Resolving Arab Capital Investment Disputes: The Aftermath of the Al-Kharafi Award's Annulment by the Egyptian Courts

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Abstract

This article analyses the Egyptian Court's decisions regarding the Al-Kharafi USD 1 billion award in an investment dispute between Al-Kharafi, a Kuwaiti construction firm and the Libyan State, which was issued by an ad hoc arbitration panel under the auspices of the Unified Agreement for the Investment of Arab Capital in the Arab States. In particular, it focuses on the judicial debate between the Cairo Court of Appeals and the Egyptian Court of Cassation over the appropriateness of applying the articles of the Egyptian Arbitration Law, including the annulment proceedings, on an investment dispute arbitration.

This article will demonstrate that the investment dispute mechanisms in both the Unified Agreement for the Investment of Arab Capital and the Amended Agreement that took place in 2013 suffer from serious shortcomings that do not provide any form of judicial scrutiny of the decisions issued by arbitral panels. This is evidenced by the fact that, on two occasions, the Arab Investment Court has ruled that it does not have the jurisdiction to scrutinise the arbitral awards issued by ad hoc arbitration. This article argues that in face of a lack of recourse under the above mentioned agreements and the dangers of enforcing an abusive award in Al-Kharafi award damages for the sum of USD 1 billion, the Egyptian Court of Cassation instructed the Cairo Court of Appeals to hear the annulment proceedings against the award on two occasions .

The article will examine the recent decision of the Cairo Court of Appeals to set aside the Al-Kharafi award for violating Egyptian public policy by awarding an enormous sum of damages for unsubstantiated injury. The article will examine how the Cairo Court of Appeals applies the principle of proportionality of damages with injury by awarding damages for lost profits for the touristic project that was not completed in war-torn Libya before being overturned by the Egyptian Court of Cassation 24 June 2021 decision.

Finally, this article will demonstrate the current outcomes of the Egyptian Court's decisions. First, the prolongment of the litigation process will be subject to judicial scrutiny by the Egyptian Courts. Second, the application of the Egyptian Arbitration Law to the Al-Kharafi Award opens the door for the Egyptian Public Prosecution to intervene as prescribed by the Egyptian law. Third, the Egyptian Court of Cassation has asserted that the Egyptian Arbitration Law applies territorially to any arbitration held inside Egypt regardless of its nature.

Keywords

Arbitration; investment disputes; Al-Kharafi; Egyptian Court of Cassation; Arab Investment Court

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Introduction

On 24 June 2021 , the Egyptian Court of Cassation (ECC) decided to dismiss the Libyan State's annulment lawsuit against Al-Kharafi award after ruling on two occasions that the Egyptian Arbitration Law (EAL) provisions, including those on the annulment of arbitral awards, apply to the Al-Kharafi arbitral award, that was issued on 22 March 2013 in the dispute between Al-Kharafi, a Kuwaiti construction company, and the Libyan State in an ad-hoc investment arbitration proceedings under the auspices of the Unified Agreement for the Investment of Arab Capital in the Arab States (Unified Agreement),[1] which ordered the Libyan State to pay Al-Kharafi damages amounting to approximately USD 1 billion for the Libyan state's breach of its' duties under the Unified Agreement. The ECC's critical and far-reaching decision indicates its' willingness to allow the Egyptian Courts to hear annulment proceedings against ad hoc investment arbitration awards under the Unified Agreement or its successor the Amended Unified Agreement for the Investment of Arab Capital in the Arab States (Amended Agreement)[2] according to the provisions of EAL. In this article, it will be explained why did the ECC allow the Egyptian Courts to hear the annulment lawsuit against the Al-Kharafi award because the text of the Unified Agreement did not provide a mechanism for reviewing arbitral awards issued under the auspices of the agreement and did explicitly prevent the local courts of the seat of arbitration from exercising jurisdiction over those awards. Therefore, we must examine the Egyptian Courts' decisions in Al-Kharafi, in light of the dispute resolution mechanisms provided by the Unified Agreement and its successor the Amended Agreement while addressing the thorny legal issue of the relationship between the agreements mentioned above, such as international treaties and the EAL, as the law of the seat of arbitration to verify if the Egyptian Courts have the jurisdiction to annul arbitral awards under the Unified Agreement and the Amended Agreement.

This article will examine the subject as follows: First, a summary will be provided of the main articles and the investment dispute mechanisms in both the Unified Agreement and the Amended Agreement. Second, the EAL and the annulment proceedings under its articles will be briefly examined. Third, an examination of the Arab Investment Court (AIC) and the decisions of Egyptian courts that dealt with the Al-Kharafi award and how they reflect the shortcomings in the both the Unified Agreement and Amended Agreement as to provide recourse against abusive arbitral awards will be provided. Emphasis will be placed on how the EEC insisted on applying the EAL provisions to the Al-Kharafi award despite being an investor-state dispute raised under the auspices of an international convention, the Unified Agreement. In particular, it will be highlighted how the CCA was reluctant and sometimes adamant not to apply the EAL because of the nature of the dispute, while the ECC was determined to apply the provisions of EAL to the award before issuing its latest decision to dismiss the case. Finally, the consequences of the Egyptian Courts decisions and how this will affect the future of arbitrating investment disputes under the Amended Agreement will be explored.

1. The investment dispute mechanism under the Unified and Amended Agreements

The Unified Agreement first came into existence in 1980 and entered into force on 9 September 1981[3] and was amended by the Amended Agreement in 2013 that entered in force on 24 April 2016 and it is ratified by eight Arab states.[4] The investment dispute resolution mechanism in both the Unified Agreement and the Amended Agreement has two unique features. First, these agreements do not protect all investments. The provisions protect Arab investments made by Arab investors using Arab capital. Both the Unified and the Amended Agreements use a trio of concepts: the concept of Arab capital, the concept of Arab investors, and the concept investment of Arab capital to define their scope of application. Second, both the Unified Agreement and the Amended Agreement offer several methods for resolving dispute resolution, with some differences between both agreements, besides bringing a lawsuit before the AIC. Conciliation, ad hoc arbitration, and, recently, mediation, which is introduced by the Amended Agreement, are available options

[1] An English translation exist at UNCTAD Investment Hub website: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2394/download (last visited on 29 August 2021).
[2] An English translation exist at OECD: https://www.oecd.org/mena/competitiveness/Amended%20Arab%20League%20Investment%20Agreement%20(Arabic%20and%20English)%20and%20Comparative%20Table.pdf (last visited on 29 August 2021).
[3] https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3087/arab-investment-agreement-1980- (last visited on 29 August 2021).
[4] http://www.lasportal.org/ar/legalnetwork/Pages/agreements_details.aspx?RID=315(last visited on 29 August 2021).

for resolving Arab capital investment disputes. We will first examine the trio of concepts of investment and demonstrate the available means of dispute resolution.

1.1 The concept of investment of Arab capital under the Unified and Amended Agreement

Section 6 of Article 1 of the Unified Agreement defines Arab investment as:

> "[T]he use of Arab capital in a field of economic development with a view to obtain a return in the territory of a State Party other than the State of which the Arab investor is a national or its transfer to a State Party for such purpose in accordance with the provisions of this Agreement."

The Amended Agreement adopted a similar definition noted in Section 7 of Article 1 which states that:

> "Investment of Arab capital: the use of Arab capital in an economic or social field in the territory of a State Party other than the State of which the Arab investor is a national, or its transfer to said State with a view to obtaining a return in accordance with the provisions of this Agreement."

The following concepts will be examined: Arab capital, the Arab investor, the investment of Arab capital.

1.1.1 Arab capital

Section 5 of Article 1 of the Unified Agreement defines Arab capital as "assets owned by an Arab citizen comprising any tangible and intangible rights which have a cash valuation, including bank deposits and financial investments. Revenues accruing from Arab assets shall be regarded as Arab assets, as shall any joint share to which this definition applies". Comparatively, Section 7 of Article 1 of the Amended Agreement defines Arab capital as "funds owned by an Arab investor compromising any material and immaterial rights which have a monetary value". The definition of Arab capital is quite expansive under both the Unified and the Amended Agreement as the case in most bilateral investment treaties signed by Arab States and non-Arab States.[5] Nonetheless, the AIC ruled that investments by Arab investors, through funds accumulated inside the Arab host state, do not qualify as an investment of Arab capital.[6] Thus, the Arab investor must transfer any investment funds accumulated outside the Arab host state to the Arab host state to qualify his investment as an investment of Arab capital. In order for an asset to qualify as Arab capital, an Arab investor must own the asset in question. In *Horizon Touristic v. the Egyptian Prime Minister*, the AIC ruled that Horizon Touristic, an Egyptian company established in Egypt pursuant to Egyptian Law with headquarters located inside Egypt, qualified as an Arab investment because the funds used in its establishment were transferred from Saudi Arabia to Egypt— thus, Horizon Touristic was qualified as Saudi capital and was entitled to the protection provided by the Unified Agreement.[7]

1.1.2 Arab investor

Section 7 of Article 1 of the Unified Agreements defines "Arab investor" as "an Arab citizen who owns Arab capital which he invests in the territory of a State Party of which he is not a national." However, Section 1 of Article 1 Unified Agreement defines the "Arab citizen" as:

> "[A]n individual or a body corporate having the nationality of a State Party, provided that no part of the capital of such body corporate belongs either directly or indirectly to non-Arab citizens. Joint

[5] See Agreement between The Swiss Confederation and The Arab Republic of Egypt on the Promotion and Reciprocal Protection of Investments, Egypt-Swizt., art. 1 (1), June 7, 2010; Agreement to Protect and Encourage Mutual Investments Between the Government of the Arab Republic of Egypt and the Government of Kuwait, Egypt-Kuwait , art 1 (1) , Apr. 17, 2001; Agreement between the Republic of Turkey and the Great Socialist People's Libyan Arab Jamahiriya on the reciprocal promotion and protection of investments, Libya-Turk., art 1 (2) Nov. 25, 2009; Agreement between the Kingdom of Morocco and the Great Socialist People's Libyan Arab Jamahiriya on the encouragement and protection of investments, Morocco-Libya, art 1 (1), Nov.2 , 2000. All texts are available at UNTCAD Investment Hub website https://investmentpolicy.unctad.org/ (last visited 29 August 2021).

[6] *Mohammed et Al. v His Excellency the President of United Arab Emirates* AIC Case No. 2/4 (2007).

[7] AIC Case No. 2/7 J (2011).

> Arab projects which are fully owned by Arab citizens shall be deemed to be included within this definition in instances where they do not have the nationality of another State."[8]

Therefore, under the Unified Agreement, if the investor is a natural person, they must hold the nationality of an Arab State other than that of the Arab host state. On the other hand, if the investor is a corporate body, then the direct and indirect ownership of the capital should be held by Arab Nationals who are not citizens of the Arab host State and any non-Arab ownership of the corporate body's capital will result in disqualifying the corporate body from being designated as an Arab investor.

Partial ownership in a corporate body will qualify the owner as an Arab investor. In *Lido Hotel Co. v. The Egyptian Minister of Justice*, the AIC held that an Arab citizen's share in a corporate body qualified him as an Arab Investor. Hence, his investment is an Arab investment under Section 6 of Article 1 of the Unified Agreement, even if the corporate body did not qualify under the Unified Agreement as an Arab citizen.[9] Lido Hotel Co. was a general partnership established in Egypt according to the Egyptian Law with its centre of management located in Egypt and the majority of its capital held by Egyptian nationals.[10] Lido Hotel Co. was in fact an Egyptian Corporate body subject to the Egyptian Law.[11] Nonetheless, the AIC decided that a share owned by a Kuwaiti general partner in Lido Hotel Co. constituted an Arab investment made by an Arab Citizen in the Egyptian touristic section. It granted the AIC jurisdiction to hear the case filed by Lido Hotel Co. against the Egyptian state.[12]

The Amended Agreement took a different approach to the definition of an Arab investor. It did not employ the concept of Arab citizen in defining the concept of Arab investor. Instead, it defined Arab investor in Section 8 of Article 1 as "[t]he natural or judicial person who/which owns Arab capital which it invests in the territory of a State Party of which it is not a national, provided that the Arab investor holds directly at least fifty-one percent of the share capital of the relevant juridical person." There is no longer a requirement that a judicial person's capital must consist of full Arab ownership to qualify the judicial person as an Arab Investor.

1.1.3 Investment of Arab capital

The Unified Agreement and the Amended Agreement use similar definitions for what constitutes an "investment" of Arab capital. The Unified Agreements definition of investment emphasises 'the use of Arab capital in a field of economic development with a view to obtain a return'. Under the Amended Agreement, an investment of Arab capital is "in an economic or social field in the territory of a State Party other than the State of which the Arab investor is a national, or its transfer to said State with a view to obtaining a return in accordance with the provisions of this Agreement."[13]

However, the AIC did not adopt a universal approach to determine when the use of Arab capital constitutes an investment. In *Batook v. The Egyptian Minister of Justice*, the AIC ruled that Batook's activity in trading, marketing and exporting food and sweets did not constitute an investment under the Unified Agreement.[14] The Court referred to Article 1 of the former Egyptian Law No. 8/1997 on Investment which contained a list of economic activities qualified as investment projects that did not include trading, marketing, and exporting food and sweets.[15]

On the other hand, the AIC decided in *Tanmiyah v. Tunisia* that a contract signed between a Saudi firm and the Tunisian Mediterranean Games Committee involving radio and television broadcasting rights and market

[8] Art. 1 Sec. 1 of the Unified Agreement.
[9] AIC Case No.1 /2 J (2007).
[10] *Ibid.*
[11] Egypt Law No. 131/1948 (Civil Code), *Al-Jarida Al-Rasmiyya* (the Official Gazette), 29 July 1948, § 11: "The legal status of foreign juristic persons such as companies, associations, foundations, or others, is subject to the law of the State in whose territory such juristic persons have established their actual principal seat of management. If, however, a juristic person carries on its principal activities in Egypt, Egyptian law will be applied."
[12] AIC Case No1 /2 J (2007).
[13] Art. 1 Sec. 7 of the Amended Agreement.
[14] AIC Case No.1/12J (2015).
[15] For an English translation of the Egyptian Investment Law No. 8 for 1997, *Al-Jarida Al-Rasmiyya*, 11 May 1997 https://www.investinegypt.gov.eg/flip/library/LawsAndRegulations/PDFs/Law72_and_Exec_reg_en.pdf (last visited June 20, 2020).

advertisements is an investment under the Unified Agreement.[16] There was no reference to a definition of investment under Tunisia law, and the AIC did not elaborate on its findings. Thus, there is no clear criterion, under the AIC, on how to determine when a given economic activity qualifies as an investment under the Unified Agreement.

1.2 Methods for dispute resolution

Both the Unified Agreement and the Amended Agreement provide for several methods for dispute resolution that the parties to an investment dispute can choose form, governed by a body of rules divided between the Agreements' main text and its annexes. Under Article 25 of the Unified Agreement, the disputes between the Arab investor and the Arab host State can be resolved by 'conciliation or arbitration or by recourse to the Arab Investment Court' while the Amended Agreement added mediation as a choice for dispute resolution.[17] Both the Unified Agreement and the Amended Agreement allows the Arab investor to bring his/her lawsuit before the national courts of the Arab host State.[18]

However, there are some differences between the Unified Agreement and the Amended Agreement. First, unlike the Unified Agreement, the default method for dispute resolution under the Amended Agreement is recourse to the AIC.[19] Second, through mandatory rules, the annex to the Unified Agreement determines the procedures that the parties should follow in resolving their dispute via conciliation or arbitration. Whereas the rules in the annex to the Amended Agreement—which provide for mediation, conciliation, and arbitration—are facultative rules that the parties can replace with any rules they wish to use.[20] I will examine each method of dispute resolution, starting with the least formal process of mediation to the most formal method of seeking recourse in the Arab host's national courts.

1.2.1 Mediation

Mediation is a novel method for dispute resolution added by Article 1 of the annex to the Amended Agreement. Article 1 of the annex does not define mediation but instead offers rules on how the parties should proceed. It states that the General Secretariat of the Arab League will be in charge of "following up on the mediation procedures". The mediator's duty shall be restricted to reconciling the parties' point of view and issuing a report within one month from his appointment.[21] The parties' agreement should include a description of the dispute, the demands made by each party, and the name of the mediator and his/her fees.[22] It is important to note that under the Amended Agreement, the parties can choose other rules to govern their mediation

[16] AIC Case No. 1/1 J (2004).
[17] Art. 24 of the Amended Agreement: "unless otherwise agreed upon between the parties to the dispute, the mediation, conciliation and arbitration may be applied in accordance with the rules and procedures set forth in the annexes to the agreement, which shall be deemed as an integral part of this agreement."
[18] Art. 31 of the Unified Agreement states that: "the Arab investor may have recourse to the courts in the State where the investment is made according to the rules of jurisdiction within such State in the case of matters which fall within the jurisdiction of the Court. However, where the Arab investor brings an action before one authority, he must refrain from so doing before the other."
Art. 21 of the Amended Agreement states that: "the Arab investors may resort to the Courts in the Host State, in accordance with the rules of jurisdiction within Such state, in relation to the matters which fall within the jurisdiction of the Court. However, when the Arab investor initiates a legal action before one authority the said investor may not initiate a legal action before the other.
[19] Art. 22 of the Amended Agreement: "Unless otherwise agreed upon by the parties to the dispute, disputes arising between the parties to the investment concerning the application of this agreement shall be settled through the Court in accordance with its statute, which describes its composition, mandate and procedures."
[20] Art. 24 of the Amended Agreement: "unless otherwise agreed upon between the parties to the dispute, the mediation, conciliation and arbitration may be applied in accordance with the rules and procedures set forth in the annexes to the agreement, which shall be deemed as an integral part of this agreement."
[21] Art. 1 Sec. 3 of Annex to the Unified Agreement: "the mediator's tasks shall be restricted to reconciling viewpoints. He/she shall issue his/her report within one month as the date he/she is notified of his/her mission by the General Secretariat of the League of Arab States."
[22] Art. 1 Sec. 2 of Annex to the Unified Agreement: "The parties' agreement shall include a description of the dispute, the demands of the parties, the name of the mediator and the fees thereto. The General Secretarial shall communicate the mediator a copy of said agreement."

1.2.2 Conciliation

As with mediation, the annex in both the Unified Agreement and the Amended Agreement do not define "conciliation" but they do organize conciliation in the same manner; Article 1 of the annex to the Unified Agreement is identical to Article 2 of the annex to the Amended Agreement.[23] The annex in both Agreements asserts that the parties' agreement must include: a description of their dispute, the demands of the parties concerned, the name of the selected conciliator, and their remuneration. The parties should inform the General Secretariat of the Arab League of their agreement so they could inform the conciliator of their appointment and provide the parties' agreement. The conciliator's duty is "to achieve a rapprochement between the different points of view". The conciliator has two weeks to produce their report and to submit it to the parties who have two weeks to accept. The conciliator's report does not have any binding legal nature.

1.3 Arbitration

The Unified Agreement and the Amended Agreement gives the parties the option to choose arbitration as the primary method for resolving their dispute through an arbitration clause within a contract or an independent arbitration agreement,[24] or as an alternative for a failed attempt at mediation or conciliation.[25] Article 2 of the annex to the Unified Agreement and Article 3 of the annex to the Amended Agreement are identical with one exception. There is an explicit reference to Riyadh Agreement on Judicial Cooperation in Section 11 of Article 3 in the annex to the Amended Agreement.[26] Section 2 in both Agreements determines the process for notification of the arbitration process and arbitrators' appointment.[27] Section 3 of Article 2 of the Annex to the Unified Agreement and Section 3 of Article 3 of the annex to the Amended Agreement determines the number of arbitrators.[28] Section 6 embodies the principle of Kompetenz-kompetenz,[29] while Section 8 declares that the arbitral award shall be final and binding upon the parties ,and that no appeal can be made

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[23] Art. 1 of Annex to Unified Agreement: "1.Where two disputing parties agree to conciliation, the agreement must comprise a description of the dispute, the demands of the parties concerned, the name of the conciliator they have selected and the remuneration, which they have decided he should receive. The two disputing parties may ask the Secretary-General of the League of Arab States to select a person to assume the task of conciliation between them. The General Secretariat of the League shall provide the conciliator with a copy of the conciliation agreement and ask him to carry out his task.
2. The task of the conciliator shall be restricted to achieving a rapprochement between the different points of view. He shall be entitled to put forward proposals guaranteeing a solution satisfactory to the parties concerned, who must furnish him with the necessary information and documents to assist him in carrying out his task. Within three months of being informed of the conciliation task, the conciliator must submit a report to the Council summarizing the dispute, his proposals for its settlement and any solutions, which have been accepted by the parties concerned. The report must be forwarded within two weeks of its submission to the parties, each of whom shall express his opinion thereon within two weeks of the date of receipt.
3. The report of the conciliator shall not have probative force in any court before which the dispute may be brought."
See Art. 2 of the annex to the Amended Agreement.

[24] Art. 25 of the Unified Agreement: "The disputes between the Arab investor and the Arab host State can be resolved by conciliation or arbitration or by recourse to the Arab Investment Court'. art 23 of the Amended Agreement' If is not possible to settle the dispute through the means agreed upon by the parties to the investment, the matter shall be referred to the Arab Investment Court."

[25] Art. 2 Sec. 1 of the Annex to the Unified Agreement: "Where the two parties fail to agree to conciliation or where the conciliator proves unable to render his decision within the period specified or where the parties do not agree to accept the solutions proposed, they may agree to resort to arbitration."; Art. 3(1) of the annex to the Amended Agreement: "Where the two parties fail to agree to conciliation or where the conciliator proves unable to render his decision within the period specified or where the parties do not agree to accept the solutions proposed, they may agree to resort to arbitration."

[26] Art. 3 Sec. 11 of the Amended Agreement: "The arbitration award shall be enforced in accordance with Article 37 of the Riyadh Agreement on Judicial Cooperation with respect to States Parties thereto."

[27] Art. 2(2) of the annex to the Unified Agreement: "Arbitration procedures shall commence by the dispatch of a notice by the party seeking arbitration to the other party in the dispute. The notice shall set out the nature of the dispute, the decision which he wishes to see rendered in the dispute and the name of the arbitrator whom he has appointed. Within 30 days of receiving the notice, the other party must inform the party seeking arbitration of the name of the arbitrator he has appointed. Within 30 days of the appointment of the second arbitrator, the two arbitrators must choose a third person to serve as chairman of the arbitral panel, who shall have the casting vote in the event of opinions being equal."
See also Art. 3 Sec. 2 of the annex to the Amended Agreement.

[28] Art. 2 Sec. 3 of the annex to the Unified Agreement: "Where the other party fails to appoint an arbitrator or where the two arbitrators fail to agree on the appointment of the person who is to have the casting vote within the time-limits specified, the arbitral panel shall consist of one arbitrator or an uneven number of arbitrators, one of whom shall have a casting vote. Either party may ask the Secretary-General of the League of Arab States to appoint the arbitrators."
See also Art. 3 Sec. 3 of the annex to the Amended Agreement.

[29] Art. 2 Sec. 6 of the annex to the Unified Agreement: "The arbitral panel shall decide all matters related to its jurisdiction and shall determine its own procedure".
See also Art. 3 Sec. 6 of the annex to the Amended Agreement.

against the award, there is no mention of the possibility to annul the arbitral award by the AIC.[30] Section 9 gives the arbitral tribunal six months to render its decision and give the tribunal the right to seek an extension from the Secretary General of the Arab League for a period not exceeding six months.[31] Section 10 gives the Secretary General of the Arab League, not the arbitral tribunal, the power to determine the arbitrator's fees and the remuneration of other persons engaged in the arbitration process.[32] Finally, Section 11 states that the arbitral award should be enforced within three months after its issuance or the AIC can take the appropriate measure to secure the enforcement of the award.[33] Thus, absent voluntary enforcement by the parties, the AIC is in charge of enforcing the arbitral award but it does not have the power to review the arbitral award or to set it aside.

1.4 The Arab Investment Court (AIC)

The Unified Agreement established the AIC as a specialised court for hearing Arab capital investment disputes. The AIC has its own statue, which was modified after the signing of the Amended Agreement.[34] The AIC is located in Cairo, Egypt.[35] The AIC is composed of five judges, appointed for a three-year tenure by the Arab League's Economic and Social Council.[36] Each sitting judge should not be a national of either party to the dispute.[37] The AIC hears the disputes in circuits that contain at least three sitting judges.[38]The AIC's decision is final and binding upon the parties.[39] The AIC's decision should be enforced in the territories of the State under the Unified or Amended Agreement in the same manner as final enforceable judgment delivered by their competent courts.[40]

The AIC does have jurisdiction over investment disputes arising under the Unified Agreement and the Amended Agreement; however, the Unified Agreement and the Amended Agreement rules on the AIC's jurisdiction are not similar, which warrants treating them separately.

1.4.1 AIC's jurisdiction under the Unified Agreement

Under Article 27 of the Unified Agreement, either party to an Arab capital investment dispute can, seek recourse to the AIC directly to resolve their dispute or if their efforts to resolve their dispute through conciliation or arbitration did not succeed.[41] Article 29 of the Unified Agreement first defines the AIC's

[30] Art. 2 Sec. 8 of the annex to the Unified Agreement: "Decisions of the arbitral panel rendered in accordance with the provisions of this article shall be final and binding. Both parties must comply with and implement the decision immediately it is rendered unless the panel specifies a deferral of its implementation or of the implementation of part thereof. No appeal may be made against arbitration decisions."
See also Art. 3 Sec. 8 of the annex to the Amended Agreement.
[31] Art. 2 Sec. 9 of the annex to the Unified Agreement: "Decisions of the arbitral panel must be rendered within a period not exceeding six months from the date on which the panel first convenes. The Secretary-General of the League of Arab States, at the substantiated request of the panel, may extend the period once only for no more than a further six months should he deem it necessary."
See also Art. 3 Sec. 9 of the annex to the Amended Agreement.
[32] Art. 2 Sec. 10 of the annex to the Unified Agreement: "The Secretary-General of the League of Arab States shall determine the fees of the arbitrators and the remuneration of other persons engaged in work and procedures related to the arbitration. Each party shall be responsible for its own arbitration costs, whilst the arbitral panel shall determine which party is to bear the costs of the arbitration itself or the proportion of the arbitration costs to be shared between both parties, in addition to payment procedures and method."
See also Art 3 Sec. 10 of the annex to the Amended Agreement.
[33] Art. 2 Sec. 11 of the annex to the Unified Agreement: "Where the decision of the arbitral panel fails to be implemented within three months of its rendering, the matter shall be brought before the Arab Investment Court for it to rule on such measures for its implementation as it deems appropriate."
See also Art 3 Sec. 12 of the annex to the Amended Agreement.
[34] The AIC's Original and Amended Statute can be found at http://www.lasportal.org/ar/legalnetwork/Pages/Investment_CourtSystems.aspx (last visited 30 June 2021).
[35] Art. 28 Sec. 5 of the Unified Agreement; Art. 2 of the AIC's Modified Statue.
[36] Art. 1 of the AIC's Original Statue; Art. 2 of the AIC's Modified Statute.
[37] Art. 3 of the AIC's Original Statute; Art. 5 of the AIC's Modified Statute.
[38] Art. 28 Sec. 6 of the Unified Agreement; Art. 10 of the AIC's Modified Statute.
[39] Art .34 of the Unified Agreement: "Judgements shall have binding force only with regard to the parties concerned and the dispute on which a decision is given."
[40] Art. 34 Sec. 3 of the Unified Agreement: "A judgement delivered by the Court shall be enforceable in the States Parties, where they shall be immediately enforceable in the same manner as a final enforceable judgement delivered by their own competent courts."
[41] Art .27 of the Unified Agreement: "Each party may seek recourse to the Courts in order to settle a dispute in the following instances: 1.Failure of the two parties to agree to the expedient of conciliation; 2.Failure of the conciliator to award his decision within the period

subject matter jurisdiction to include disputes related to or arising from the application of the Unified Agreement's provision. Secondly, Article 29 outlines AIC's personal jurisdiction, as disputes not limited to those between a State party to the agreement and an Arab investor, but also disputes between State parties and other State parties or affiliated public institutions and organizations.[42] Although Article 29 suggests that the AIC's jurisdiction is limited to treaty-based claims, the AIC has established its jurisdiction over contract-based claims. In *Tanmiyah v. Tunisia*, the AIC held that it had the jurisdiction to hear a dispute concerning a contract signed between a Saudi firm and the Tunisian Mediterranean Games Committee for exploiting and marketing advertisements as well as radio and television broadcasting rights.[43]

The AIC's jurisdiction is not limited to disputes concerning Arab investment arising under the Unified Agreement. It can also hear disputes arising under other international investment treaties, such as a bilateral investment treaty between two-party States, if the parties to an investment dispute previously agreed to resort to an international court or international arbitration,. In this case, the parties to the investment dispute can substitute the previously agreed forum with the AIC.[44]

Finally, the AIC has appellate jurisdiction over decisions issued by its circuits. According to Article 35 of the Unified Agreement, "the Court may admit an application for a review of a judgment where the judgment gravely exceeds an essential principle of the Agreement or litigation procedures." Additionally, the Court may admit an application "where a decisive fact is revealed, which was not known at the time of judgement, either by the Court or by the party requesting the review." It is important to note that the appellate process is called retrial and not an annulment. Further, the AIC's statute does not prohibit the judges who were present at the first trial form hearing the petition for retrial, unlike annulment of arbitral awards issued by the ICSID under the 1965 Washington Convention.[45]

There is a discrepancy between the Unified Agreement and the AIC's Original Statute. Article 49 of the AIC statue adds the third ground for retrial: "c) If the litigant commits fraud, deception or forgery which had an effect of the judgment". [46] The discrepancy between the Unified Agreement's provisions and the Articles of the AIC's statutes is evident when it comes to the time limit for filing a petition for retrial. According to Article 35 of the Unified Agreement, the petition for retrial must be made "within six months of uncovering new facts and within five years of the delivery of judgment". Under Article 50 of AIC's statutes, the petition for retrial for breach of an essential principle of procedures is "six months commencing from the date on which the judgment was issued" while the time limit for a petition for retrial based on discovering a decisive

specified; 3.Failure of the two parties to agree on accepting the solutions proposed in the decision of the conciliator; 4.Failure of the two parties to resort to arbitration; 5.Failure of the arbitral panel to award a decision within the prescribed period for whatever reason."

[42] Art. 29 of the Unified Agreement: "1.The Court shall have jurisdiction to settle disputes brought before it by either party to an investment which relate to or arise from application of the provisions of the Agreement. 2.The disputes must have occurred:

(a) Between any State Party and another State Party or between a State Party and the public institutions and organizations of the other parties or between the public institutions and organizations of more than one State Party;

(b) Between the persons referred to in paragraph 1 and Arab investors;

(c)Between the persons referred to in paragraphs 1 and 2 and the authorities providing investment guarantees in accordance with this Agreement."

[43] Case No. 1/1 J (2004).

[44] Art. 30 of the Unified Agreement: "Where an international Arab agreement setting up an Arab investment or any agreement related to investment within the scope of the League of Arab States stipulates that a matter or dispute should be referred to international arbitration or to an international court, the parties involved may agree to regard it as being within the jurisdiction of the Court."

[45] Art. 52 Sec.3 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 U.N.T.S. 159 (herein after the 1965 Washington Convention): "On receipt of the request the Chairman shall forthwith appoint from the Panel of Arbitrators an ad hoc Committee of three persons. None of the members of the Committee shall have been a member of the Tribunal which rendered the award, shall be of the same nationality as any such member, shall be a national of the State party to the dispute or of the State whose national is a party to the dispute, shall have been designated to the Panel of Arbitrators by either of those States, or shall have acted as a conciliator in the same dispute. The Committee shall have the authority to annul the award or any part thereof."

[46] Art. 49 of the AIC Statutes: "The petition to reconsider the decisions of the Court shall be accepted in the following instances

a) The decision contained a grave breach of a basic rule in the agreement or in the statute of the court or in litigation procedures.
b) If a material fact with a decisive effect on the decision appeared and was unknown by both the court and the party requesting the petition when the decision was delivered.
c) If the litigant commits fraud, deception or forgery which had an effect of the judgment."

The AIC Original Statue is available online at http://www.leagueofarabstates.net/ar/legalnetwork/Pages/Investment_CourtSystems.aspx (last visited 29 August 2021)

fact or forgery is "six months from the date on which the cause was discovered and before the lapse of five years after issuing the judgment".

1.4.2 AIC's jurisdiction under the Amended Agreement

There have been significant changes to the rules governing the AIC's jurisdiction under the Amended Agreement and the AIC's statute. First, Article 22 of the Amended Agreement gives the AIC original jurisdiction over the Arab capital investment disputes. It states that "unless otherwise agreed upon by the parties to the dispute, disputes arising between the parties to the investment concerning the application of this agreement shall be settled through the Court in accordance with its statute, which describes its' composition, mandate, and procedures".

The parties can resort to the AIC directly in the absence of any prior agreement. Secondly, the Amended Agreement abolished the retrial. Thus, there is no recourse against the decisions of the AIC, ultimately going against the present trend in establishing international investment courts with an appellate mechanism.[47]

On the other hand, the Amended Agreement kept the AIC's jurisdiction to hear the dispute if the parties' meditation, conciliation, or arbitration did not succeed.[48] On the other hand, the Amended Agreement kept the AIC's jurisdiction to hear the dispute if the parties' meditation, conciliation, or arbitration did not succeed. The Amended Agreement also gave the AIC jurisdiction to hear disputes regarding Arab investments under international agreements other than the Amended Agreement if the parties choose to bring their dispute before the AIC.[49]

Finally, it is imperative to note that the AIC, under both the Unified Agreement and the Amended Agreement, has no jurisdiction over the arbitration process with the exception of enforcing the arbitral award. The AIC does not have the jurisdiction to hear annulment proceedings against an arbitral award issued under the Unified Agreement or the Modified Agreement, nor does the AIC interfere with selecting the arbitrator's or determining the rules applicable to the dispute. The AIC's role is limited only to assisting the parties to enforce the arbitral award if three months passed after the issuance of the award without enforcement.[50]

1.5 Host State's domestic courts

The Unified Agreement and the Amended Agreement do not prevent the Arab investor from seeking recourse before the Arab host State's courts. Nonetheless, both agreements contain a fork in the road clause that prevents the Arab investor from seeking recourse before the AIC if they initiate a legal action before the host state's courts.[51] Still, the AIC held that the fork in the road clause operates only when the Arab investor seeks legal recourse before the Arab host State's national courts to resolve a dispute that lies within the jurisdiction

[47] See for example Art. 8.28 of The Comprehensive Economic and Trade 30 October 2016 between the EU and Canada: "1. An Appellate Tribunal is hereby established to review awards rendered under this Section. 2. The Appellate Tribunal may uphold, modify or reverse the Tribunal's award based on:
(a) errors in the application or interpretation of applicable law;
(b) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law;
(c) the grounds set out in Article 52(1) (a) through (e) of the ICSID Convention, in so far as they are not covered by paragraphs (a) and (b)."

[48] Art. 23 of the Amended Agreement: "If is not possible to settle the dispute through the means agreed upon by the parties to the investment, the matter shall be referred to the Arab Investment Court."

[49] Art. 25 of the Amended Agreement: "if it stated in an Arab international agreement establishing an Arab Investment or in any agreement regarding investment within the scope of the Arab League or between its members that an issue or dispute that refers to international arbitration or international Courts, the parties involved may agree to deem the said issue or dispute falling within the jurisdiction of the Court."

[50] Art. 2 Sec. 11 of the Annex to the Unified Agreement: "Where the decision of the arbitral panel fails to be implemented within three months of its rendering, the matter shall be brought before the Arab Investment Court for it to rule on such measures for its implementation as it deems appropriate". *See also* art. 3 sec. 12 of the Annex to the Modified Agreement."

[51] Art. 31 of the Unified Agreement; Art. 21 of the Amended Agreement: "The Arab investor may have recourse to the courts in the State where the investment is made according to the rules of jurisdiction within such State in the case of matters which fall within the jurisdiction of the Court. However, where the Arab investor brings an action before one authority, he must refrain from so doing before the other."; Art. 21 of the Amended Agreement: "the Arab Investors may resort to the Courts in the Host State, in accordance with the rules of jurisdiction within Such state, in relation to the matters which fall within the jurisdiction of the Court. However, when the Arab investor initiates a legal action before one authority the said investor may not initiate a legal action before the other."

of the AIC.[52] As a result, if the Arab investor filed a lawsuit before the Egyptian Conseil d'État (Administrative Courts) to seek recourse against an administrative decree that resulted in causing injury to his investments then this lawsuit will not preclude the investor from seeking damages before the AIC for the Egyptian government's breach of duty under the Unified Agreement because AIC does not have jurisdiction to hear disputes regarding administrative decrees issued by the Arab League's member states even if it results in breach of the state's obligation under the Unified Agreement.[53] On the other hand, the AIC has the jurisdiction to hear disputes between Arab States and Arab investors over the ownership of land. Therefore, if the Arab investor has already filed a lawsuit against the Egyptian Government over the ownership of a piece of land, then they are precluded from seeking recourse before the AIC over that dispute.[54] It is worth mentioning that neither the Unified Agreement nor the Amended Agreement prescribed any limitations on the host state courts if the Arab investor brought their lawsuit before them. In other words, recourse to the host state courts will be governed entirely by the forum's law.

2. The Al-Kharafi award judicial saga

The Al-Kharafi Award, issued by an ad-hoc arbitral tribunal under the Unified Agreement, is currently the subject of an annulment proceeding before the Egyptian courts. The ECC issued two decisions, Case No. 6065/84J, Decision of 4 November 2015 and Case No. 18615/88, Decision of 10 December 2019, confirming that the provisions of the Unified Agreement do not preclude the Libyan State form resorting to the annulment proceedings under the EAL. First, we will briefly examine the facts underlying the Al-Kharafi award, then quickly overview the EAL and the Egyptian courts powers under the EAL. Finally, the decisions rendered by the AIC and the Egyptian courts will be listed and analysed.

2.1 Al-Kharafi award

On the 7 June 2006, the General People Committee on Tourism issued Decision No. 135/2006 and granted Al-Kharafi, a Kuwaiti conglomerate, the license to establish a touristic investment project in Tripoli. The next day, on 8 June 2006, Al-Kharafi and the Libyan Tourism Development Authority (TDA) signed a lease that the latter assigned a considerable quantity of land for Al-Kharafi to establish the project.[55] Al-Kharafi claimed that the Libyan authorities prevented it from establishing the project and that the Libyan police harassed their workers at the project's construction site.[56] Al-Kharafi decided to resort to arbitration per Article 29 of the contract of the lease signed between itself and the Libyan Tourism Development Authority. The arbitration clause stated that:

> "In the event of a dispute between the two parties arising from the interpretation or performance of present contract during its validity period such a dispute shall be settled amicably. Failing that, the dispute shall be referred to arbitration pursuant to the provisions of the Unified Agreement of the Investment of Arab Capital in the Arab States adopted on Nawar (November) 26, 1980."

Al-Kharafi decided to sue for damages the following entities: The Libyan State, the Libyan Ministry of Economy, the General Authority for Investment Promotion and Privatization Affairs (GIPPA) formerly the General Authority for Investment and Ownership (GAIO) that replaced the TDA, the Libyan Ministry of Finance and finally, the Libyan Investment Authority (LIA). A single legal team represented the Libyan defendants.[57] The arbitral tribunal consisted of three arbitrators. The president of the tribunal , unilaterally, chose Cairo, Egypt as the seat for arbitration and the rules of arbitration of the Cairo Regional Centre for International Commercial Arbitration as the curial law.[58]

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[52] *Horizon Touristic v. the Egyptian Prime Minister* AIC Case No.2/7J (2011).
[53] *Ibid.*
[54] *Ibid.*
[55] pp 4 of the Al-Kharafi Award available online https://www.italaw.com/cases/2185 (last visited 20 June 2020) (hereinafter *the Award*).
[56] *Ibid.*
[57] pp 3 of *the Award*.
[58] *Id.* at pp 7.

The dispute involved several issues, including issues related to the arbitration clause and the applicable law. The arbitration clause gives rise to three issues. First, the defendants plead that Al-Kharafi did not attempt to reach an amicable settlement of the dispute as required by the arbitration clause, and therefore, the request for arbitration was premature.[59] Second, the defendants plead that the arbitration clause was not binding upon the Libyan State and the Libyan Ministries of Economy and Finance who were not parties to the contract of the lease containing the arbitration clause.[60] The defendants argued that the arbitration clause was binding only upon the GIPPA—which replaced the LTDA—and that the GIPPA was an independent juridical person with financial autonomy form the Libyan State and not an affiliate of that State.[61] In addition, the defendants argued that the arbitration clause was limited to disputes related to the execution and interpretation of the lease contract and did not include the current dispute concerning the termination of the contract itself.[62] The defendants argued that the Unified Agreement did not apply to the dispute because Al-Kharafi did not transfer any capital from Kuwait to Libyan nor did it open a bank account for the project in the Libyan banks[63], and therefore, there was no transfer of Arab capital as required by the Unified Agreement.[64]

As to the applicable law, the defendants argued that the Libyan administrative law governed the contract lease because it was an administrative contract signed by a public law person—the LTDA—and contained several clauses that are uncommon in regular contracts.[65] Examples for such clauses include the existence of a time limit for establishing the project; the TDA's right to terminate the contract without compensation; not allowing Al-Kharafi to assign its right and obligations under third party contracts; barring Al-Kharafi from making any changes in the project without procuring the prior approval of TDA; Al-Kharafi undertook to use locally sourced labour and materials for the completion of the project.[66]

The arbitral tribunal rejected the pleas made by the defendants. The tribunal examined the texts of both Article 24 of the Libyan Law for Promotion of Foreign Investment No. 5/1997 and Article 24 of the Libyan Law on the Promotion of Investment No.9/2010 to determine the Unified Agreement's status under the Libyan law. The tribunal concluded that Libyan law included the Unified Agreement and its provisions applied to the dispute. However, the tribunal did not include in its analysis any attempt to verify the existence of the trio concepts of Arab Investor, Arab Capital and investment of Arab Capital as a condition precedent for the applicability of the Unified Agreement to the dispute. Thus, tribunal analysis did not answer the question as to whether or not Al-Kharafi and the Libyan Government dispute qualify as a dispute involving an Arab investor investing Arab Capital inside Libya. Further, the tribunal found that the Unified Agreement did not require the transfer of capital from Kuwait to Libya,[67] however despite that the AIC case law is clear that transfer of capital from one Arab State to the Arab host state is a perquisite for qualifying the investment as an investment of Arab Capital.[68]

In addition, the tribunal found evidence to support the existence of a failed attempt made by the parties to settle the dispute amicably.[69] Then the tribunal relied on expert testimony of the Dr. Burhan Mohammed Tawhid Amrallah to reach the conclusion that even if there was no attempt to settle the dispute amicably, the request for settling the dispute through arbitration was valid and not filed prematurely because according to Judge Amrallah's testimony "have neither determined the means, nor set forth any procedures to reach such an amicable solution; whereas, in addition, they have not determined a period of time for such settlement and have not provided for the participation of specific persons in the settlement".[70] However, as explained, Article 1 of the annex to the Unified Agreement organises conciliation as a method of resolving disputes under the auspices of the Unified Agreement which means that the party's reference to the Unified Agreement should suffice to have their attempt to settle the dispute amicable governed by the rules included within the annex

[59] *Id. at* pp 63.
[60] *Id.* at pp 65.
[61] *Ibid.*
[62] *Ibid*
[63] *Id.* at pp 70 of *the Award*.
[64] *Id.* at pp 67 of *the Award*.
[65] *Id.* at pp 68 of *the Award*.
[66] *Ibid.*
[67] *Id.*at pp 235 of *the Award*.
[68] Mohammed et Al. v His Excellency the President of United Arab Emirates AIC Case No. 2/4 J(2007); Horizon Touristic v. the Egyptian Prime Minister AIC Case No. 2.7J (2011).
[69] pp 243 of *the Award*.
[70] *Id.* at pp 244.

of the Unified Agreement such as the right to contract the Secretary-General of the Arab League to nominate a conciliator contrary to the testimony of Judge Amrallah.[71] In addition, Subsection 1 of Article 2 of the annex, which governs arbitration under the Unified Agreement, clearly states that "Where the two parties fail to agree to conciliation or where the conciliator proves unable to render his decision within the period specified or where the parties do not agree to accept the solutions proposed, they may agree to resort to arbitration."[72] This means that it is imperative for the tribunal to assert the parties' failure to settle the dispute amicable under the Unified Agreement before asserting its jurisdiction over the dispute.

The tribunal found that according to the Libyan Decision No. 322/2007, the Libyan Ministry of Finance was responsible for fulfilling any final judicial rulings rendered against public entities funded by the Libyan State's treasury and accepted Al-Kharafi's request for joinder of the Libyan Ministry of Finance as a defendant.[73]

As to the extension of the arbitration clause to the Libyan Ministry of Economy, the tribunal noted that the Authority for Investment Promotion replaced the Tourism Development Authority that initially signed the contract with the plaintiff under Decision No. 87/2007 of the General People's Committee. Thus, bound by the arbitration clause.[74] The Authority for Investment Promotion was renamed GAIO according to the General People's Committee Decision No. 89/2009, which rendered GAIO bound by the arbitration clause.[75] The tribunal noted that in 2012 the Libyan Council of Ministers issued Decision No. 59/2012 whereby GAIO became an affiliate of the Libyan Ministry of Economy, and the Ministry became bound by the arbitration clause.[76] The tribunal reinforced its decision by referring to the Libyan Council of Ministers' Decision No. 364/2012 that replaced GAIO with GIAPPA, which is also an affiliate of the Libyan Ministry of Economy.[77] The tribunal was confident in stating the arbitration clause in the contract of lease extended to the Libyan Ministry of Economy.[78]

As to the Libyan State, the tribunal found that it was involved in the conclusion, performance, and termination of the lease contract. The Libyan state and TDA own the leased land, a Libyan governmental unit signed the contract, which was approved by the Libyan Ministry of Tourism.[79] Additionally, the tribunal asserted that the Libyan government's affiliates, "Authority for Investment Promotion," GAIO, and GIAPPA retained rights and duties arising under the lease, making the arbitration clause binding upon the Libyan State.[80] The tribunal said, "the independence of the administrative entities from the State as well as having a moral personality and a financial autonomy does not mean that they are totally independent from the State and that a legal action can be brought only against them without involving the State."[81]

Regardless, the tribunal refused Al-Kharafi's request to join the Libyan Investment Authority to the dispute because it did not intervene in the conclusion of the contract. However, the tribunal noted the Libyan Investment Authority was "an integral part of the State of Libya which is bound by the arbitral award alongside with all its entities and bodies, even though the Libyan Investment Authority was not joined to the present arbitration case."[82] Thus, the arbitral tribunal reached the conclusion that the Libyan Investment Authority was bound by the tribunal's decision but as the same time it was not allowed to intervene in the proceedings to defend itself.

As to the arbitration clause's scope, the tribunal determined Article 25 of the Unified Agreement was a crucial rule that mandates the resolution of any investment-related dispute, through arbitration, which takes precedence over any contractual term limiting the tribunal's jurisdiction to disputes involving the performance and interpretation of the contract as stated in the arbitration clause in the contract of the lease

[71] See Art .1 of annex to the Unified Agreement.
[72] Art. 2 Sec. 1 of annex to the Unified Agreement.
[73] pp 249 of *the Award*...
[74] *Id.* at pp 250.
[75] *Id.* at pp 252.
[76] *Id.* at pp 252.
[77] *Id.* at pp 253.
[78] *Id.* at pp 253.
[79] *Id.* at pp 263.
[80] *Ibid.*
[81] *Ibid.*
[82] *Id* .at pp 268.

itself.[83] In other words, the tribunal decided that the scope of its jurisdiction is determined through the provisions of the Unified Agreement and not the letter of the arbitration clause singed between the parties. Afterwards, the tribunal decided that Article 25 of the Unified Agreement mandated the arbitration of any dispute related to Al-Kharafi's investment, regardless of the fact that the arbitration clause, which both parties agreed upon, has confined the arbitration process to the execution and the interpretation of the lease contract.[84] Thus, the tribunal has decided that the arbitration process is not based on the parties' agreement but stems directly form the provisions of the Unified Agreement despite the fact that arbitration under the Unified Agreement is based on the parties' mutual agreement and it is not imposed upon them.[85]

As for the issue of the law governing the contract of lease, the tribunal determined that the lease contract between Al-Kharafi and TDA was not an administrative contract according to Article 3 of the Decision No. 563 of 1375/2007; the contract was characterised as a BOT contract subject to the Libyan Civil Code and not the Libyan administrative law.[86] The tribunal decided that the contract allowed the Al-Kharafi to establish a touristic project aiming at achieving profit and was not related to the operation of a public utility.[87] Furthermore, the tribunal did not find any unusual clauses in the contract of the lease that warranted characterizing the contract as administrative.[88]

Then the tribunal addressed the issue of damages. Originally Al-Kharafi demanded that the plaintiff pay USD 5 million for losses and expenses incurred before adding around USD 2 billion as damages for lost profits, and USD 50 million as moral damages.[89] The tribunal reduced the amount of damages awarded to Al-Kharafi, through its discretionary powers, from around USD 2 billion to USD 1 billion to support Libya's transitional state in which Libya following the toppling of the Qadhafi regime.[90] Interestingly, the tribunal did not discuss the basis for the exorbitant amount of damages demanded by Al-Kharafi or its reasoning behind the use of the discounted cash flow method. The tribunal simply stated that it accepted the finding of the financial reports prepared by experts from Ernst and Young and the Prime Global report, and the testimony of two financial experts claiming the Al-Kharafi's demands were reasonable.[91] This will be a decisive factor in annulling the later award.

Finally, in a highly unusual manner, the tribunal stated that the award is a summary final arbitral award to be immediately enforced, and it was issued by the majority of votes of the Arbitral Tribunal members and not subject to appeal."[92] Quoting Article 2(8) of the Conciliation and Arbitration Annex of the Unified Agreement[93] the tribunal stated that its decision is enforceable without the need to obtain a writ of execution and Libyan Government should pay the sum due to Al-Kharafi without further delay.[94]

2.2 Subsequent recourse against the award before the AIC

The Libyan government sought recourse twice against the Al-Kharafi award before the AIC without any results. In the first time, the Libyan government sought the annulment of the award by the AIC. In the second time, the Libyan government sought to reinstate the dispute before the AIC because the arbitral award was not enforced and for the second time the AIC dismissed the case.

[83] *Id.* at pp 275.
[84] *Id.* at pp 274.
[85] Art. 2 Sec. 1 of annex to the Unified Agreement.
[86] pp 292 of *the Award.*
[87] *Id* .at pp 298.
[88] *Id.* at pp 303 et seq of *the Award.*
[89] *Id.* at pp 80.
[90] *Id*. at pp 382.
[91] *Id*. at pp 379.
[92] *Id.* at pp 387.
[93] Art. 2 Sec. 8 of the Conciliation and Arbitration Annex of the Unified Agreement: "Decision of arbitral panel rendered in accordance with the provisions of this article shall be final and binding. Both parties must comply with and implement the decision immediately it is rendered unless the panel specifies a deferral of its implementation or of the implementation of part thereof. No appeal may be made against arbitration decisions."
[94] pp 387 of *the Award.*

2.2.1 AIC Case No. 1/11 J dated 12 December 2014 to dismiss the annulment lawsuit

The Libyan government and its affiliates sought the annulment of the Al-Kharafi award, to consider the arbitral award as non-existent.[95] The AIC commenced its decision by examining its jurisdiction to hear the case because the 'Court's jurisdiction to hear this case must proceed the determination of any other issue given'. The Court then reiterated Article 23[96] of its statute and Articles 25-27, 29 of the Unified Agreement. The Court interpreted those articles as a 'single unit which complement each other and not in contradiction with each other so [we] cannot interpret some articles in isolation from the others while in fact that [they] comprise an integrated fabric'.[97] The AIC said that an ad hoc arbitration that commenced on 14 September 2012 resolved the dispute between Al-Kharafi and the Libyan government and it had no jurisdiction to hear the non-invocation case under Article 27 of the Unified Agreement because it 'does not fall under any of the Arab Investment Court's grounds of jurisdiction'.[98] Consequently, the AIC's analysis focused on its jurisdiction to hear the dispute but did not address the issue of whether the Unified Agreement was applicable to the dispute or not. The Court did not address whether Al-Kharafi qualified as an Arab Investor or Al-Kharafi's touristic project qualifies as an investment of Arab Capital under the Unified Agreement .

2.2.2 AIC Case No. 3/13 J dated 7 February 2017

In this lawsuit, the Libyan government sought to set aside the Al-Kharafi award after the Cairo Court of Appeals (CCA) refused to set aside the Al-Kharafi award. The Libyan government sought to set aside the award on five grounds. First, that the Al-Kharafi company and the TDA signed the contract of lease, currently the General Tourism Authority was not a party to the arbitration proceedings, which means that the award was not binding upon the General Tourism Authority.[99] Second, the General Tourism Authority did not appoint an arbitrator, and, therefore the composition of the arbitral tribunal was invalid according to the Unified Agreement.[100] Third, the president of the tribunal did not disclose his close relationship with the arbitrator appointed by Al-Kharafi Company that granted a majority in favour of Al-Kharafi.[101] Fourth, the president of the tribunal violated his duty of confidentiality by publishing the details of the award in a journal that the casting arbitrator publishes. Finally, the award stated that it is binding upon the General Tourism Authority despite that the General Tourism Authority was not a party to the dispute, therefore the General Tourism Authority had the right to demand its set aside.[102]

The AIC, once again, reiterated Article 25 of the Unified Agreement, Articles 23 and 24 of the Amended Agreement, Article 23 of the Court's amended statute, and Sections 8, 11, and 12 of Article 3 of the Amended Agreement's annex. The Court then said:

> "[the Court's] jurisdiction regarding disputes under the Unified Agreement is limited to the following instances:
>
> (1) The parties to the investment have explicitly agreed to resolve their disputes through the Arab Investment Court.
> (2) The parties to the investment have not reach an agreement to choose a means for resolving their disputes
> (3) The dispute could not be resolved by the means agreed by the parties to the investment."

The AIC concluded that the plaintiff's demand for non-invocation of the Al-Kharafi award did not "fall within the instances prescribed for the plenary jurisdiction of this Court, previously defined by the basic statute of this Court and the Unified Agreement for the Investment of Arab capital in the Arab States."[103]

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[95] *Libya Government v. Al-Kharafi*, AIC Case No. 1/11J (2014).
[96] Art. 23 of the Unified Agreement: "The Court shall have jurisdiction to resolve all disputes in accordance with Chapter V and Chapter VI of the Unified Agreement for the Investment of Arab Capital in the Arab Capital. It shall have jurisdiction to resolve the disputes referred form the Economic and Social Council according to Article 13 of the Agreement for Facilitation and Development of Commercial Exchange among Arab Nations."
[97] *Ibid.*
[98] *Ibid.*
[99] *Libyan General Tourism Authority v. Al-Kharafi Co., and the Libyan Government et al*., AIC Case No. 3/13 J (2017).
[100] *Ibid.*
[101] *Ibid.*
[102] *Ibid.*
[103] *Ibid.*

The AIC in this decision was very clear that it was not 'an appellate and reviewing body for the awards issued by the arbitral tribunal in the disputes related to the Unified Agreement'.[104] Furthermore, the AIC explained that its role regarding arbitral awards issued under the Amended Agreement was limited to 'facilitating the issue of enforcing the arbitral award and deciding what it deems "appropriate" to reach a certain goal, which is the enforcement of the award without exceeding that to the jurisdiction to hear any other issue'.[105]

However, there are two remarks on the Court's decision. First, the AIC has for the second time avoided in its analysis addressing the issue of whether Al-Kharafi qualified as an Arab Investor or Al-Kharafi's touristic project qualifies as an investment of Arab Capital under the Amended Agreement, choosing instead to focus its analysis on explaining why it lacked the jurisdiction to hear the dispute. Second, since that this lawsuit was filed after the Amended Agreement has entered into force in 2016, the Court has founded its decision on the provisions of the Amended Agreement and the Amended Statutes of the Court despite the fact the Libya has neither signed nor ratified the Amended Agreement. In fact, Article 30 of the Amended Agreement does not allow the AIC to apply the Amended Agreement to the dispute until the Libyan Government accede or ratify the Amended Agreement.[106] Therefore, the AIC should have applied the Unified Agreement, and not the Amended Agreement, to the dispute.

Thus, it is clear that the AIC has no jurisdiction to review the arbitral awards issued under the Unified Agreement and the Amended Agreement. However, this did not stop the Libyan government from seeking recourse against the award before the Egyptian courts.

2.3 Subsequent recourse against the award before the Egyptian Courts

The Libyan government sought to set aside the Al-Kharafi award by recourse to the Egyptian courts by using the provisions of the EAL. Until June 2020, the Libyan government did not procure a decision to annul the award because of a notable difference of opinion between the CCA and ECC. On two occasions, the CCA insisted that the provisions of EAL do not give the Egyptian court's jurisdiction to annul the Al-Kharafi award per the Unified Agreement until the CCA issued its decision to annul the Al-Kharafi Award in June 2020 while the ECC insisted on interpreting the Unified Agreement and the EAL to give the Egyptian Courts the jurisdiction to hear the lawsuit for the annulment of Al-Kharafi award. Thus, a quick overview of the relevant articles of the EAL is required before analysing the various decision issued by both the CCA and the ECC.

2.3.1 EAL scope of application

In 1994, Egypt promulgated Egypt Law No. 27/1994 on Arbitration (EAL). The 1985 UNCITRAL Model Law on International Commercial Arbitration is the basis for the EAL.[107] EAL's scope of application is defined by Article 1 as follows:

> "Without prejudice to the provisions of international conventions applicable in the Arab Republic of Egypt, the provisions of the present Law shall apply to all arbitrations between public law or private law persons, whatever the nature of the legal relationship around which the dispute revolves, when such an arbitration is conducted in Egypt or when an international commercial arbitration is conducted abroad and its parties agree to submit it to the provisions of this Law."

[104] *Ibid.*
[105] *Ibid.*
[106] Art. 30 of the Amended Agreement: "This amended Agreement shall enter into force within three months after the submission of the instruments of ratification by five member States to the Unified Agreement for the Investment of Arab Capital in the Arab States. It shall apply to the Arab States which have ratified or acceded to the amended Agreement one month after the date of the submission of the instruments of ratification or accession to the General Secretariat of the League of Arab States."
[107] Egypt Law No. 27/1994 (Law of Arbitration in Civil and Commercial Matters, amended in 2000), *Al-Jarida Al-Rasmiyya,* 18 April 1994 (hereinafter EAL). An English translation of the Code can be found in Egypt: Law No. 27 of 1994 , 10 *Arab L. Q.* 34-51(1995).

As a result, the Egyptian courts have consistently ruled that the EAL rules are applied territorially to any arbitration with its legal seat in Egypt, regardless of the nationality of the parties or the subject matter of the dispute.[108] Article 4 of EAL defines arbitration as "voluntary arbitration agreed upon by the two parties to the dispute according to their own free will, whether or not the chosen body to which the arbitral mission is entrusted by agreement of the two parties is a permanent arbitral organization or centre."

The EAL's scope of application includes all arbitration 'between public law or private law persons, whatever the nature of the legal relationship around which the dispute revolves'.[109] Therefore, Article 1 allows the application of the EAL provisions to all types of arbitration, including the arbitration of investment resolution disputes between States, as a public person, and investors as a private person. We must not forget that neither the Unified Agreement nor the Modified Agreement provide recourse against arbitral awards issued under their auspices. On the other hand, neither the Unified Agreement nor the Modified Agreement precluded the Courts of the Seat of Arbitration form exercising their jurisdiction over the arbitral awards issued under the auspices of either agreement.

2.3.2 Annulment of arbitral awards under EAL

According to Article 52[110] of the EAL, the only course of action against any arbitral award under the EAL is the annulment procedures set out in Article 53 and Article 54 of the EAL. Article 53 of EAL lists eight grounds for annulling an arbitral award.[111] The EAL added two additional grounds for setting aside an arbitral ground beside those included in the UNCITRAL model law on international commercial arbitration. The first additional ground is the arbitral tribunal's failure to apply the law chosen by the parties. The second additional grounds is the arbitral award's violation of an essential procedural rule in either the EAL or the Egyptian Law for Civil and Commercial Procedures.[112] It is important to make some notes: First, the Egyptian courts did not adopt a criterion for determining which rules of the EAL or the Egyptian Civil and Commercial Procedures Law were essential procedural law.[113] Second, as under the Unified Agreement and the Amended Agreement, arbitral awards under the EAL are final and binding upon the parties and yet they can be set aside by the Egyptian Courts.[114] Finally, Section 2 of Article 54 gives the jurisdiction to hear lawsuits for annulling

[108] Maḥkamat al-Naqḍ [Court of Cassation] No. 5026/79, decision of 14 May 2018 (Egypt).
[109] EAL §1.
[110] EAL § 52: "1. Arbitral awards rendered in accordance with the provisions of the present Law may not be challenged by any of the means of recourse provided for in the Code of Civil and Commercial Procedures. 2. An action for the nullity of the arbitration award may be instituted in accordance with the provisions of the following two articles."
[111] "1. An action for the nullity of the arbitral award cannot be admitted except for the following causes:
a. If there is no arbitration agreement, if it was void, voidable or its duration had elapsed;
b. If either party to the arbitration agreement was at the time of the conclusion of the arbitration agreement fully or partially incapacitated according to the Law governing its legal capacity;
c. If either party to arbitration was unable to submit its defense as a result of not being duly notified of the appointment of an arbitrator, of the arbitral proceedings, or for any other reason beyond its control;
d. If the arbitral award excluded the application of the Law agreed upon by the parties to govern the subject matter in dispute;
e. If the composition of the arbitral panel or the appointment of the arbitrators had been undertaken in violation of the Law or contrary to the parties' agreement;
f. If the arbitral award dealt with matters not falling within the scope of the arbitration agreement or exceeding the limits of this agreement.
However, in the case when matters falling within the scope of the arbitration can be separated from the part of the award which contains matters not included within the scope of the arbitration, the nullity affects exclusively the latter parts only;
g. If the arbitral award itself or the arbitration procedures affecting the award contain a legal violation that causes nullity.
2. The court adjudicating the action for nullity, shall ipso jure annul the arbitral award if it violates the public order in the Arab Republic of Egypt."
[112] Maḥkamat al-Naqḍ [Court of Cassation] No. 5162/79, decision of 21 January 2016; Maḥkamat al-Naqḍ [Court of Cassation] No. 9568/79, decision of14 March 2011; Maḥkamat al-Naqḍ [Court of Cassation], Case No. 661/72, decision of 1 August 2005 (Egypt).
[113] Yehya Badr, *The Grounds for Setting Aside Arbitral Awards under the Egyptian Arbitration Code: Unresolved Choice of Law Issues and Unwanted Extraterritorialism*, 32 Arab Law Quarterly 49 et seq (2018).
[114] EAL § 55: "Arbitral awards in accordance with the provisions of the present Law have the authority of the res judicata and shall be enforceable in conformity with the provisions of the present Law."

an arbitral award the Court of Appeals designated by Article 9 of the EAL,[115] in cases involving international commercial arbitration is the CCA.[116]

Thus, the question remains: Can the Egyptian courts set aside an arbitral award issued under the Unified Agreement? This issue has been the subject of a judicial debate among the Egyptian courts after the Libyan Government initiated annulment procedures against the Al-Kharafi Award.

2.3.2.1 CCA Commercial Circuit No. 62, Case No. 39/130 JY 5 February 2014

The Libyan State filed a lawsuit before the CCA to set aside the Al-Kharafi award on four grounds. First, it claimed that the award dealt with matters not falling within the scope of the arbitration clause in the lease contract signed between Al-Kharafi and the TDA.[117] The Libyan Government claimed that the arbitration clause was limited to settling disputes related to the interpretation and the execution of the contract during the period of the lease.[118] Thus, the arbitration clause was not applicable to the current dispute that aroused before the execution of the contract of lease because of TDA's termination of the contract.[119] The Libyan government also claimed that administrative decree foreign to the contract of lease caused the Al-Kharafi's injury.[120] Furthermore, the Al-Kharafi's award was issued against the Libyan government alongside the TDA and other affiliates of the Libyan State despite the fact, the Libyan government was not party to contract of the lease containing the arbitration clause.[121]

Second, the Libyan State claimed that the Al-Kharafi contained legal violations that lead to its nullity. The tribunal in the Al-Kharafi issued the award without explaining why an arbitrator decided to resign from the arbitral tribunal[122]. Additionally, the arbitrators did not present their declaration of independence and impartiality as required by Article 11 of the Arbitration Rules of the Cairo Regional Centre for International Commercial Arbitration.[123] The arbitral tribunal did not sufficiently deliberate among its members as it delivered the award after examining the enormous volume of the documents, which contained thousands of pages of docket disputes for only five days after hearing the parties' closing arguments according to the minutes of tribunal.[124]

Third, the Libyan State claimed that the tribunal did not apply the law chosen by the parties in Article 30 of the contract of lease, which indicated that Law No. 5/1997 and Law No. 7/2004 along with other Libyan statutes was the governing contract law.[125] The contract of lease was an administrative contract concluded by a public law person, the Libyan Tourism Development Authority, and governed by the Libyan administrative Law[126]. Furthermore, the contract of the lease contained unfamiliar clauses such prohibiting Al-Kharafi from assigning its rights under the contract, and a clause that gave the Libyan Tourism Development Authority extensive supervisory powers over the establishment and the operation of the Al-Kharafi's project which indicated that the contract in question is an administrative contract governed by the Libyan administrative law.[127]

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[115]EAL § 54: "jurisdiction with regard to an action for the nullity of awards rendered in international commercial arbitrations lies with the court referred to in Article 9 of the present Law. In cases not related to international commercial arbitration, jurisdiction lies with the court of appeal having competence over the tribunal that would have been initially competent to adjudicate the dispute."
[116]EAL § 9: "1 . Competence to review the arbitral matters referred to by the present law to the Egyptian judiciary lies within the court having original jurisdiction over the dispute. However, in the case of international commercial arbitration, whether conducted in Egypt or abroad, competence lies within the Cairo Court of Appeals unless the parties agree on the competence of another appellate court in Egypt. 2. The court having competence in accordance with the preceding paragraph shall continue to exercise exclusive jurisdiction until completion of all arbitration procedures."
[117] Maḥkamat Istināf al-Kāhra [Cairo Court of Appeals] Commercial Circuit No. 62, Case No. 39/130 Judicial Year 5 February 2014 (Egypt).
[118] *Ibid.*
[119] *Ibid.*
[120] *Ibid.*
[121] *Ibid.*
[122] *Ibid*.
[123] *Ibid*.
[124] *Ibid*.
[125] *Ibid*.
[126] *Ibid*.
[127] *Ibid*.

The arbitral tribunal treated the lease contract as a civil contract governed by the Libyan Civil Code. Moreover, the tribunal misapplied the provisions of Libyan Civil Law, especially Article 165, that imposes on the injured party a duty to mitigate that injury.[128] The Libyan State claimed that Al-Kharafi failed to carry out its duty to mitigate damages by refusing a lease on a piece of land other than one allotted by the terminated contract.[129] The Libyan government claimed that the tribunal also misapplied the Libyan Civil Law by awarding Al-Kharafi damages for potential injury resulted from the loss of anticipated future profits. The Libyan Civil Law limits Al-Kharafi's claim for damages to damages that occurred as a direct result of the contract's termination.[130]

The Libyan State also claimed that the Unified Agreement was not applicable because the documents presented to the arbitral tribunal did prove that Al-Kharafi had invested inside Libya. In fact, Al-Kharafi never transferred any assets into Libya nor maintained, at any point in time, a bank account inside the Libyan banks.[131]

The final ground used by the Libyan State to set aside the Al-Kharafi's award was the award's violation of the Egyptian public policy.[132] The Libyan State claimed that the award exaggerated the sum of damages due to Al-Kharafi by awarding it USD 1 billion without any factual or legal basis justifying such an exorbitant sum of damages. Besides, the incoherent and contradictory reasoning used by an arbitral tribunal lacked independence and impartiality, meaning that enforcing that award would create injustice contradictory to Egyptian public policy.[133]

On the other hand, Al-Kharafi argued that the award was subject to a special procedural regime considering that the Unified Agreement and Libyan law governed the arbitration process, including the award itself. It did not allow the Libyan State to set the award aside before the Egyptian courts.[134] This special procedural regime should govern the award even if the arbitral tribunal decided to resort to the arbitration rules at the Cairo Regional Centre for International Commercial Arbitration because the Unified Agreement allows the tribunal to do such an action.[135]

According to Al-Kharafi, the special procedural regime, created by the Unified Agreement, removed the jurisdiction to review arbitral awards away from the State courts and confined the AIC within the jurisdiction to enforce and implement the Al-Kharafi award.[136] Al-Kharafi supported its argument by pointing to paragraph 8 of Article 2 of the annex to the Unified Agreement, which states that 'decisions of the arbitral tribunal rendered in accordance with the provisions of this article shall be final and binding'. Article 1 of EAL gives the text of the Unified Agreement precedence over the Egyptian Law.[137]

The CCA agreed with Al-Kharafi's arguments and decided to dismiss the dispute for non-admissibility because the EAL was not applicable to the Al-Kharafi's award.[138] The ECC did not agree with the CCA's decision.

2.3.2.2 ECC Case No.6065/84 JY 4 November 2015

The Libyan State challenged the CCA decision to dismiss the annulment lawsuit before the ECC. The Libyan State argued that neither the Unified Agreement nor the EAL prevented the Egyptian courts from setting

[128] *Ibid*.
[129] *Ibid*.
[130] *Ibid*.
[131] *Ibid*.
[132] *Ibid*.
[133] *Ibid*.
[134] *Ibid*.
[135] *Ibid*.
[136] *Ibid*.
[137] *Ibid*.
[138] *Ibid*.

aside an arbitral award issued under the Unified Agreement's auspices. The ECC accepted that argument stating that:

> "International agreements should be interpreted within the framework of Good Faith and according to usual meaning of its expressions within context set forth herein, without prejudice to the objective or purpose as established by the Case law of this Court. [This] is not an appeal against the award because it does not entail rehearing the dispute but it reviews the validity of the arbitral award, and [ensures] its issuance according to the procedures of the applicable law, out of respect for the basic guarantees [of a fair trial] and in a manner that leads to the disregard of any award which lacks the basic fundamental [element] of judicial rulings."[139]

The ECC then referred to the text of the eighth paragraph of Article 2 of the mediation and arbitration annex to the Unified Agreement which states that "no appeal may be made against arbitration decisions." Clarifying, they said:

> "[this] means that [the Unified Agreement] banned appealing against the arbitrator's award through normal and special means of appeal, however it did not ban the initiation of the lawsuit for annulment which means that the basic principles for judicial judgments should be followed in regards to that lawsuit [the annulment lawsuit] which is not a means of appealing against the awards but it is an instrument to restitute defective awards form producing judicial effects." [140]

The ECC concluded by saying:

> "Since the challenged decision has been contrary to this point of view and established its decision to dismiss the lawsuit for annulling the arbitral award the subject of this dispute, as reported by [the challenged decision's] text, that the arbitral award was issued according to the Unified Agreement for the Investment of Arab Capital in the Arab States and cannot be recourse against even through annulment, it has breached and misapplied the law which prevented [the challenged decision] from ruling on the merits according to the Egyptian Law of Arbitration in Civil and Commercial Matters, as it is the common law for all arbitration taking place in Egypt, whose articles in that regard does not contradict with provisions of the Unified Agreement for the Investment of Arab Capital in the Arab States and its annex which the current arbitration was conducted [according to its articles]."

Consequently, the CCA decision was quashed, and the ECC ordered the case to be reminded before a new circuit at the CCA. However, the debate over applying the EAL to the annulment of the Al-Kharafi award continued.

Thus, the ECC logic behind its' decision is that the text of the Unified Agreement did not preclude the Egyptian Courts form applying the EAL and did not grant the Al-Kharafi award immunity against the annulment proceedings within the EAL because annulment is not an appeal against a decision that allows the Egyptian Courts to hear the fact of the case and to decide on its' merits but a process that aims at vetting the arbitral awards to ensure that those who are defective do not produce legal effects inside Egypt.[141] Therefore, the Libyan Government had the right to resort to CCA and seek the annulment of the Al-Kharafi award.

On balance, one might think that the ECC had gone too far in its decision by allowing the application of the EAL to an arbitral award issued under the auspices of an international treaty. However, we must note that neither the Unified Agreement nor the Amended Agreement provide any means for recourse against the arbitral awards issued under their auspices, which is unusual given that other investment instruments, such as under the Washington 1965 Convention, allows the parties to seek recourse against arbitral award issued under their auspices such as the revision and annulment proceedings.[142] This means that the Libyan Government has no path to seek recourse against what it has seen as an erroneous and unjust award. In addition, the EEC decision should not come as a surprise since that the Egyptian Courts are consistent in applying the EAL to any arbitration taking place inside Egypt, whether it is an international arbitration or a

[139] Maḥkamat al-Naqḍ [Court of Cassation] No.6065/84, Decision of 4 November 2015 (Egypt).
[140] *Ibid*.
[141] Maḥkamat al-Naqḍ [Court of Cassation] No. 9301/80, decision of 28 December 2017; Maḥkamat al-Naqḍ [Court of Cassation] No. 8767/80, decision of 28 Apr. 2016; Maḥkamat al-Naqḍ [Court of Cassation] No. 10370/83, decision of 10 March 2015(Egypt).
[142] See Art. 51-52 of the 1965 Washington Convention.

domestic one.[143] In fact the EAL is applicable to "all arbitrations between public or private law persons, whatever the nature of the legal relationship around which the dispute revolves, when such an arbitration is conducted in Egypt".[144] As a result, the investment disputes arbitrations that takes place in Egypt falls under the scope of the EAL as a general rule and since that ECC has interpreted that the Unified Agreement does not preclude the Egyptian Courts form exercise their jurisdiction over the Al-Kharafi Award, whether or not such interpretation is compatible with the text of the Unified agreement, and that there is no reason for treating Al-Kharafi award differently from any other arbitral award issued inside Egypt, including those issued by the Cairo Regional Centre for International Commercial Arbitration despite being an international organisation based in Egypt and established by an international treaty signed with the Egyptian Government,[145] which are subject to annulment under EAL.[146]

Finally, the provisions of both the Unified Agreement and the Amended Agreement do not organise the recognition and enforcement of arbitral awards issued under their auspices similar to Section 6 of the 1965 Washington Convention, which provides detailed rules on how should the contracting states recognise and enforce the awards issued by ICSID.[147] Therefore, the recognition and enforcement of arbitral awards issued under the auspices of the Unified Agreement and the Amended Agreement is left for the forum's law to decide and since the seat of Al-Kharafi Arbitration was in Egypt, the ECC had little trouble in exploiting the lacuna within the Unified Agreement, and the Amended Agreement, to apply the EAL to the Al-Kharafi award and use EAL's rules to govern the enforcement of the Al-Kharafi, including the EAL rules on the annulment of arbitral awards because the rules governing the enforcement of an arbitral award under the EAL are linked with the rules governing the annulment. The link between the rules governing the enforcement of the arbitral awards and the rules governing enforcement is manifested by Article 58 which does not allow a wining party to enforce an arbitral award unless the time limit for filing an annulment lawsuit has elapsed.[148]

2.3.2.3 CCA Commercial Circuit No. 62, Case No. 39/130 JY 6 August 2018

Despite the ECC's decision that the EAL applies to the Al-Kharafi award, which impliedly indicates the Egyptian Court's jurisdiction to hear the annulment proceedings, the CCA has blatantly refused such action in its second decision. Unlike the CCA's first decision, the latter engaged in a detailed analysis and interpretation of the Unified Agreement. Their analysis starts by stating that the Unified Agreement applies to the arbitration dispute's subject matter and a fortiori to the arbitral award.[149] The CCA said that interpreting the Unified Agreement was not similar to interpreting the Egyptian law because of the "important and serious impact such treaties can have on the interests of contracting states [parties to the Unified Agreement]". In particular, the Court said that:

> "An Egyptian national judge should interpret the Unified agreement according to Article 31 of the Vienna Convention on the law of treaties of 1969 and influence by four principles: first, the principle of good faith. Second, the principle of interpretation following the ordinary meaning of the terms. Third, the principle of taking into consideration the context and the circumstances surrounding the conclusion of the treaty. Finally, the principle of effect utile."[150]

[143] Maḥkamat al-Naqḍ [Court of Cassation] No. 5026/79, decision of 14 May 2018 (Egypt).
[144] EAL §1: "Subject to the provisions of international conventions applicable in the Arab Republic of Egypt, the provisions of this Law shall apply to all arbitrations between public or private law persons, whatever the nature of the legal relationship around which the dispute revolves, when such an arbitration is conducted in Egypt, or when an international commercial arbitration is conducted abroad and its parties agree to submit it to the provisions of this Law. With regard to disputes relating to administrative contracts, agreement on arbitration shall be reached upon the approval of the competent minister or the official assuming his powers with respect to public juridical persons. No delegation of powers shall be authorized in this respect."
[145] Headquarters' Agreement for the Cairo Regional Centre for International Commercial Arbitration, Egypt-The Asian African Legal Consultative Committee, 24 May 1987 available at https://crcica.org/FilesEnglish/AboutOpening_2016-05-14_14-48-3-866570.pdf (last visited 12 June 2021).
[146] Maḥkamat al-Naqḍ [Court of Cassation] No. 7211/86, decision of 25 May 2017 (Egypt).
[147] See Art. 53-55 of 1965 Washington Convention.
[148] EAL §58: "1- Application for the enforcement of an arbitral award shall not be admissible before the expiration of the period during which the action for annulment should be filed in the court registry."
[149] Maḥkamat Istināf al-Kāhra [Cairo Court of Appeals], Commercial Circuit No. 62, Case No. 39/130 Judicial Year 6 August 2018.
[150] *Ibid*.

The Court concluded that the Unified Agreement created a set of international binding rules that preceded the national legislation. A particular judicial system, the Arab Investment Court, protects those addressed by the rules mentioned above.[151] The Court then argued that the principle of primacy of international treaties over national legislation and Article 1(1) of the Egyptian Arbitration Code binds the Court, and:

> "denotes that the Legislator imposed as a condition for the application of the provisions of the Arbitration Law to all arbitrations conducted in Egypt that the provisions of the international conventions in force in the Arab Republic of Egypt should not be disregarded in favour of the provisions of the Arbitration Law."[152]

As a result, CCA said that it should, *sua suponte*, and without the parties' request or a legislative directive, apply the Unified Agreement to determine the outcome of the case.[153] The CCA said that the ECC decision, which impliedly suggested that the Egyptian courts have jurisdiction to hear the annulment lawsuit, violates Article 3(2) of the Unified Agreement and should have no binding effect. The CCA then, for the second time, dismissed the case.[154]

Nonetheless, a close look at the CCA reasoning reveals that it did not address the main issues within the dispute. First, the CCA did not explain why the presence of the AIC prevented the Egyptian Courts from exercising jurisdiction over the Al-Kharafi Award. As explained, the AIC does not play any role, nor does it interfere with the arbitration under the auspices of the Unified Agreement or the Amended Agreement except for the parties' failure to enforce the arbitral award within three months after the issuance of the award. Thus, provisions of the Unified Agreement or the Amended Agreement do not support the conclusion that the presence of the AIC ousts the jurisdiction of the Egyptian Courts over the Al-Kharafi award.

Second, the CCA has argued that the ECC has disregarded the supremacy of the Unified Agreement over the Egyptian Law, including the EAL. On the contrary, the ECC acknowledged that the provisions of the Unified Agreement have supremacy over the provisions of the Egyptian Law. The ECC was clear that it was not allowing an appeal against the Al-Kharafi decision, but it focused its analysis on the fact that the Unified Agreement did ban the appeal against the decision, but it did not ban the Egyptian Courts form annulling the Al-Kharafi since that annulment is a distinct form appeal, where a re-trial of the dispute occurs. The CCA did not provide an explanation why the term appeal mentioned in the Unified Agreement should also include annulment. Finally, the CCA did not, even remotely, analyse whether the enormous sum of damages awarded by the tribunal in the Al-Kharafi award constitutes a breach of the right to a fair trial, and therefore renders the Al-Kharafi award eligible for annulment under the EAL.

2.3.2.4 ECC Case No.18615/88 JY 10 December 2019

Unsurprisingly, the Libyan State decided to challenge the CCA's decision for a second time before the ECC. This time the ECC decision dealt with three main issues: first, the res judicata effects of the ECC's decisions; second, the applicability of the EAL to the Libyan State's lawsuit for annulling the Al-Kharafi Award; finally, the ECC explained when it could address directly the annulment proceedings when it exercises its review of the decision issued by the Court of Appeals.

First, the ECC explained two res judicata effects of its decisions. First, that a fact was presented to the Court of Cassation, and the Court gave "its foresight and purposeful opinion on it".[155] Second, that "the decision in that particular issue acquires res judicata within the limits of what has been decided". Then ECC explained that the res judicata effect of its decision meant that "the referred [appellate] Court is forbidden form prejudicing the res judicata of the [quashing] Cassation Court's decision and they should confine its' review of the case to the limits set out by the [quashing] Cassation decision."

[151] *Ibid*.
[152] *Ibid*.
[153] *Ibid*.
[154] *Ibid*.
[155] Maḥkamat al-Naqd [Court of Cassation] , Case No.18615/88, Decision of 10 December 2019 (Egypt).

The duty to respect the res judicata effect of the ECC's decision extends to "the Court of Cassation itself" and the court cannot revisit the issue when it exhausts its jurisdiction to decide it." Therefore the CCA cannot, and its competence does not include, disregarding the quashing decision and not following the Court of Cassation's finding on the legal matter that was decided in it [decision]". [156]

The ECC emphasized that the res judicata effect of its decision must be respected even if the ECC decision is legally unsound because "it is not an excuse that the Court of Cassation committed an error in deciding the issue presented before, since that there is no recourse against its decision." The ECC then indicated that, the Court of Appeals should have abided by the quashing decision, regardless of its view on the decision, and the decision should not be a subject of debate before the Court of Appeals.[157]

Second, the ECC criticized the CCA for not following its prior decision on the applicability of the EAL to the Libyan State's lawsuit for annulling the Al-Kharafi award as decided in its prior decision. The ECC stated:

> "nonetheless the challenged decision has consciously violated the above decision and held that the Cairo Court of Appeals is not internationally competent by founding its decision in that regard that the [arbitration] agreement to resolve the dispute according to [the Unified Agreement] is sufficient reason to close the path of judicial recourse through an initial lawsuit before any national court of any state member of the treaty, including the Arab Republic of Egypt, and the jurisdiction of the Arab Investment Court to hear to such cases. The National Courts' decisions do not enjoy res judicata when issued in violation of the treaty's [Unified Agreement] provisions without paying attention to the fact that, the decision, issued by the Cairo of Appeals should adhere to and bound by the quashing decision since that res judicata transcends the public policy."[158]

Finally, the ECC formulated a new legal principle regarding the review of Egyptian courts of Appeal decisions on the annulment of arbitral awards. The EEC stated that it will not rule on issue of annulment unless the Court of Appeals has addressed the issue by itself. It stated that:

> "The text of the last paragraph of Article 269 of the Civil and Commercial Procedures Law requires that the Court of Cassation should decide on the merits if the challenge is accepted for the second time[159], the duty of the Court of Cassation to do so does not exist in this case, when the dispute is considered on one stage [of litigation]—as it is the case with Cairo Court of Appeals jurisdiction to hear an initial lawsuit for annulling an arbitration award—unless it [the Cairo Court of Appeals] has ruled on the merits of the dispute, if the Court's decision is limited ruling on the procedures for initiating the lawsuit or a procedural defence without [addressing] the subject [of the dispute] then the Court of Cassation in this case, cannot decided on the merits since that this will reduce the litigation process in a single stage if the Court of Cassation ruled on the merits of the dispute after quashing the challenged decision, which is inconsistent with the principles of justice that may not be forfeited for the sake of expediting the resolution of the lawsuit for annulment of the arbitration award."[160]

The ECC's novel impetration of Article 269 of the Egyptian Civil and Commercial Procedures Law prevented it from ruling on the merits of the dispute. If an Egyptian Court of Appeals did not have the opportunity to decide on the request to annul the arbitral award, either by accepting the request or denying it, and it's decision was quashed by the ECC , the ECC will not rule on the annulment request by itself according the above-mentioned article and will order the remand of the dispute to the Egyptian Court of Appeals.

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[156] *Ibid*.
[157] *Ibid*.
[158] *Ibid*.
[159] Art. 269 of Egypt Law No. 13/1968 (Civil and Commercial Procedures Code, amended in 2007) *Al-Jarida Al-Rasmiyya*, 5 August 1968 (Egypt) (hereinafter ECCPL): "If the appealed decision has been challenged for violating the jurisdiction rules, the court shall be limited to deciding on the issue of jurisdiction, and when necessary, the competent court shall be appointed to which the court shall be summoned with new procedures. If the decision has been challenged for any other ground, the case is referred to the court that issued the challenged decision to relitigate it again upon the litigants' request, and in this event the court to which the case was referred must follow the decision of the Court of Cassation in the legal issue that the court has decided upon. And the members of the court to which the case was referred to must not include any of the judges who participated in the issuance of the challenged decision. Nevertheless, if the court [of cassation] quashed the challenged decision and the case can be decided [by the Court of Cassation] , or the appeal was for the second time and the court [of Cassation] decided to quash the challenged decision, it must resolve the dispute."
[160] Maḥkamat al-Naqḍ [Court of Cassation] , Case No.18615/88, Decision of 10 December 2019 (Egypt).

2.3.2.5 CCA First Commercial Circuit, Case No. 39/130 JY 3 June 2020

Finally, the Cairo Court of Appeals followed the ECC's decisions which found that the provisions of the EAL governs the annulment proceedings against the Al-Kharafi award. The Court decided to set aside the award because of the exorbitant amount of damages awarded to the Kharafi.[161] The Court emphasized that it was not concerned with "the end result of the arbitral award" and it shall not set aside the award for 'errors related to flaws in the estimation of elements of fact or a violation of the law' in accordance with the provisions of the EAL.[162] On the contrary, the Court emphasised that, from a public policy perspective, it was entitled to "audit and ensure that standards of the arbitral proceedings (procedural integrity) were maintained or disregarded in a substantially, dangerous and flagrant manner".[163] Thus, the Court signalled that it would examine the Al-Kharafi award form a procedural public policy perspective.

However, the Court afterward explained that it reviewed the Al-Kharafi award to ensure that the award did not include in its reasoning or its result an "actual or obvious aggression on the rules of public policy that is well established".[164] According to the Court, one of those rules is "the principle of equality or proportionality of compensation". This rule mandates that compensation awarded by the tribunal must be in proportion with the injury caused by defendant, aligned with "the interests and rights of individuals, and respecting their legitimate expectations".[165] Hence, if the award did not respect that principle, then the Court would set it aside.[166]

The Court reinforced its position to apply the principle of proportionality of compensation by referring to Article 9 of the Amended Agreement and stated that:

> "Hence, there is no remedy without restriction or ceiling or barrier, or else it would be a merely absurd, paternalistic arbitration that is prohibited under all laws. As it is unimaginable that a cure is worse than the disease, and that damage may not be countered with another damage, each law works towards laying a legal rule for remedies. Article 9 of the Arab Unified Investment Treaty itself made sure that this rule is preserved and maintained, as it ruled in its essence on the necessity of the compensation awarded to the Arab investor being proportionate with the damage whereas remedying damages is the core of the right to remedy and the sought purpose of it; hence, straying from the objectively reasonable boundaries of such a right may be described as an unorthodox behaviour, external behaviour, malicious act, deviant judgment, and unlawful."[167]

The Court stated the tribunal's compensation was "totally unjustifiable, contrary to the nature of things, which cannot be expected by reason nor law". The Court went further and described Al-Kharafi's demands for two billion USD damages as "highly absurd".[168] The Court heavily criticized the arbitral tribunal complying with Al-Kharafi with "impotent logic and untenable arguments"[169] rendering the award "absurd and excessively harsh, detrimental to reason, law and the notion of justice and equity".[170] The Court found the tribunal's assessment of the compensation "arbitrary, overestimated and beyond reasonable limits and constitutes a clear and serious violation of the essence of the principle of proportionality and equivalence between the amount of compensation and the incurred injury."[171]

Thus, the Court found that the award "disregards with arbitrariness, the rights and legal status of the arbitral proceedings while violating, legally and logically, the legal guarantees of a fair trial."

The centre of the Court's analysis was how the arbitral tribunal calculated the compensation for lucrum cessans, the presumed lost profits that Al-Kharafi suffered as a result of the dispute. The Court stated that lucrum cessans was awarded as a compensation for "the loss of hope in achieving profit and therefore caution

[161] Maḥkamat Istināf al-Kāhra [Cairo Court of Appeals], 1st Commercial Circuit, Case No. 39/130, Decision of 3 June 2020 (Egypt).
[162] *Ibid*.
[163] *Ibid*.
[164] *Ibid*.
[165] *Ibid*.
[166] *Ibid*.
[167] Art. 9 of the Amended Agreement: "The Arab Investor Shall be entitled to fair proportionate compensation for damages which it sustains due to any of the following actions by a State Party or any of its public or local authorities or institutions."
[168] Maḥkamat Istināf al-Kāhra [Cairo Court of Appeals], 1st Commercial Circuit, Case No. 39/130, Decision of 3 June 2020 (Egypt).
[169] *Ibid*.
[170] *Ibid*.
[171] *Ibid*.

should be exercised in assessing the damages for [that loss]. The hope of achieving success is the only ascertained injury for lucrum cessans, nothing more or less".[172] Then the Court stated that "this kind of compensation does not, and as a result is not awarded for, mere unfulfilled dreams, baseless visions, and aspirations or imaginary illusions because they are not compensated for [their loss]".[173] Instead, the Court found that the tribunal has "in a scandalous appearance" decided to treat the loss of hope in achieving profit as "actual injury that would inevitably have occurred in the future". The Court pointed out that "the amount awarded to the claimant for the lucrum cessans is grossly unfair, artificially exaggerated, not adjusted or balanced at all in light of the circumstances surrounding the arbitral dispute on every fair legal scale."[174]

According to the Court, the arbitral tribunal did not establish the relationship between the injury and the awarded damages. The Court found that it was an "injury in which the compensation was awarded for is illusory, unreal, and an assault on the rights in question". [175]

According to the Court, the arbitral tribunal "relied upon on a world of abstract numbers and results derived from deal papers without considering the physical realities and establishing the validity [of its findings] legally". While based on expert testimony, which "contradicts with any reasonable person's sense of logic".[176] The Court then elaborated on the absurdity of the damages awarded by the tribunal when the project in question "remained purely passive, without physical body or spirit [….] a mere trouble territory, in a legal and factual [sense]".[177] The project in question was "a wasteland not yielding crops, lacking profit or yield, and it is [a centre of a] dispute with a continuum of obstacles, complaints, objections' despite all attempts made by the parties to settle the dispute amicably".[178] In addition, the Court, quite rightly, points out that the project was located in Libya—a country which is "overtaken, isolated, twisted and exhausted, and does not form the outset attract tourism".[179] Such circumstances "hock every tourism investment and make it useless without any wellness or hope of earning any profit".[180]

Nonetheless, the Court was aware that its analysis is about the arbitral tribunal's discretionary powers, which, as a rule, lies beyond the Egyptian Court's jurisdiction under the annulment proceeding. It stated:

> "there is no immunity for an absolute arbitrary authority-throwing its net wherever it wants and desires or intensively excessive, especially when this results in an enormous receding of the concept of justice and its logical boundaries since that it is not allowed, under the guise of [exercising] discretionary powers to violate the values of justice or to separate the legal doctrines form its intended purposes or to break its structure and its boundaries."[181]

The Court found that the arbitral tribunal "failed to fulfil its duty to observe the legal principles and logical frameworks". Such failure resulted in carrying out an arbitral mandate "without fully guaranteeing the right to a fair trial" and stigmatized the award by "deviation and transgression manifested in the abuse of arbitral power" by offering compensation for an injury that does not exist.[182]

Finally, the CCA disclosed, arguably, the *raison d'etre* behind the ECC insistence on apply the EAL to Al-Kharafi award:

> "Every absolute is absolute with limits, the arbitral tribunal has acted as if its decision is conclusive and does not accept scrutiny, as it is an inevitable destiny infallible from any control. Therefore, its decision came, in a clear and explicit manner... blatantly excessive and unjust to the extent that renders it beyond [all] legal restrictions and all forms of mental logic, arbitrary, discriminatory and thus constitutes a clear and serious violation of the basic legal principles. Accordingly, it is not

[172] *Ibid*.
[173] *Ibid*.
[174] *Ibid*.
[175] *Ibid*.
[176] *Ibid*.
[177] *Ibid*.
[178] *Ibid*.
[179] *Ibid*.
[180] *Ibid*.
[181] *Ibid*.
[182] *Ibid*.

> permissible for such an award that is, despite its material existence, to create rights or result in obligations, and it is also unacceptable that such an award be invoked or granted immunity."[183]

Ultimately, the CCA decided for 'the nullity of the arbitral award as a whole, as a result of such an excessive abuse'. [184]

Here we can see that the CCA reasoning links the concept of public policy in Article 53(2) of the EAL[185] with the principle of proportionality between injury inflicted upon the Arab investor by the Arab Host State and damages awarded to the Arab investor mentioned in both the Unified Agreement and the Amended Agreement[186] to declare the principle of proportionality between damages and injury as a rule related to the public policy under the EAL, the Unified Agreement and the Amended Agreement. Thus, the CCA was able to get two birds with one stone. First, by declaring the principle of principle of proportionality as rule related to the public policy, the CCA was able to examine the manner in which the arbitral panel has calculated the damages, which entails examining the facts of the dispute, without infringing upon its mandate according to the EAL, because, as the ECC stated clearly in its decision, annulment is not a form of appeal but a process to review the validity of the arbitral awards from a purely legal prospective and should not involve retrial of the dispute. However, when it comes to reviewing the computability of the arbitral award with the public policy, the Court enjoys more freedom in examining the facts of the dispute to determine the existence, or the absence, of a violation of the public policy. In one reported case, the ECC has allowed the annulment of an arbitral award for violating the Egyptian public policy based on the concept of 'evasion of law' despite the absence of any legislative embodiment of that concept.[187] In this case, the EEC upheld the Court of Appeals decision to annul the arbitral award because the latter deemed the agreement to arbitrate the dispute over the ownership of real estate as attempt to evade the Egyptian law's rules on the ownership of real estate that constitutes a violation of the Egyptian public policy.[188] The EEC stated that "[e]xtracting the elements of fraud from the facts of the case and estimating what establishes this fraud and what does not falls within the discretionary powers of the trial judge away from the oversight of the Court of Cassation as long as the facts allow it."[189]

This approach towards examining the facts of the dispute to determine the arbitral award's computability with the annulling Court's public policy is not unique to the Egyptian Courts. Recently, the Cour D'Appel in Paris has annulled an arbitral award for violating the French international public policy.[190] The arbitral award was the result of an arbitration between SORELEC, a French Construction company, and the Libyan government over the execution of a construction project to build schools and dormitories.[191] In 2016 SORELEC and the Libyan government signed a protocol to resolve their differences through arbitral before the International Chamber of Commerce in Paris.[192] The panel awarded SORELEC EUR 230 million as damages.[193] Afterwards, the Libyan government sought to annul the arbitral award on the basis that the protocol singed in 2016 was tainted by corruption that rendered both the arbitration process and the arbitral award contrary to the French international public policy.[194]

SORELEC argued that the Libyan government should have presented its claim of corruption to the arbitral panel because its claim is based on facts that should be only examined by the panel during the arbitration process and not by the Court during the annulment proceedings or else the Court will be acting as a court of

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[183] *Ibid*.
[184] *Ibid*.
[185] EAL § 53: "2. The Court adjudicating the action for nullity, shall ipso jure annul the arbitral award if it violates the public order in the Arab Republic of Egypt."
[186] Art. 10 Sec. 2 of the Unified Agreement: "The amount of compensation shall be equivalent to the damage sustained by the Arab investor according to the type and amount of damage."
See also Art. 9 Sec. 3 of the Amended Agreement: "The amount of compensation shall be fair to the damage sustained by the investor according to the type and amount of damage, and shall be made in a convertible currency in accordance with Paragraph (2) of Article (6)."
[187] Maḥkamat al-Naqḍ [Court of Cassation] Case no.3504/78, Decision of 26 December 2015.
[188] *Ibid*.
[189] *Ibid*.
[190] Cour d' appel [CA] [Regional Court of Appeal] Paris, 17 November 2020 (Fr.).
[191] *Ibid*.
[192] *Ibid*.
[193] *Ibid*.
[194] *Ibid*.

appeal that disregards the finality of the arbitral award.[195] Thus, the finality of an arbitral award does not prevent the Court form examining the facts surrounding the dispute or even the parties agreement to arbitration if they are incompatible with forum's public policy.

Second, the CCA reference to the principle of proportionality damages and injury that is reminder that the annulment of the Al-Kharafi should not be seen as completely incompatible with the provisions of both the Unified Agreement and the Amended Agreement because the arbitral tribunal in Al-Kharafi did not give heed to that principle when it awarded approximately USD 1 billion compensation for a touristic project that was never completed and did not even receive a single guest. In fact, the Al-Kharafi award is incompatible with the provisions of either Unified Agreement or the Amended Agreement. Both agreements aim at protecting the Arab Investor's investment in an Arab host state but this does not render tribunal's findings on damages acceptable. It is true that there is no universal rule for calculating damages in investment disputes but it is also true that arbitral tribunals do not provide compensation for future loss if it is too uncertain and speculative.[196] The discounted cash flow approach used by the tribunal in Al-Kharafi, is not used when the investment had no long history of operations [197] and when investment project is discontinued at an early stage, such as the case here, arbitral tribunals usually will calculate the damages due to the investor based upon the amounts invested.[198]

Even if the tribunal in Al-Kharafi decided to adopt the discounted cash flow approach, this does not mean that it should accept the findings of the financial experts as a foregone conclusion because discounted cash flow "is not a friars balm"[199] which cures all ailments. It is simply a financial technique, which enables a financial expert to estimate with reasonable certainty a number of future parameters (income, expenses, investments), and then discount the net income at an appropriate rate,[200] and "should not be applied mechanically since this could easily lead to a distorted outcome."[201] As a result, how could any reasonable person accept the financial experts estimation that an unfinished touristic project in a country suffering from an ongoing civil war can produce such a return ?

2.3.2.6 ECC Case No. 12262/ 90 JY 24 June 2021

The final decision in the Al-Kharafi judicial Saga is the ECC Decision Case no. 12262/JY 90 decision issued on the 24 June 2021.[202] The ECC has surprisingly decided to quash the CCA decision to set aside the Al-Kharafi award. The ECC commenced its examination of the CCA decision by stating that:

> "[T]he judge [hearing] the setting aside lawsuit has no right to review the arbitral award so as to assess its suitability or to monitor the appropriateness of the arbitrators' assessment [of facts], whether the arbitrators were correct or wrong when they strived to characterize the contract or estimate the compensation [due to one party], because even if they erred, their error does not rise as ground for setting aside their decision, given that the action for setting aside [the arbitral panel] differs from the challenging [the decision] by way of appeal."[203]

Thus, after reiterating the Egyptian law's position that annulling the arbitral award is not meant to be a mechanism for appealing against the arbitral panel's finding, the ECC then expressly rejected the CCA argument that principle of proportionality damages and injury is related to the Egyptian public policy that allows the Egyptian Courts to set aside the arbitral awards. The ECC stated that:

> "[T]he challenged decision [of Cairo Court of Appeals] had established its decision to set aside the arbitral award on the ground that the compensation awarded was exaggerated, exceeding the

[195] *Ibid*.
[196] Sergey Ripinsky, Assessing Damages in Investment Disputes: Practice in Search of Perfect, 10 J. World Investment and Trade 5, 16 (2009).
[197] Christian L. Beharry & Elisa Méndez Bräutigam, *Damages and Valuation in International Investment Arbitration, in* 17Handbook of International Investment Law & Policy (Julien Chaisse, Leïla Choukroune & Suffian Jusoh eds., 2020).
[198] PSEG v. Turkey, ICSID Case No. ARB/02/15, Award of 19 January 2007, paras 307-308; MTD v. Chile, ICSID Case No. ARB/01/7, Award of 25 May 2004, paras 239-240.
[199] Rusoro v. Bolivia, ICSID Case No. ARB(AF)/12/15, Award of 22 August 2016, para 759.
[200] *Ibid*.
[201] OI European v. Bolivia, ICSID Case No. ARB/11/25, Award of 10 March 2015.
[202] Maḥkamat al-Naqḍ [Court of Cassation] Case no. 12262/ 90 decision dated 24 June 2021 (Egypt).
[203] *Ibid*.

> reasonable limits and its intended purpose, and this was not among the grounds for setting aside [arbitral panels] mentioned in Article 53 of the Arbitration Law exclusively, as it is [the estimation of compensation due is]one of the discretionary issues of the arbitral tribunal which does not lay within the scope of this lawsuit, that taints [this decision] with violating the law and the error in its application, and it must be quashed for this reason without the need to discuss the rest of the reasons for the cassation."[204]

Finally, and in accordance with Article 269 of the Civil and Commercial Procedures, the ECC decided on the merits of the case and ruled that " it was clear from the documents [of the lawsuit] that what the plaintiffs relied on in Case No. 39 of 130 Judicial Year Cairo was not among the grounds identified by Article 53 of the referred to [the Egyptian] Arbitration Law, which mandates the rejection of the lawsuit".[205]

However, it is noteworthy to stay that the ECC did not examine the other grounds for annulment presented by the Libyan side. The ECC did not examine whether the arbitral panel has respected the parameters of the arbitration agreement made between the parties[206] nor did the ECC examined the Libyan side's argument that the Libyan administrative law should govern the dispute and not the Libyan Civil Code.[207] The ECC did not even examine the Libyan side's claims based on the violation of the Egyptian public policy.[208] The extreme shortness of ECC's reasoning on its rejection of the Libyan State's lawsuit to set aside the Al-Kharafi award stands in contrast with the Court's insistence on applying the EAL on the Al-Kharafi award. One was expecting that the ECC would do a thorough analysis of all the grounds of annulment made by the Libyan State and to ensure that One-Billion-dollar award is free from any taint of nullity. Instead, the ECC decided to abbreviate its analysis to reject the CCA argument that the sum awarded by the arbitral panel is not in proportion with the injury suffered by Al-Kharafi while ignoring any mention of the other grounds of nullity presented by the Libyan State. Thus, the ECC decision leaves us wonder why the Court insisted on applying the provisions of the EAL to Al-Kharafi award and what exactly should the parties expect form the Egyptian Courts in the future if either party to the to an ad-hoc arbitration made under the auspices of the Unified Agreement or the Amended Agreement decided to file an annulment proceedings against the award before the Egyptian Courts.

3. The current outcomes of the Al-Kharafi award's litigation before the Egyptian courts

The Al-Kharafi award has been the subject of lengthy litigation before the Egyptian courts. However, the current outcomes of the Al-Kharafi award litigation are prolonging the process of litigation and the potential joinder of the Egyptian Public Prosecutor, in the judicial proceedings alongside with subjecting ad hoc investment dispute arbitration under either the Unified Agreement or the Amended Agreement held in Egypt to the EAL.

3.1 The prolongation of the litigation process

A direct result of the ECC's first and second decisions on Al-Kharafi was the prolongation of the litigation process because the ECC made it clear that it will not apply Article 269 of ECCPL and rule on the merits of case instead of ordering a retrial before the CCA[209] which in turn ruled on the annulment proceedings against Al-Kharafi award on three different occasions. In addition, Al-Kharafi still has the right to challenge the CCA's decision before the ECC. Thus, the litigation process has extended to almost a decade since the issuance of the Al-Kharafi award in 2013 and was finally settled by the ECC decision in June 2021.

3.2 The joining of the Egyptian Public Prosecution in the litigation

[204] *Ibid*.
[205] *Ibid*.
[206] Maḥkamat Istināf al-Kāhra [Cairo Court of Appeals] Commercial Circuit No. 62, Case No. 39/130 Judicial Year 5 February 2014 (Egypt).
[207] *Ibid*.
[208] *Ibid*.
[209] Maḥkamat al-Naqḍ [Court of Cassation] Case no.6065/84, Decision of 4 November 2015 ; Maḥkamat al-Naqḍ [Court of Cassation], Case No.18615/88, Decision of 10 December 2019 (Egypt)

When the ECC ruled twice that the provisions of the annulment proceedings in the EAL applies to the Al-Kharafi Award, it inadvertently opened the door for the Egyptian Public Prosecution to join the proceedings.[210] According to Article 88 of the ECCPL, the Egyptian Public Prosecution has to join in any proceeding brought before the ECC, or else the ECC's decision will be null and void.[211] Article 89 of the ECCPL also mandates the Public Prosecution joinder if the dispute relates to the public policy.[212] Under Article 90 of the CCA, any Egyptian Court can invite the Public Prosecution to examine the dispute if the Court believes that the dispute raises questions related to the public policy. The Egyptian Public Prosecution will be a party to the proceedings and can submit its arguments for or against annulling the Al-Kharafi award.

3.3 Application of EAL to ad-hoc investment dispute arbitration under the Unified and Amended Agreement in Egypt

The ECC's case law indicates that the EAL rules apply territorially to any arbitration seated inside Egypt. During the Al-Kharafi litigation, the ECC added a new wrinkle to the case-law mentioned above. The Court decided that the Unified Agreement, and by analogy the Amended Agreement, does prevent the Egyptian courts form applying the provisions of the EAL to the arbitration of investment disputes seated in Egypt under the auspices of the Unified Agreement. The main reason behind this attitude is that both the Unified Agreement and Modified Agreement do not give the AIC the jurisdiction to review the arbitral awards, as declared in the AIC decisions concerning the Al-Kharafi award.[213] The ECC signalled its intention to subject any ad hoc arbitration under the Unified Agreement or the Amended Agreement to judicial scrutiny through the annulment proceedings in EAL.

Conclusion

As we have seen, there are several mechanisms for resolving investment disputes under the Unified Agreement and the Amended Agreement. Nonetheless, the Al-Kharafi award has exposed the weaknesses of ad hoc arbitration as a mechanism for resolving investment disputes. This weakness is the manner in which both the Unified Agreement and the Amended Agreement regulates the ad-hoc arbitration. Neither the Unified Agreement nor the Amended Agreement gives the AIC the jurisdiction to review the arbitral decisions issued by ad-hoc arbitral tribunals. This allowed the arbitral tribunal in Al-Kharafi to award Al-Kharafi a billion-dollar award for an injury that did not occur. It's assessment of the damages was flawed, since that the touristic project was not completed and even if it was completed, the circumstances of the civil strife in Libya since 2011 and afterwards will definitely prevent the project form being profitable. Thus, it was necessary to find a solution to lift the injustice caused by the Al-Kharafi award.

Fortunately, neither the Unified Agreement nor the Modified Agreement has prevented the domestic courts form reviewing the award and the EEC size the opportunity to apply the EAL territorially to rectify the situation and instructed the CCA to apply EAL provision to the award. However, this was the result of the Unified Agreement and the Amended Agreement's lack of attention to the relationship between the ad-hoc arbitration under their auspices and the courts of the State where the seat of arbitration exists, primarily when that seat is located in the territory of a State signatory to either agreement. As a result, the ECC found the opportunity to apply the EAL to the Al-Kharafi Award and ordered the CCA to decide on the nullity of the award. Ultimately, this led the CCA to set aside the Al-Kharafi award before the ECC decided to dismiss the case in its decision issued in June 2021, creating uncertainty over the viability of ad hoc arbitration as method to resolve investment disputes under the Unified and the Amended Agreement.

Thus, ad-hoc arbitration under the Unified and the Amended Agreement will most likely lose its attractiveness as a method for resolving Arab capital investment disputes. Therefore, it came as no surprise

[210] Maḥkamat al-Naqḍ [Court of Cassation] , Case no. 5162/79 J dated 21January 2016; Maḥkamat Istināf Al-Isma‹liyah [Ismailia Court of Appeals], Case No.1660/33 J dated 28 January 2009 (Egypt).
[211] Art. 88 of the ECCPL: "Except for urgent cases, the Public Prosecution must intervene in the following cases, otherwise the decision is null. 1 - The lawsuits that she may file on her own. …. 3- Every other lawsuit that the law stipulates that it must intervene in."
[212] Maḥkamat al-Naqḍ [Court of Cassation] Case no. 5026/79 dated 14 May 2018 (Egypt).
[213] *Ibid*.

that several legal experts and interest groups, such as the Union of Arab Chambers, called on the Arab League to draft a new agreement in order to address the shortcomings of dispute resolution under both Unified Agreement and the Amended Agreement.[214]

[214]http://uacorg.org/ar/publications/edetails/70/%D8%A7%D9%84%D8%A7%D8%AA%D9%81%D8%A7%D9%82%D9%8A%D8%A9-%D8%A7%D9%84%D9%85%D9%88%D8%AD%D8%AF%D8%A9-%D9%84%D8%A7%D8%B3%D8%AA%D8%AB%D9%85%D8%A7%D8%B1-%D8%B1%D8%A4%D9%88%D8%B3-%D8%A7%D9%84%D8%A3%D9%85%D9%88%D8%A7%D9%84-7-9-%D8%A3%D9%8A%D8%A7%D8%B1-2018 (last visited 29 August 2021).