbitration, would be conducted without the participation of the owner of the real estate.

The arbitral award rendered would unduly permit a foreigner to acquire real estate, in violation of public policy provisions.

The public prosecution took the initiative to challenge these awards through setting-aside proceedings under Article 53(2) of the Arbitration Law, which provides for the annulment of awards contravening Egyptian public policy. The public prosecution aimed to protect real estate property from fraudulent arbitral proceedings that violated public policy rules and harmed third parties' rights. The Egyptian Arbitration Law does not contain any provision empowering the public prosecution to challenge arbitral awards. Nevertheless, the public prosecution relied on Article 87 CCCP, which provides, "… public prosecution is entitled to file lawsuits in the cases provided by the Law…" It has also invoked Article 89(6), which entitled it to intervene in lawsuits pertaining to public policy and good morals, as well as Article 96, which entitled it to challenge court decisions in cases where the law authorizes such intervention and if the court decision breaches a public policy rule, or if the law permits the public prosecution to file an appeal.

The case related to two foreigners, who had purchased real estate property from a company in Sharm El Sheikh and had initiated arbitration proceedings by virtue of a submission agreement. On 25 June 2005, an award (Arbitration Award No. 12/2005) was rendered in their favor, establishing the validity and the enforceability of the purchase agreement despite its breach of Laws No. 114/1946 (Law for Property Registry and Certification) and No. 230/1996 (Law Regulating the Ownership by Foreigners of Buildings and Land Plots). The public prosecution initiated setting-aside proceedings against the award before the Ismailia Court of Appeal, which rendered a judgment on 28 January 2009, annulling the award. The Company lodged an appeal against the judgment before the Court of Cassation.

The Court of Cassation clearly stated that if an arbitration award violates a public policy rule (here, the purchase by a foreigner of real estate without complying with the conditions of Law 230/1996), the public prosecution is entitled to file setting-aside proceedings against both the award and the arbitration agreement itself. The Court of Cassation prioritized the protection of public policy by remedying the legislative lacuna, through extending to post-arbitral proceedings the CCCP rules regulating the intervention of the public prosecution in civil litigation proceedings.

## C. Trends and observations

The abrupt changes to the government and the entire political system in the aftermath of the 25 January Revolution led to severe disruption to investor-state relationships. Following thousands of complaints filed with the public prosecution, many of the transactions concluded in the Mubarak era came under scrutiny and Egyptian courts (in particular, the Administrative Courts) issued rulings ordering the state to reverse transactions concluded by the former president's administration, with dozens of other lawsuits pending before the courts. In their rulings, the courts stated that investors (whose assets were seized as a result of the ruling) will not have any recourse or

right to initiate arbitration or ICSID proceedings under the pretext that the transaction was tainted with corruption.

Notwithstanding this, Egypt announced that it did not have any intention of withdrawing from the ICSID Convention, like some South American states, despite the fact that a large number of investment-related cases have been filed following the 25 January Revolution.

All the "privatization cases" — ruled by or pending before the Administrative Courts — were initiated by third parties, such as activists and lawyers who alleged that companies were sold off too cheaply and thus representative of corrupt business practices during the Mubarak era. They nearly all involved charges of corruption or political mismanagement, which did not necessarily find their way into the reasons of the decision invalidating the state contract. To the investors' surprise, the court annulled the arbitration clause in many cases based on the lack of approval of the minister, even though these contracts had generally been entered into in or around 1994, and the amendment to the Arbitration Law, which requires ministerial approval, was only introduced three years later, ie in 1997.

Although these rulings were issued in the context of an effort to reinforce the rule of law, which was a core demand of the Revolution, they plunged a number of foreign companies operating in Egypt into a state of legal limbo, where investors were deprived from their rights and assets, and the government was unable to execute rulings on transactions going back some 20 years. These rulings also created a torrent of costly international arbitrations brought against Egypt, which resulted in scaring off some potential investors already reluctant to invest in a turbulent business climate.

Nevertheless, the government's ongoing efforts since the second wave of the Revolution that hit in June 2013 seem to have had a positive impact on the investment environment in Egypt. In an attempt to restore investor confidence, the then-interim president issued a decree promulgating Law 32 of 2014, which regulates the procedure for challenging state contracts.

Law 32 of 2014 allows the parties to a state contract to challenge its validity, with only one exception: where the right to challenge extends to third parties when a contracting party is found guilty of criminal conduct in the transaction and the contract is found to have been concluded on such basis. The law also provides for its application to all pending proceedings before the courts with immediate effect, which will result in the court declaring all the actions or challenges pending before them inadmissible.

The Egyptian government's keenness to end all disputes with investors in a friendly manner, so as to encourage them and boost the investment climate in Egypt, resulted, during the course of 2016, in the settlement of a USD 600 million ICSID claim brought by Luxembourg-registered steel company ArcelorMittal. In October of the same year, Egypt reached a deal with Kuwaiti petrochemicals investor Bawabet Al Kuwait Holding Company to resolve a USD 400 million ICSID claim over gas pricing and tax measures that pre-dated the revolution.

The state also settled an ICSID claim in August 2016 brought by Italian waste manufacturing company ASA International, and in 2015 agreed to pay USD 54 million to Indonesian textiles group Indorama to settle a claim over a factory nationalized in the wake of the Arab Spring. Despite Egypt's tireless efforts, eight ICSID cases against Egypt are still pending, three of which have been filed in 2016.