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Editorial Board

Editor's Note

Welcome to the inaugural issue of the Journal of Law in the Middle East by LexisNexis!

The Journal of Law in the Middle East by LexisNexis is an open-access and peer-reviewed academic journal dedicated to discussing the multitude of legal systems present in the Middle East, including Islamic Law, Common Law, and Civil Law.

In our first issue, we were delighted to receive a number of diverse Articles, Essays and Case Notes for consideration through our open call for submissions.

We begin with an overview of the developments in arbitration in the United Arab Emirates throughout 2020. Despite the pandemic, an onslaught of critical case law in the DIFC made for an eventful year in the arbitration landscape. Our next article delves into the famed Libyan Al-Kharafi case, with a particular focus on the annulment of the award in the Egyptian courts.

Have you ever wondered what pineapples have to do with Islamic criminal law? Find out in our first essay, where the compatibility of modern human rights with ancient Sharia law is discussed. Next, discover the potential for growth within the NILEX in Egypt based on an evaluation of the current laws and regulations.

Our Case Notes, which are a unique type of publication in the Middle East, offer practical insight into these case law developments. We are proud to partner with ADERSO Law Firm in Egypt to publish the winning piece of their 2021 Writing Competition on the SCA vs. Evergreen case, in relation to the Suez Canal blockage that gripped the global economy earlier this year. Lastly, the approach of the Egyptian courts to the United Nations Convention on Contracts for the International Sale of Goods (CISG) is briefly explored.

At LexisNexis, we know that by providing free and unrestricted access to our Journal, we can contribute to the flourishment of the academic community in the Middle East and the creation of a more equitable knowledge system that is accessible to all.

To our Editorial Board, thank you all very much for your continued support of the Journal of Law in the Middle East. Your referrals and support on social media have been essential to what is already a very successful first issue.

To our authors and peer reviewers, thank you for your trust in LexisNexis as we embark on this new and exciting endeavour. Your time and expertise is invaluable to the academic community.

Lastly, to our readers, thank you for your initial interest in the Journal of Law in the Middle East. I would like to encourage you all to continue to spread the word of our launch within your academic and professional circles, or even consider submitting your own piece in our 2022 issue.

As always, please do not hesitate to contact me should you have any questions about the Journal. Whether you would like to discuss an opportunity with the Editorial Board, a piece you would like to submit, or even the content of one of our published articles, I will be thrilled to connect with you.

Ellen McClure, Editor-in-Chief of the Journal of Law in the Middle East by LexisNexis

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Arbitration in the UAE: 2020 in Review

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Abstract

This article provides an overview of both on and offshore arbitration developments in the United Arab Emirates in the year 2020.

Keywords

Arbitration, international arbitration, arbitral awards, enforcement

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Introduction

The United Arab Emirates (UAE) are the leading arbitration hub in the Middle East. No other Middle Eastern jurisdiction offers the width of arbitration services that the UAE do. The UAE arbitration landscape provides a choice of both onshore and offshore arbitration. Being seated in mainland UAE, onshore arbitration operates on the basis of traditional mainland resources, i.e., the UAE Federal Arbitration Law (the "FAL")[1], which replaced the former UAE Arbitration Chapter with effect from 16 June 2018. Offshore arbitration, seated in one of the UAE's judicial free zones, i.e., the Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM), is, in turn, governed by the DIFC Arbitration Law[2] and the ADGM Arbitration Regulations[3] respectively. Onshore arbitration engages the curial competence of the mainland UAE courts[4] whereas arbitration offshore proceeds with the curial assistance of the DIFC and ADGM Courts, as the case may be.

Importantly, the DIFC and ADGM Courts are common law courts that follow a system of binding precedent. The UAE Courts, by contrast, are of a civil law origin and as such are not bound by case law precedent. That said, the rulings of the court of cassation are respected by the lower courts and are as such capable of giving rise to – to borrow from the French - a *jurisprudence constante*. Against this background, it is important for a full contextual understanding of the operation of the provisions of the FAL and those of either of the free zone arbitration laws to follow the rulings of the competent courts to determine the extent to which they contribute to the formation of a body of *jurisprudence constante* or case law precedent in the construction of the respective laws over time.

In addition, arbitration in the UAE, both onshore and offshore, is guided by legislative and/or soft law instruments as well as arbitration rules (provided that the arbitrating parties have contracted into a form of institutional arbitration) that are subject to change over time.

In the light of the foregoing, this article seeks to provide a summary of all developments onshore and offshore relevant to arbitration in the UAE in 2020. In doing so, it will focus on (i) developments onshore, summarising dicta of relevant court rulings both under the former UAE Arbitration Chapter and the FAL as well as arbitration-relevant rulings of the Dubai-DIFC Joint-Judicial Tribunal in the terms further defined below[5]; and (ii) developments offshore, summarising dicta of relevant case law precedent of the DIFC Court of First Instance (DIFCCFI) under the DIFC Arbitration Law. The article also provides initial insights into the revised provisions of the DIFC-LCIA Rules and recent legislative developments in the ADGM, such as arbitration-relevant amendments to the ADGM Founding Law, the first revision of the 2015 ADGM Arbitration Regulations and the adoption by the Memorandum of Understanding between the Ministry of Justice and the ADGM on enforcement of awards.

1. Developments onshore

Developments onshore have seen some of the first case law precedent under the FAL since its adoption and subsequent entry into force with effect from 16 June 2018. That said, a number of cases continue to be processed under the former UAE Arbitration Chapter[6]. These are primarily cases that were originally initiated in the onshore UAE Courts shortly before entry into force of the FAL. As stated elsewhere before[7], these retain their relevance to the interpretation of the FAL in relevant part to the extent that they address the construction of provisions of the FAL which originate in case law precedent under the former UAE Arbitration Chapter or in the text of the former UAE Arbitration Chapter itself. Finally, there is also some case law precedent emanating from the Dubai-DIFC Joint Judicial Committee in the terms defined below.

[1] UAE Federal Law No. 6/2018 Concerning Arbitration.
[2] DIFC Law No. 1/2008 on Arbitration.
[3] 2015 ADGM Arbitration Regulations as amended.
[4] And more specifically of the President of the Court of Appeal of the Emirate in which the arbitration is seated, with an option for further recourse to the competent Court of Cassation.
[5] See section 1.3.
[6] I.e., Articles 203-218 of the UAE Civil Procedures Code. For a full commentary, see G. Blanke, *Commentary on the UAE Arbitration Chapter*, Thomson Reuters/Sweet&Maxwell, 2017.
[7] G. Blanke, "The UAE Federal Arbitration Law: In With the New, Out With the Old", 3 ICC Dispute Resolution Bulletin (2018), pp. 25-28.

1.1 Case law precedent under the former UAE Arbitration Chapter[8]

Despite the fact that Article 60(1) FAL repealed the provisions of the former UAE Arbitration Chapter, some arbitration-related actions continue to be processed under it given that these were initiated before entry into force of the FAL on 16 June 2018.[9]

Incorporation by reference. In application of former Article 203(2) CPC,[10] it has been found that where there are two separate main contracts independent from each other, an arbitration clause contained in one can usually not be implied into the other absent express wording to that effect, unless the two contracts are closely connected, e.g., one contract being concluded in implementation of the other.[11]

Extension of time-limit. A ruling of 18 December 2019 of the Dubai Court of Cassation[12] confirms that the 6-month time-limit for rendering an award under former Article 210(1) CPC was capable of being extended implicitly by reference to Article 36 of the DIAC Rules within the meaning of former Article 210(2) CPC.[13]

Challenge of award. In its ruling in Case No. 250/2019[14], the Dubai Court of Cassation confirmed that the list of grounds for nullification at former Article 216(1) CPC[15] constituted an exhaustive list of grounds for the nullification of arbitration awards under the former UAE Arbitration Chapter. In Case No. 932/2019,[16] claims for breach of a contract for the lease of marine equipment have been found not to fall within the public policy definition under Article 3 of the UAE Civil Transactions Code (hence not invalidating the underlying arbitration agreement within the meaning of former Article 216(1)(a) CPC) and could therefore be arbitrated. Finally, it has been confirmed[17] that to award Counsel fees (or other party costs other than the tribunal's fees and expenses and the administrative costs of the administering arbitration institution) without express authorization in the underlying arbitration agreement or the terms of reference could ground the partial nullification of an award within the meaning of former Article 216(1)(c) CPC.

Enforcement and execution. A recent UAE court ruling[18] has found that pursuant to Article 36 of the GCC Commercial Arbitration Regulation, an award rendered under the auspices of the GCC Arbitration Centre requires enforcement directly through the competent execution judge, and not the court of first instance, which was traditionally competent as the enforcement forum under the former UAE Arbitration Chapter.

1.2 Case law precedent under the UAE Federal Arbitration Law[19]

[8] This section is based on G. Blanke, "UAE Onshore Arbitration: Key 2020 Case Law Precedent Revisited (Part 1)", Westlaw Middle East, Thomson Reuters, January 2021.
[9] As a variation of the theme, the Dubai Court of Cassation declined to consider the application of Article 19 FAL to the case before it in Case No. 417 & 427/2018, Dubai Court of Cassation, ruling of 6 February 2019, given that the subject award was rendered before entry into force of the FAL. To similar effect with respect to the application of Article 53 FAL, see Case Nos 18 & 94/2019, Dubai Court of Cassation, ruling of 21 April 2019.
[10] For further guidance on the construction of former Articles 216(1) CPC, see G. Blanke, *Commentary on the UAE Arbitration Chapter*, Thomson Reuters/Sweet&Maxwell, 2017, II-016 *et seq*.
[11] Case No. 132/2019, ruling of the Dubai Court of Cassation of 6 October 2019.
[12] Case No. 250/2019 – Real Estate, ruling of the Dubai Court of Cassation of 18 December 2019.
[13] For further guidance on the construction of former Articles 210(1) and (2) CPC, see G. Blanke, *Commentary on the UAE Arbitration Chapter*, Thomson Reuters/Sweet&Maxwell, 2017, II-089 *et seq*.
[14] Case No. 250/2019 – Real Estate, ruling of the Dubai Court of Cassation of 18 December 2019.
[15] For further guidance on the construction of former Article 216(1) CPC, see G. Blanke, *Commentary on the UAE Arbitration Chapter*, Thomson Reuters/Sweet&Maxwell, 2017, II-133 *et seq*.
[16] Ruling of the Abu Dhabi Court of First Instance of 22 September 2019, reported in "Parties not indicated, Court of First Instance of Abu Dhabi, Case No. 932/2016, 22 September 2019, in 12(1) IJAA (2020), 117-121.
[17] See Case No. 250/2019 – Real Estate, ruling of the Dubai Court of Cassation of 18 December 2019.
[18] See Case No. 64/2020 – Commercial, ruling of the Dubai Court of Cassation of 11 March 2020.
[19] This section is based on G. Blanke, *Blanke on UAE Arbitration Legislation and Rules*, Thomson Reuters/Sweet & Maxwell, forthcoming 2021. Also see G. Blanke, "UAE Onshore Arbitration: Key 2020 Case Law Precedent Revisited (Part 1)", Westlaw Middle East, Thomson Reuters, January 2021; and G. Blanke, "UAE Onshore Arbitration: Key 2020 Case Law Precedent Revisited (Part 2)", Westlaw Middle East, Thomson Reuters, February 2021.

Apart from the case law precedent under the former UAE Arbitration Chapter, which for the reasons stated above retains some relevance to the construction of the FAL, both 2019[20] and 2020 have also seen the arrival of case law precedent under the FAL proper.

Scope of application. The UAE Courts have confirmed that the FAL does not find application in free zone seated arbitrations (unless perhaps in the unlikely event that the parties have expressly contracted into the application of the FAL to an arbitration with a free zone seat). Where the parties have agreed to the application of a free zone law as the procedural or curial law of the arbitration, such as the DIFC Arbitration Law, that law applies.[21]

In another type of case, involving the DIFC-LCIA as an administering institution, the UAE Courts have given preference to the DIFC Courts as the supervisory courts on the basis of a combined reading of Article 8 of DIFC Law No. 9/2011 as amended and DIFC Law No. 9/2004 without reference to the location of the seat or of the award debtor's assets[22] and considering that the DIFC-LCIA qualifies as a body of the DIFC within the meaning of Article 2 of DIFC Law No. 12/2004 as amended by DIFC Law No. 16/2011.[23]

Article 2(1) has been found to be subject to the overarching principle of party autonomy, whereby the contracting or arbitrating parties are free to contract into a procedural law or an arbitration law of their choice.[24] The exercise of party autonomy is subject to the requirements of UAE public policy.[25]

Finally, arbitration rules, such as the DIAC Rules, which have been adopted by Ruler's Decree, have been considered to constitute special legislation within the meaning of Article 2(3) FAL.[26]

Arbitration: definition. According to recent case law precedent of the UAE Courts, arbitration in the terms defined at Article 1 FAL is based on two main pillars, the will of the parties, i.e., party consent, and the legislator's acceptance of arbitration as a private form of dispute resolution.[27] The arbitral instance is considered a *"neutral party to settle the dispute between [the parties] without resorting to the judiciary"*[28]. In doing so, the Courts have emphasised the impartiality and independence of arbitrators as a fundamental feature of arbitration.[29]

Case law precedent of early 2019, albeit not consistent,[30] questions the qualification of arbitration under the FAL as an *exceptional* - as opposed to an *alternative* - form of dispute resolution. Thus, the Dubai Court of Appeal held in a ruling of 16 January 2019 as follows:

> "[…] arbitration is the agreement of parties to a specific legal relationship (whether contractual or otherwise) to settle a dispute which has arisen or which may arise between them by referring it to persons selected as arbitrators. The parties would determine the identities of the arbitrators or request the arbitral tribunal or a permanent arbitral institution to administer the arbitral process. […] As such, arbitration is not an exceptional means of resolving disputes but an alternative means that shall be followed once its conditions are satisfied. Arbitration is a matter of the parties' intent and giving expression to their intent in a written agreement, whether in the form of a separate

[20] Some of which has been reported late and as such is taken account of in relevant part here.
[21] See, e.g., Case No. 992/2020 – Commercial, ruling of the Dubai Court of Cassation of 23 December 2020.

[22] See Case No. 665/2020 – Commercial, ruling of the Dubai Court of Cassation of 27 September 2020; also, Case No. 43/2020, ruling of the Dubai Court of Appeal of 9 December 2020.
[23] See Case No. 930/2020 – Commercial, ruling of the Dubai Court of Cassation of 23 December 2020.
[24] See, e.g., Case No. 272/2019 – Commercial, ruling of the Dubai Court of Cassation of 4 August 2019; and Case No. 293/2019 – Commercial, ruling of the Dubai Court of Cassation of 30 June 2019.
[25] See, e.g., Case No. 272/2019 – Commercial, ruling of the Dubai Court of Cassation of 4 August 2019; and Case No. 293/2019 – Commercial, ruling of the Dubai Court of Cassation of 30 June 2019.
[26] See Case No. 437/2018 – Real Estate, ruling of the Dubai Court of Cassation of 20 February 2019.
[27] See Case No. 55/2020 – Labour, ruling of the Dubai Court of Cassation of 6 February 2020; and Case No. 692/2020 – Commercial, ruling of the Dubai Court of Cassation of 23 September 2020.
[28] See, e.g., Case No. 324/2020 – Civil, ruling of the Dubai Court of Cassation of 26 November 2020; Case No. 960/2020 – Commercial, ruling of the Dubai Court of Cassation of 9 December 2020; and Case No. 1037/2020 – Commercial, ruling of the Dubai Court of Cassation of 9 December 2020.
[29] See Case No. 36/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020.

[30] See Case No. 218/2020 – Commercial, ruling of the Dubai Court of Cassation of 20 May 2020. See also earlier case law precedent to similar effect: Case No. 883/2018 – Commercial, ruling of the Dubai Court of Cassation of 12 May 2019; and Case No. 903/2018 – Commercial, ruling of the Dubai Court of Cassation of 12 May 2019.

> agreement or as a clause within a contract. In all cases, the law requires that such agreement be evidenced in writing."[31]

Since then, there has been a line of case law precedent emphasising the *traditional* position, i.e., that arbitration qualifies as an *exceptional* form of dispute resolution[32] and that a party's submission to arbitration constitutes a waiver of the *fundamental right* to have its case heard in court[33].

Arbitration defence. The arbitration defence pursuant to Article 8 FAL has been found to operate as an exception to the general rule in favour of the jurisdiction of the courts in civil and commercial disputes.[34] According to the arbitration defence, a court before which an action on the merits has been initiated is obligated to dismiss that action in the event that the opponent raises the existence of an obligation to arbitrate unless the underlying arbitration agreement is found to be unenforceable, whether for being invalid or otherwise.[35] For this latter purpose, an arbitration agreement will be found unenforceable in circumstances where the parties fail to make payment of the advance on costs prescribed under the DIAC Rules and the case is considered withdrawn and the arbitration procedure is consequently closed within the meaning of 9(2) of the Appendix on Costs of the DIAC Rules.[36]

Importantly, as confirmed by the UAE Courts, an opponent party must raise the arbitration defence before making any submissions on the merits (rather than at the "first hearing", as used to be the case under the former UAE Arbitration Chapter[37]), otherwise the opponent will be considered to have waived the right to enforce the arbitration obligation against the claimant,[38] in which case the courts – to the exclusion of an arbitral tribunal - will be properly competent to hear the action on the merits[39]. The UAE Courts have found that for this purpose, pleadings on the merits include submissions before an expert appointed by the court to assist in the resolution of the parties' dispute.[40] With this in mind, under Article 8(1) FAL, an opponent party will be allowed to request an adjournment before the court to review the case file before formally raising the

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[31] See Case No. 8/2018, ruling of the Dubai Court of Appeal of 16 January 2019.

[32] See Case No. 153/2020 - Commercial, ruling of the Dubai Court of Cassation of 8 March 2020; Case No. 567/2020 – Commercial, ruling of the Dubai Court of Cassation of 26 July 2020; and Case No. 803/2020 – Commercial, ruling of the Dubai Court of Cassation of 25 October 2020.

[33] See, e.g., Case No. 293/2019 – Commercial, ruling of the Dubai Court of Cassation of 30 June 2019, stating that *"the agreement to arbitrate means waiving the right to the state's jurisdiction, including the guarantees of litigants."*. See also Case No. 5/2020 – Real Estate, ruling of the Dubai Court of Cassation of 19 March 2020; and Case No. 803/2020 – Commercial, ruling of the Dubai Court of Cassation of 25 October 2020.

[34] See Case No. 1071/2019 – Commercial, ruling of the Dubai Court of Cassation of 16 February 2020.

[35] See, e.g., Case No. 300/2019 – Real Estate, ruling of the Dubai Court of Cassation of 13 February 2020; Case No. 319/2019 – Commercial, ruling of the Dubai Court of Cassation of 8 December 2019; Case No. 399/2019 – Commercial, ruling of the Dubai Court of Cassation of 23 February 2020; Case No. 521/2019 – Commercial, ruling of the Dubai Court of Cassation of 30 January 2020; Case No. 581/2019 – Commercial, ruling of the Dubai Court of Cassation of 15 September 2019; Case No. 604/2019, ruling of the Dubai Court of Cassation of 24 November 2019; Case No. 685/2019 – Commercial, ruling of the Dubai Court of Cassation of 10 November 2019; and Case No. 853/2019 - Commercial, ruling of the Dubai Court of Cassation of 2 February 2020; Case No. 903/2019 – Commercial, ruling of the Dubai Court of Cassation of 11 November 2020; Case No. 986/2019 – Commercial, ruling of the Dubai Court of Cassation of 15 December 2019; Case No. 1646/2019 – Commercial, ruling of the Dubai Court of First Instance of 3 March 2020; Case No. 5/2020 – Real Estate, ruling of the Dubai Court of Cassation of 19 March 2020; Case No. 135/2020 – Civil, ruling of the Dubai Court of Cassation of 14 May 2020; Case No. 142/2020 – Real Estate, ruling of the Dubai Court of Cassation of 3 November 2020; Case No. 153/2020 – Commercial, ruling of the Dubai Court of Cassation of 8 March 2020; Case No. 156/2020 - Commercial, ruling of the Dubai Court of Cassation of 11 March 2020; Case No. 161/2020 – Commercial, ruling of the Dubai Court of Cassation of 4 October 2020; Case No. 218/2020 – Commercial, ruling of the Dubai Court of Cassation of 20 May 2020; Case No. 224/2020 – Civil, ruling of the Dubai Court of Cassation of 27 August 2020; Case 276/2020 – Commercial, ruling of the Dubai Court of Cassation of 20 May 2020; Case No. 315/2020 – Commercial, ruling of the Dubai Court of Cassation of 13 September 2020; Case No. 367/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 August 2020; Case No. 421/2020 – Commercial, ruling of the Dubai Court of Cassation of 4 October 2020; Case No. 441/2020 – Commercial, ruling of the Dubai Court of Cassation of 27 September 2020; Case No. 732/2020 – Commercial, ruling of the Dubai Court of Cassation of 30 September 2020; Case No. 803/2020 – Commercial, ruling of the Dubai Court of Cassation of 25 October 2020; Case No. 865/2020 – Commercial, ruling of the Dubai Court of Cassation of 11 October 2020; Case No. 960/2020 – Commercial, ruling of the Dubai Court of Cassation of 9 December 2020; and Case No. 1037/2020 – Commercial, ruling of the Dubai Court of Cassation of 9 December 2020.

[36] See Case No. 215/2019 – Commercial, ruling of the Dubai Court of Cassation of 7 July 2019.

[37] See G. Blanke, *Commentary on the UAE Arbitration Chapter*, Thomson Reuters/Sweet&Maxwell, 2017, at II-040 – II-041.

[38] See, e.g., Case No. 1159/2018 – Commercial, ruling of the Dubai Court of Cassation of 21 July 2019; Case No. 319/2019 – Commercial, ruling of the Dubai Court of Cassation of 8 December 2019; Case No. 399/2019 – Commercial, ruling of the Dubai Court of Cassation of 23 February 2020; and Case No. 156/2020 - Commercial, ruling of the Dubai Court of Cassation of 11 March 2020.

[39] See Case No. 156/2020 - Commercial, ruling of the Dubai Court of Cassation of 11 March 2020.

[40] See Case No. 604/2019, ruling of the Dubai Court of Cassation of 24 November 2019.

arbitration defence in the second hearing (or indeed at a later hearing to the extent that it reserves its position on the merits): The UAE Courts have thus been seen to entertain an arbitration defence that was raised by an attorney at a second hearing following a successful application for adjournment of the first hearing in order to review the file.[41]

The UAE Courts have found that for an arbitration defence under Article 8(1) FAL to succeed, it must meet three cumulative conditions:[42] (i) the opponent files a case before the courts in violation of an existing arbitration agreement; (ii) the aggrieved party raises the arbitration defence before arguing the case on the merits; and (iii) the subject arbitration agreement is valid and as such enforceable as between the parties. It has been found that condition (ii) allows a party to request an extension of time in the first hearing before the competent court to appoint a legal representative, who in turn raises the arbitration defence in the second hearing before the court.[43] An arbitration defence requires submission of the underlying arbitration agreement - in Arabic translation, in the event that the original is in a language other than Arabic, e.g. in English[44] - only, to the exclusion of the entire main contract,[45] nor is there a requirement for submission of the original of the underlying main contract, including the arbitration agreement, a photocopy thereof having been found to be sufficient.[46]

In the event of multiple parties, some of which are signatories and some of which are non-signatories to the arbitration agreement, and provided that the dispute between the parties is indivisible, the UAE Courts have found that they have general jurisdiction on the basis that arbitration is an exceptional form of dispute resolution[47]:

> "even if the arbitration obligation - as an exception from the principle requiring the jurisdiction of the courts to consider all civil and commercial disputes - is only binding on its parties and therefore it does not apply to others, so if a lawsuit is filed against several litigants or filed by a number of plaintiffs and one of them is the one who agreed to an arbitration obligation in the contract that is the subject of the dispute concluded with them and the claim in the case is related to this contract, so the proper functioning of justice requires that the dispute not be divided because it relates to a single transaction with multiple parties, and then it must be considered before one party, which is the court, as it is the holder of general jurisdiction in hearing any lawsuit according to the origin and that the arbitration court."[48]

Where no indivisible link can be established between a first contract that contains an arbitration clause and a second contract that does not, a tribunal will be competent to hear the dispute arising from the first contract to the exclusion of the general jurisdiction of the UAE Courts.[49] The arbitration defence has failed with respect to matters that fall within the proper competence of the courts, in particular those that qualify as of public policy, including, e.g., the registration of off-plan real estate;[50] and in circumstances where a party was not a signatory of the underlying sale contract that contained the subject arbitration agreement[51]. Subject to party agreement otherwise, the courts will also regain general jurisdiction in the event that an arbitration agreement cannot be performed for whatever reason, including, e.g., the parties' failure to defray the costs of the arbitration within, e.g., the meaning of the DIAC Rules, resulting in the closure of the DIAC reference.[52] The UAE Courts have been seen to dismiss the arbitration defence where the dispute between the parties did not fall within the scope of the disputed arbitration agreement and as such arose from circumstances not

[41] See, e.g., Case No. 1159/2018 – Commercial, ruling of the Dubai Court of Cassation of 21 July 2019.
[42] See Case No. 300/2019 – Real Estate, ruling of the Dubai Court of Cassation of 13 February 2020.
[43] *Id*.
[44] See Case No. 581/2019 – Commercial, ruling of the Dubai Court of Cassation of 15 September 2019.
[45] See Case No. 319/2019 – Commercial, ruling of the Dubai Court of Cassation of 8 December 2019.
[46] See Case No. 399/2019 – Commercial, ruling of the Dubai Court of Cassation of 23 February 2020.
[47] See Case No. 153/2019 – Commercial, ruling of the Dubai Court of Cassation of 28 April 2019; Case No. 300/2019 – Real Estate, ruling of the Dubai Court of Cassation of 13 February 2020; and Case No. 17/2020 – Real Estate, ruling of the Dubai Court of Cassation of 14 May 2020.
[48] See Case No. 5/2020 – Real Estate, ruling of the Dubai Court of Cassation of 19 March 2020.
[49] See Case No. 803/2020 – Commercial, ruling of the Dubai Court of Cassation of 25 October 2020.
[50] See, e.g., Case No. 5/2020 – Real Estate, ruling of the Dubai Court of Cassation of 19 March 2020; and Case No. 84/2020 – Real Estate, ruling of the Dubai Court of Cassation of 21 May 2020.
[51] See Case No. 224/2020 – Civil, ruling of the Dubai Court of Cassation of 27 August 2020.
[52] See Case No. 791/2019 – Commercial, ruling of the Dubai Court of Cassation of 19 January 2020.

covered by that agreement.[53] Further, in a recent case,[54] the UAE Courts refused to entertain as a debt enforcement action a claim for payment of a debt which the debtor party had admitted was outstanding by email, declining the court's jurisdiction in favour of the existence of an arbitration clause under Article 8 FAL. The UAE Courts have also refused to accept that a final payment certificate within the meaning of the FIDIC Conditions is suitable for enforcement as a debt by the competent courts irrespective of the existence of an arbitration clause.[55]

In exercising their powers under Article 8(1) FAL, the UAE Courts respect the parties' choice to submit their dispute to arbitration in a foreign forum.[56]

Agreement to arbitrate. The agreement to arbitrate has been recognised as the source of the tribunal's mandate and powers under the FAL.[57] It has been confirmed[58] that pursuant to Article 4(1) FAL, both natural and legal persons, i.e., individuals and body corporates, are empowered to enter into arbitration agreements. Given the similarity in wording between Article 4(1) FAL and former Article 203(4) CPC, the Dubai Court of Cassation has been seen to rely on the UAE Courts' analysis of former Article 203 in relevant part in construing Article 4(1) FAL.[59] Given the exceptional nature of arbitration, arbitration clauses and agreements are interpreted narrowly.[60]

Subject to the application of the doctrine of apparent authority in the terms set out under a separate heading below, the UAE Courts have confirmed that a third party that seeks to submit to arbitration for and on behalf of and/or represent the original rightsholder, whether an individual or a body corporate, in an arbitration must be specifically authorised to do so by means of a special power of attorney in accordance with Article 58(2) CPC[61] or a board resolution, subject to a number of well-defined exceptions, such as the legal presumption in favour of the binding authority of a director of a UAE-incorporated limited liability company.[62] To this effect, the Dubai Court of Cassation has found in Case No. 153/2020[63] that *"[t]he director of a limited liability company is the holder of full authority in its management and has the capacity to dispose of the rights related to its activity including the agreement on arbitration in the contracts concluded between it and others unless the company's articles of incorporation specify its authority to deprive him of certain actions or expressly prevent him from agreeing to arbitration […]."*

According to more recent case law precedent of the UAE Courts, a lack of special authority may only be invoked by a principal against its agent or attorney, and not by the opponent party.[64] It has also been held that where a board of directors only counts two members and the articles of association authorise one director on his or her own to carry out the company affairs, one director on his own is considered authorised to bind the company to arbitration.[65]

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[53] See Case No. 1071/2019 – Commercial, ruling of the Dubai Court of Cassation of 16 February 2020.
[54] See Case No. 265/2020 – Commercial, ruling of the Dubai Court of Cassation of 28 June 2020.
[55] See Case No. 692/2020 – Commercial, ruling of the Dubai Court of Cassation of 23 September 2020.
[56] See, e.g., Case No. 685/2019 – Commercial, ruling of the Dubai Court of Cassation of 10 November 2019, providing for arbitration seated in Seoul, Korea, under Korean procedural and substantive law.
[57] See, e.g., Case No. 114/2020 – Commercial, ruling of the Dubai Court of Cassation of 18 March 2020; and Case No. 324/2020 – Civil, ruling of the Dubai Court of Cassation of 26 November 2020.
[58] See, e.g., Case No. 293/2019 – Commercial, ruling of the Dubai Court of Cassation of 30 June 2019; Case 276/2020 – Commercial, ruling of the Dubai Court of Cassation of 20 May 2020; and Case No. 329/2020 – Commercial, ruling of the Dubai Court of Cassation of 20 September 2020.
[59] See, e.g., Case No. 236/2019 – Real Estate, ruling of the Dubai Court of Cassation of 11 December 2019.
[60] See, e.g., Case No. 329/2020 – Commercial, ruling of the Dubai Court of Cassation of 20 September 2020; Case No. 441/2020 – Commercial, ruling of the Dubai Court of Cassation of 27 September 2020; Case No. 459/2020 – Commercial, ruling of the Dubai Court of Cassation of 4 October 2020; and Case No. 567/2020 – Commercial, ruling of the Dubai Court of Cassation of 26 July 2020.
[61] See, e.g., Case No. 205/2019 – Commercial, ruling of the Dubai Court of Cassation of 23 June 2019; Case No. 236/2019 – Real Estate, ruling of the Dubai Court of Cassation of 11 December 2019; and Case No. 5/2020 – Real Estate, ruling of the Dubai Court of Cassation of 19 March 2020.
[62] See, e.g., Case No. 236/2019 – Real Estate, ruling of the Dubai Court of Cassation of 11 December 2019; Case No. 1013/2019 – Commercial, ruling of the Dubai Court of Cassation of 19 January 2020; and Case No. 870/2020 – Commercial, ruling of the Dubai Court of Cassation of 25 November 2020.
[63] Case No. 153/2020 – Commercial, ruling of the Dubai Court of Cassation of 8 March 2020.
[64] See, e.g., Case No. 205/2019 – Commercial, ruling of the Dubai Court of Cassation of 23 June 2019; Case No. 685/2019 – Commercial, ruling of the Dubai Court of Cassation of 10 November 2019; Case No. 1118/2019 – Commercial, Dubai Court of Cassation of 19 February 2020; and Case No. 247/2020 – Real Estate, ruling of the Dubai Court of Cassation of 13 October 2020.
[65] See Case No. 153/2020 – Commercial, ruling of the Dubai Court of Cassation of 8 March 2020.

More recently, the UAE Courts have confirmed that the requirement for a special power of attorney extends to the delegation of any powers to be conferred upon a tribunal in arbitration, including the power to award party costs more specifically:

> "[…] the decision according to the text of the first and third paragraphs of Article 4 of the Arbitration Law No. 6 of 2018 that 1- The agreement on arbitration is concluded only by a natural person who has the capacity to dispose of rights or from the person's representative, the legal person who is authorized to conclude an agreement on arbitration, otherwise the agreement will be void ... 3- And that in the cases in which this law permits the parties to agree on the procedure to be followed to decide on a specific issue, then each of them may authorize others to choose this procedure or decide on it, and it is considered among others in this regard every natural person or arbitration institution inside or outside the country. And that the text of Article (216/4) of the Civil Procedures Law under which the arbitration procedures were conducted is that resorting to arbitration is only valid for those who have the capacity to act in the disputed right and who are not qualified to resort to the judiciary, for the agreement on arbitration implies that if a person relinquishes filing a case to the state's judiciary, including the guarantees it contains for the litigants, which is an exceptional way to settle disputes, the legislator is required to agree on a private agency and that it is in the private agency that the agent has nothing but to undertake the matters assigned to it and the necessary consequences required by the nature of the behaviour and the current custom, it is not permissible to depart from the limits of this authorization, and if it exceeds those limits, then it does not apply to the right of the delegated person unless he permits this behaviour."[66]

Finally, in keeping with Article 5(1) FAL, a recent ruling of the Abu Dhabi Court of Cassation[67] recognises that by virtue of the principle *lex specialis derogat legi generali*, whereby more specific rules apply to the exclusion of more general rules, disputes in relation to service charges and community fees may be carved out of the arbitration clause contained in a real estate sale and purchase agreement by making them subject to proceedings before the courts by a simple express reference to that effect in terms appended to the sale and purchase agreement in the form of a declaration.

Separability. In accordance with Article 6(1) FAL, the UAE Courts have confirmed the isolation of the arbitration agreement from the main contract and its continued integrity despite the nullity, rescission or termination of the main contract,[68] always provided that the agreement to arbitrate is itself not affected by an instance of invalidity.[69]

Against this background, it has been held by the UAE Courts that the invalidity of a board resolution (intending to confer powers upon new management to submit a company to arbitration) does not extend to an existing arbitration agreement contained in the main contract between the parties in circumstances where the existing arbitration agreement was lawfully executed by previous management of the company.[70]

The net consequence of Article 6(1) FAL is that the arbitration agreement survives the termination (including in the form of a rescission) or invalidity of the main contract: *"[…] it is also decided that the invalidity of the original contract that includes the arbitration clause, or its annulment or termination, does not prevent the arbitration clause from remaining valid and producing its effects with respect to the effects of the nullity, annulment or termination of the original contract unless the nullity extends to the arbitration clause itself […]."*[71] As a result, the arbitral tribunal retains jurisdiction to determine the question of the termination or invalidity of the main contract.[72]

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[66] See Case No. 990/2019 – Commercial, ruling of the Dubai Court of Cassation of 5 January 2020.
[67] Reported in S. Nagar, "Tailoring the scope of arbitration agreements: A recent judgment of the Abu Dhabi Court of Cassation", Al Tamimi Law Update (October 2020).
[68] See, e.g., Case No. 156/2020 - Commercial, ruling of the Dubai Court of Cassation of 11 March 2020; Case No. 516/2020 – Commercial, ruling of the Dubai Court of Cassation of 15 July 2020; and Case No. 1115/2020 – Commercial, ruling of the Dubai Court of Cassation of 20 December 2020.
[69] See, e.g., Case No. 516/2020 – Commercial, ruling of the Dubai Court of Cassation of 15 July 2020.
[70] See Case No. 946/2019 – Commercial, ruling of the Dubai Court of Cassation of 24 November 2019.
[71] See Case No. 516/2020 – Commercial, ruling of the Dubai Court of Cassation of 15 July 2020.
[72] *Id.*

In-writing requirement. The UAE Courts have confirmed the in-writing requirement of arbitration agreements within the meaning of Article 7(1) FAL[73] and that as such, an agreement to arbitrate is never presumed[74]. A failure to sign an arbitration provision contained in schedules to the original main contract will render that provision null and void *ab initio*.[75] It has been found that the simple amendment of a main contract without specific reference to the underlying arbitration clause does not displace the obligation to arbitrate.[76] In order to meet the in-writing requirement, it will be sufficient for an agreement to arbitrate to fall within one of the circumstances listed at Article 7(2) FAL, thus qualifying as having been concluded in writing.[77]

Importantly, according to the UAE Courts,[78] an arbitration agreement is only binding *inter partes*, i.e., only binds (authorised) signatory parties. That said, like the position under the former UAE Arbitration Chapter,[79] the UAE Courts have endorsed the express or implied assignment of the obligation to arbitrate to a third party provided the circumstances leave no room for doubt that the assignment has met with party acceptance.[80]

Further, albeit that pursuant to Article 1028 CPC the arbitration agreement of an insurance contract is required to be contained in an agreement separate from the general conditions of the insurance,[81] in circumstances where this had not been done, the insurer, which was the originator of those conditions, was not able to rely upon its own failure to insert the arbitration agreement into a separate agreement to overcome an arbitration defence advanced by the insured.[82] It has further been held that a settlement agreement between two parties with respect to a dispute arising from a main contract that contained an arbitration clause was not referrable to arbitration where that agreement did not make reference to the obligation to arbitrate.[83] Equally, a letter agreement adopted to replace an earlier agreement on the same subject without making reference to the arbitration clause contained in the earlier agreement was found not to give rise to an obligation to arbitrate.[84]

Incorporation by reference. In application of Article 5(3) FAL, a generic reference in a subcontract to dispute resolution in the terms provided for in the main contract has been found sufficient for incorporation into a subcontract of a FIDIC dispute resolution clause contained in a main contract.[85]

Further, the UAE Courts have found, taking account of the language of Article 7(2)(b) FAL more specifically, that for incorporation by reference to operate, the required reference must point to the arbitration provision in the referenced document and *expressly state* that the referenced arbitration provision forms an integral part of the subject contract:[86]

> "[…] an agreement to arbitrate is considered any referral contained in a contract drawn up between two parties to another contract that includes an arbitration clause if the referral is clear and explicit in adopting this condition, and the effect of the referral is not achieved unless it includes a specific reference to the arbitration clause. If the referral to the aforementioned contract is merely a general reference to the provisions of this contract without specifying the aforementioned arbitration clause

[73] See, e.g., Case No. 293/2019 – Commercial, ruling of the Dubai Court of Cassation of 30 June 2019; Case No. 315/2020 – Commercial, ruling of the Dubai Court of Cassation of 13 September 2020; and Case No. 441/2020 – Commercial, ruling of the Dubai Court of Cassation of 27 September 2020.
[74] See Case No. 224/2020 – Civil, ruling of the Dubai Court of Cassation of 27 August 2020.
[75] See Case No. 476/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 August 2020.
[76] See Case No. 315/2020 – Commercial, ruling of the Dubai Court of Cassation of 13 September 2020.
[77] See, e.g., Case No. 293/2019 – Commercial, ruling of the Dubai Court of Cassation of 30 June 2019.
[78] See Case No. 43/2019 – Real Estate, ruling of the Dubai Court of Cassation of 8 May 2019; and Case No. 5/2020 – Real Estate, ruling of the Dubai Court of Cassation of 19 March 2020.
[79] See G. Blanke, *Commentary on the UAE Arbitration Chapter*, Thomson Reuters/Sweet&Maxwell, 2017, at II-018.
[80] See Case No. 43/2019 – Real Estate, ruling of the Dubai Court of Cassation of 8 May 2019; and Case No. 503 – Commercial, ruling of the Dubai Court of Cassation of 15 June 2019.
[81] To this effect, see G. Blanke, *Commentary on the UAE Arbitration Chapter*, Thomson Reuters/Sweet&Maxwell, 2017, at II-008.
[82] See Case No. 236/2020 – Civil, ruling of the Dubai Court of Cassation of 13 August 2020.
[83] See Case No. 567/2020 – Commercial, ruling of the Dubai Court of Cassation of 26 July 2020; and Case No. 667/2020 – Commercial, ruling of the Dubai Court of Cassation of 4 October 2020.
[84] See Case No. 358/2020 – Civil, ruling of the Dubai Court of Cassation of 26 November 2020.
[85] See Case No. 1139/2020 – Commercial, ruling of the Court of Appeal of 19 August 2020.
[86] See Case No. 441/2020 – Commercial, ruling of the Dubai Court of Cassation of 27 September 2020; Case No. 459/2020 – Commercial, ruling of the Dubai Court of Cassation of 4 October 2020; and Case No. 567/2020 – Commercial, ruling of the Dubai Court of Cassation of 26 July 2020.

> specifically indicating that the parties know of its existence in the contract, then the referral does not extend to it and the arbitration is not agreed upon between the parties to the contract, […].”[87]

In similar terms, the Dubai Court of Cassation found in a ruling of 20 September 2020 with respect to the incorporation by reference within the context of the FIDIC Conditions of Contract as follows:

> “[…] and that the arbitration clause must be interpreted narrowly, yet accurately, and since what was previously mentioned was the evidence for this court of its review of the contracting agreement and the first and second parts and their appendices deposited in the file of the primary case, which showed that the arbitration clause contained in Appendix D, Part Two, Article (67) came without the signature of the legal representative of the two parties. The dispute, as well as the body of the original contract signed by them, did not refer to that appendix and expressly stipulate the consideration of the arbitration clause. In compliance with the requirements of Article (7-2-b) of the [FAL], and as the appealed ruling concluded in favour of the rejection of the arbitration defence based on that, then it would have worked true to the law […].”[88]

Apparent authority. A consistent line of recent case law precedent suggests that the UAE Courts now recognise a legal presumption in favour of the binding effect of a person’s signature upon a company in one of the following two situations:

(i) where that person is not specifically designated as the company’s legal representative in the preamble of the underlying contract that contains an arbitration clause, yet – regardless of its true association with the company - signs the contract[89] with a legible signature[90]: *“[…] if the name of a specific company is mentioned in the preamble of the contract and another person signed at the end of this contract, this establishes a legal claim that whoever signed it signed in the name and account of the company, regardless of whether his name is associated with its name or added to it, and this will affect the rights and obligations of the company.”*[91]; or

(ii) where that person is specifically designated as the company’s legal representative in the preamble of the contract but the signature placed under the contract is illegible[92]: *“If the name of the legal person is mentioned in the preamble of the contract only and not associated with the name and description of the legal representative and the end of the contract is signed with an illegible signature and the contract includes the arbitration clause, in this case there is a conclusive legal presumption that the signature is attributed to the legal representative of the person possessing the capacity to act and the capacity to agree to arbitration and it is not accepted from him in this case to challenge this signature in accordance with the principle of good faith […].”*[93]

Conversely, where a person is specifically designated as the company’s legal representative in the preamble to the contract that contains the arbitration clause, yet the signature under the contract is legible and as such identifiable or identified as that of another person, the legal presumption in favour of binding authority is

[87] See Case No. 329/2020 – Commercial, ruling of the Dubai Court of Cassation of 20 September 2020.
[88] *Id*.
[89] See, e.g., Case No. 236/2019 – Real Estate, ruling of the Dubai Court of Cassation of 11 December 2019; Case No. 293/2019 – Commercial, ruling of the Dubai Court of Cassation of 30 June 2019; Case No. 581/2019 – Commercial, ruling of the Dubai Court of Cassation of 15 September 2019; Case No. 51/2020 – Real Estate, ruling of the Dubai Court of Cassation of 14 May 2020; Case No. 236/2020 – Civil, ruling of the Dubai Court of Cassation of 13 August 2020; and Case No. 870/2020 – Commercial, ruling of the Dubai Court of Cassation of 25 November 2020.
[90] See Case No. 2/2020, ruling of the Dubai Court of Appeal of 6 October 2020.
[91] See Case No. 276/2020 – Commercial, ruling of the Dubai Court of Cassation of 20 May 2020.
[92] See, e.g., Case No. 236/2019 – Real Estate, ruling of the Dubai Court of Cassation of 11 December 2019; Case No. 293/2019 – Commercial, ruling of the Dubai Court of Cassation of 30 June 2019; Case No. 581/2019 – Commercial, ruling of the Dubai Court of Cassation of 15 September 2019; Case No. 2/2020, ruling of the Dubai Court of Appeal of 6 October 2020; Case No. 51/2020 – Real Estate, ruling of the Dubai Court of Cassation of 14 May 2020; Case No. 236/2020 – Civil, ruling of the Dubai Court of Cassation of 13 August 2020; Case No. 265/2020 – Commercial, ruling of the Dubai Court of Cassation of 28 June 2020; and Case No. 870/2020 – Commercial, ruling of the Dubai Court of Cassation of 25 November 2020.
[93] See Case No. 276/2020 – Commercial, ruling of the Dubai Court of Cassation of 20 May 2020.

displaced[94]: *"If the name of the legal person is mentioned in the preamble of the contract coupled with the name and description of the legal representative and the end of the contract is signed with a legible signature of another person and the contract includes the arbitration clause, then in that case the legal person may claim the nullity of the arbitration clause for its signature by a person other than the legal representative who has the capacity to agree to arbitration."*[95]

For the avoidance of doubt, a legible signature at the end of a contract in the absence of any (contradictory) designation of the legal representative in the preamble to the contract will not displace the legal presumption in favour of binding authority.[96] It has hence been found that employees of a corporate entity that did not hold a managerial position nor were furnished with special authority, did bind that entity to arbitration by signing (legibly) a settlement agreement that contained an arbitration clause.[97] The UAE Courts also appear to have recognised that the placement of a company seal on the arbitration agreement (bar proof of fraudulent interference by the agent) binds the company to arbitration and as such serves as conclusive evidence of the proper execution of the arbitration obligation by a legal person in its own right (irrespective of any other signature requirements).[98]

In finding in favour of the application of apparent authority, the UAE Courts have relied upon an overarching obligation of good faith[99] in the terms set out at Article 70 of the UAE Civil Transactions Code:

> "[I]n accordance with the principle established by Art. 70 of the Federal Civil Transactions Law No. 5/1085, whoever is seeking to set aside what he has concluded on this part will be rejected, and the defendant may not take from his own actions/ grounds to validate/constitute his claim against [a] third party, which is an application of the general principle that is based on moral and social considerations to combat such behaviour and not to deviate from the seriousness of the principle of good faith that must be complied with in all actions and procedures."[100]

On occasion, the courts have also found support in Article 14(2) CPC:

> "It is not permissible – according to Article 14(2) of the Civil Procedure Law – to claim nullity that is not related to public order from the party who caused it, whether it was caused intentionally or by negligence or the one who caused it was the same person or someone working for them. It is established that a party to the arbitration may not claim before the court a defence that leads to the

[94] See, e.g., Case No. 236/2019 – Real Estate, ruling of the Dubai Court of Cassation of 11 December 2019; Case No. 293/2019 – Commercial, ruling of the Dubai Court of Cassation of 30 June 2019; Case No. 581/2019 – Commercial, ruling of the Dubai Court of Cassation of 15 September 2019; Case No. 51/2020 – Real Estate, ruling of the Dubai Court of Cassation of 14 May 2020.
[95] See Case No. 276/2020 – Commercial, ruling of the Dubai Court of Cassation of 20 May 2020.
[96] See Case No. 581/2019 – Commercial, ruling of the Dubai Court of Cassation of 15 September 2019.
[97] See Case No. 246/2020 – Civil, ruling of the Dubai Court of Cassation of 24 September 2020.
[98] See Case No. 685/2019 – Commercial, ruling of the Dubai Court of Cassation of 10 November 2019; Case No. 2/2020, ruling of the Dubai Court of Appeal of 6 October 2020; Case No. 51/2020 – Real Estate, ruling of the Dubai Court of Cassation of 14 May 2020, in which the court emphasised the appellant party's approval of the company seal that it had placed on the subject arbitration agreement; Case No. 161/2020 – Commercial, ruling of the Dubai Court of Cassation of 4 October 2020; Case No. 236/2020 – Civil, ruling of the Dubai Court of Cassation of 13 August 2020; Case No. 865/2020 – Commercial, ruling of the Dubai Court of Cassation of 11 October 2020; and Case No. 870/2020 – Commercial, ruling of the Dubai Court of Cassation of 25 November 2020, emphasising the placement of the company seal on the contract that contains the arbitration clause, together with the signature of the company representative; possibly *contra*, however, see Case No. 960/2020 – Commercial, ruling of the Dubai Court of Cassation of 9 December 2020; and Case No. 1037/2020 – Commercial, ruling of the Dubai Court of Cassation of 9 December 2020, in which two respondent parties were found not be bound by the underlying arbitration clause for not signing that clause irrespective of the presence of the company seal.
[99] See, e.g., Case No. 161/2020 – Commercial, ruling of the Dubai Court of Cassation of 4 October 2020; Case No. 276/2020 – Commercial, ruling of the Dubai Court of Cassation of 20 May 2020; and Case No. 870/2020 – Commercial, ruling of the Dubai Court of Cassation of 25 November 2020.
[100] See Case No. 236/2019 – Real Estate, ruling of the Dubai Court of Cassation of 11 December 2019. To similar effect, see also Case No. 293/2019 – Commercial, ruling of the Dubai Court of Cassation of 30 June 2019; Case No. 581/2019 – Commercial, ruling of the Dubai Court of Cassation of 15 September 2019; Case No. 681/2019 – Commercial, ruling of the Dubai Court of Cassation of 10 November 2019; Case No. 51/2020 – Real Estate, ruling of the Dubai Court of Cassation of 14 May 2020; Case No. 236/2020 – Civil, ruling of the Dubai Court of Cassation of 13 August 2020; Case No. 276/2020 – Commercial, ruling of the Dubai Court of Cassation of 20 May 2020; Case No. 265/2020 – Commercial, ruling of the Dubai Court of Cassation of 28 June 2020; and Case No. 870/2020 – Commercial, ruling of the Dubai Court of Cassation of 25 November 2020.

> nullity of the arbitration award due to defects related to the arbitration agreement or to the arbitration procedures resulting from its own actions."[101]

Legal successorship. The UAE Courts have confirmed that pursuant to Article 4(4) FAL, the legal successor of a deceased (or bankrupted) party to the arbitration will adopt the full liability of the obligation to arbitrate that was originally binding on the party that ceases to exist. In this sense, in a ruling of 24 November 2019, the Dubai Court of Cassation held that an obligation to arbitrate contained in an existing arbitration agreement devolved to new management after the decease of the previous management regardless of the invalidity of the board resolution that, inter alia, sought to confer the power upon the new management to submit the company to arbitration.[102]

Arbitrator eligibility. Recent case law precedent suggests that the prohibition under Article 10(2) FAL does not apply to appointments that preceded entry into force of the FAL. In a ruling of 19 February 2020,[103] Dr. Tarek Riad, then member of the DIAC Board of Trustees, was found not to be in violation of Article 10(2) FAL, having been appointed in the DIAC reference in question in 2016, i.e., well before entry into force of the FAL.

Default-appointment and substitution. The UAE Courts have confirmed that in accordance with Article 11(1) FAL, parties are free to contract into an institutional set of rules, which provide for their own appointment regime, such as, e.g., the DIAC Rules[104] or the DIFC-LCIA Rules.[105] For the avoidance of doubt, the decision of the competent court default-appointing an arbitrator is final and binding and can therefore not be appealed.[106]

Further, it has been held by the UAE Courts that the substitution of an arbitrator within the meaning of Article 17 FAL, whether for dismissal, recusal or otherwise, does not affect the existence of the arbitration agreement and allows the redefinition of the arbitral mandate before a newly appointed tribunal.[107]

Arbitrability. Given the similarity between the wording of former Article 203(4) CPC[108] and Article 4(2) FAL, the existing case law precedent on the interpretation of former Article 203(4) has guided the UAE Courts in their construction of Article 4(2) FAL.[109] Some case law precedent suggests that the courts are even content to examine questions of arbitrability by reference to former Article 203(4) CPC even after entry into force of the FAL.[110]

Both contractual and tortious actions have been found arbitrable within the meaning of Article 2(3) FAL.[111] That said, objective arbitrability under the FAL remains subject to exceptions, such as labour disputes.[112] The UAE Courts have further found that an investment agreement collateral to, but not conditional on an employment relationship, did not qualify for a dispute arising from a labour relationship and was, as such, capable of arbitration.[113] More recent case law precedent appears to suggest that disputes with respect to the existence, registration and maintenance of agency agreements fall within the exclusive competence of the UAE Courts and are therefore not arbitrable whereas disputes relating to outstanding payments under a

[101] See Case No. 51/2020 – Real Estate, ruling of the Dubai Court of Cassation of 14 May 2020. To similar effect, see also Case No. 236/2020 – Civil, ruling of the Dubai Court of Cassation of 13 August 2020.
[102] See Case No. 946/2019 – Commercial, ruling of the Dubai Court of Cassation of 24 November 2019.
[103] See Case No. 1118/2019 – Commercial, Dubai Court of Cassation of 19 February 2020.
[104] See, e.g., Case No. 198/2020 – Commercial, ruling of the Dubai Court of Cassation of 13 May 2020; and Case No. 492/2020 – Commercial, ruling of the Dubai Court of Cassation of 15 July 2020.
[105] See, e.g., Case No. 421/2020 – Commercial, ruling of the Dubai Court of Cassation of 4 October 2020.
[106] See, e.g., Case No. 938/2019 – Commercial, ruling of the Dubai Court of Cassation of 15 December 2019.
[107] See Case No. 36/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020.
[108] For a full analysis, see G. Blanke, *Commentary on the UAE Arbitration Chapter*, Thomson Reuters/Sweet&Maxwell, 2017, at II-032 *et seq*.
[109] See, e.g., Case No. 231/2019 – Real Estate, ruling of the Dubai Court of Cassation of 4 December 2019, which draws direct analogies to Article 203 CPC; and Case No. 55/2020 – Labour, ruling of the Dubai Court of Cassation of 6 February 2020, which notes that Article 4(2) FAL repealed and as such replaced former Article 203(4) CPC with effect from entry into force of the FAL.
[110] See, e.g., Case No. 492/2020 – Commercial, ruling of the Dubai Court of Cassation of 15 July 2020.
[111] See, e.g., Case No. 293/2019 – Commercial, ruling of the Dubai Court of Cassation of 30 June 2019.
[112] See, e.g., Case No. 55/2020 – Labour, ruling of the Dubai Court of Cassation of 6 February 2020.
[113] *Id*.

registered agency agreement are.[114] Equally, matters reserved for determination by the UAE public authorities, such as the registration of title in the interim real estate register[115] cannot be arbitrated. By contrast, the termination of agreements relating to the sale and purchase of land[116] (short of matters of registration) and more generally the performance or breach of any such contract[117] do not qualify as of public policy and can as such be arbitrated. For the avoidance of doubt, matters of registration with respect to off-plan lands or estates do and therefore cannot be arbitrated.[118]

Further, in digression from the position under the former UAE Arbitration Chapter, which required party consent, the UAE Courts have found that multi-contract claims arising from identically-worded arbitration clauses (and subcontracts) in disputes between the same parties (a subcontractor and a main contractor) in relation to the same project are arbitrable in a single DIAC arbitration proceeding in circumstances where neither the FAL nor the DIAC Rules contain provisions to the contrary.[119] The Courts have rejected the proposition that both the FAL and the DIAC Rules refer to "Arbitration Agreement" in the singular, hence requiring separate arbitration processes for claims arising out of each Arbitration Agreement, on the basis that Article 1(2) of the DIAC Rules expressly provides that *"[w]ords used in the singular include the plural and vice versa [...]"* and that the FAL does not prohibit the filing of multi-contract claims in a single proceeding *"provided the case will be assessed on the value of each contract and the fees will be calculated on that basis".*[120] According to the Courts,[121] it is established law that even though, in principle, each action must be filed separately, this does not preclude the filing of multiple actions by one statement of claim provided that that statement includes all the relevant information required for each action in accordance with Article 42 CPC.

Procedural flexibility. The UAE Courts have confirmed the procedural flexibility of arbitrations conducted under the FAL. More specifically, pursuant to Article 4(3) FAL, parties are free to contract into the application of a specific set of procedural rules dispensed and administered by a local arbitration institution, such as DIAC,[122] ADCCAC[123] or the Arbitration Centre of the UAE Society of Engineers.[124] This also includes free zone institutions, such as the DIFC-LCIA,[125] and international arbitration institutions,[126] and extends to the rules of evidence in the terms determined under the chosen institutional set of rules, such as Article 27(2) of the DIAC Rules.[127] Recent case law precedent confirms the parties' liberty to contract into

[114] See Case No. 362/2019 – Commercial, ruling of the Dubai Court of Cassation.
[115] See Case No. 5/2020 – Real Estate, ruling of the Dubai Court of Cassation of 19 March 2020.
[116] See, e.g., Case No. 217/2019 – Commercial, ruling of the Dubai Court of Cassation of 19 May 2019; and Case No. 231/2019 – Real Estate, ruling of the Dubai Court of Cassation of 4 December 2019) or real estate (see Case No. 247/2020 – Real Estate, ruling of the Dubai Court of Cassation of 13 October 2020; and Case No. 492/2020 – Commercial, ruling of the Dubai Court of Cassation of 15 July 2020.
[117] See, e.g., Case No. 296/2020 – Real Estate, ruling of the Dubai Court of Cassation of 24 November 2020.
[118] See Case No. 5/2020 – Real Estate, ruling of the Dubai Court of Cassation of 19 March 2020.
[119] See Case No. 19/2020, ruling of the Dubai Court of Appeal of 9 September 2020.
[120] *Id*; arguably in pursuit of a similar logic, see Case No. 1003/2019 – Commercial, ruling of the Dubai Court of Cassation of 1 January 2020, in which the claimant ultimately amended its claims to focus on those arising out of one of the two originally adduced contracts only, apparently having limited payment of the DIAC advance on costs to those claims only.
[121] See Case No. 19/2020, ruling of the Dubai Court of Appeal of 9 September 2020.
[122] See, e.g., Case No. 205/2019 – Commercial, ruling of the Dubai Court of Cassation of 23 June 2019; and Case No. 198/2020 – Commercial, ruling of the Dubai Court of Cassation of 13 May 2020, both confirming the application of the DIAC Rules as amended from time to time in accordance with Article 2 of those Rules; and Case No. 142/2020 – Real Estate, ruling of the Dubai Court of Cassation of 3 November 2020; and Case No. 492/2020 – Commercial, ruling of the Dubai Court of Cassation of 15 July 2020, both of which confirm the application of the 2007 DIAC Rules with effect from 5 May 2007 replacing the 1994 Rules of Arbitration of the Dubai Chamber of Trade and Industry.
[123] See, e.g., Case No. 19/2019, ruling of the Dubai Court of Appeal of 13 November 2019.
[124] See, e.g., Case No. 735/2020 – Commercial, ruling of the Dubai Court of Cassation of 4 October 2020.
[125] See, e.g., Case No. 992/2018 – Commercial, ruling of the Dubai Court of Cassation of 23 June 2019; Case No. 300/2019 – Real Estate, ruling of the Dubai Court of Cassation of 13 February 2020; Case No. 51/2020 – Real Estate, ruling of the Dubai Court of Cassation of 14 May 2020; Case No. 224/2020 – Civil, ruling of the Dubai Court of Cassation of 27 August 2020; Case No. 240/2020 – Commercial, ruling of the Dubai Court of Cassation of 6 March 2020; and Case No. 421/2020 – Commercial, ruling of the Dubai Court of Cassation of 4 October 2020.
[126] See, e.g., Case No. 134/2018 – Commercial, ruling of the Dubai Court of Cassation of 29 July 2018; Case No. 236/2019 – Real Estate, ruling of the Dubai Court of Cassation of 11 December 2019; and Case No. 246/2020 – Civil, ruling of the Dubai Court of Cassation of 24 September 2020, in all three of which the parties contracted into UAE-seated arbitration under the ICC Rules; see also Case No. 265/2020 – Commercial, ruling of the Dubai Court of Cassation of 28 June 2020.
[127] See Case No. 205/2019 – Commercial, ruling of the Dubai Court of Cassation of 23 June 2019.

institutional sets of rules to govern the submission of witness evidence, such as Article 29 of the DIAC Rules.[128]

In this context, it has further been confirmed by the UAE Courts that arbitrators appointed under the FAL are free, subject to party autonomy, to determine the arbitration procedure and are not bound by the procedural rules prevailing under the UAE Civil Procedures Code.[129]

Language of the arbitration. The statutory presumption in favour of Arabic as the language of arbitration under Article 29(1) FAL has been found to be displaced by the English language by operation of Article 21 of the DIAC Rules in circumstances in which the arbitration agreement was drafted in English and the respondent party filed a counterclaim in English.[130]

Article 19 FAL. The UAE Courts have confirmed that Article 19(1) contains the principle of *kompetenz-komptenz*, according to which a tribunal serving under the FAL has the power to determine its own jurisdiction as a preliminary matter to the exclusion of the courts.[131] The Courts have confirmed that pursuant to Article 19(1), the tribunal may decide on an issue of jurisdiction as a preliminary matter (by way of a *"preliminary decision"*), allowing a tribunal to bifurcate the proceedings into an initial phase on jurisdiction and a subsequent phase on the merits.[132]

The UAE Courts have further found that a failure to comply with the FIDIC conditions precedent in the terms of Clause 67 of the FIDIC Standard Form 1987, 4th edition, and in particular to make a timely referral to the Engineer under Clause 67.1, renders the commencement of arbitration proceedings premature.[133] Further, according to the Courts, in circumstances where the Employer has failed to give the Contractor written notice of a change of Engineer, the Contractor is allowed to refer to arbitration under Clause 67.3 FIDIC without a Clause 67.1 referral for an Engineer's decision.[134] It has also been found that service of a request for arbitration following escalation of the parties' differences confirms a lack of willingness on part of the parties to reach amicable settlement within the meaning of Clause 67.2 FIDIC and allows the commencement of arbitration in order to avoid unnecessary delay in the arbitral proceedings: *"[T]he escalation of the differences between the parties and the […] request for arbitration confirms a lack of willingness to reach an amicable settlement. To ensure the effective performance of the parties' contract containing the arbitration clause, arbitration should be commenced after the parties invoked the arbitration clause for their dispute. Anything else would unnecessarily protract the proceedings."*[135] Further, a party's silence in response to an invitation to settle amicably followed by escalation to arbitration within the contractual time-limits demonstrates a failure to settle amicably.[136] Similarly, an architect's refusal to entertain settlement discussions between two contracting parties has been found to exhaust a pre-arbitral obligation by the parties to refer a dispute for settlement by the architect.[137] Conversely, the conditions precedent under Clause 67 FIDIC and in particular the requirement to attempt amicable settlement have been found unenforceable in circumstances where the courts retained their general jurisdiction over the subject dispute due to the unenforceability of the underlying arbitration agreement.[138]

Article 19(2) FAL only comes into play where a tribunal has adopted a ruling affirming its own jurisdiction.[139] A negative ruling on jurisdiction can only be challenged by recourse to the formal challenge

[128] *Id*.
[129] See, e.g., Case No. 29/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020; and Case No. 34/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020.
[130] See Case No. 492/2020 – Commercial, ruling of the Dubai Court of Cassation of 15 July 2020.
[131] See Case No. 358/2020 – Civil, ruling of the Dubai Court of Cassation of 26 November 2020.
[132] See, e.g., Case No. 933/2018, ruling of the Dubai Court of Cassation of 10 February 2019; and Case No. 1059/2018, ruling of the Dubai Court of Cassation of 17 March 2019, in both of which the parties agreed to bifurcate.
[133] See Case No. 32/2019, ruling of the Dubai Court of Appeal of 5 February 2020, affirmed by Case No. 339/2020, ruling of the Dubai Court of Cassation of 8 June 2020.
[134] See Case No. 8/2018, ruling of the Dubai Court of Appeal of 16 January 2019.
[135] *Id*.
[136] See Case No. 19/2020, ruling of the Dubai Court of Appeal of 9 September 2020.
[137] See Case No. 864/2020 – Commercial, ruling of the Dubai Court of Cassation of 4 November 2020.
[138] See Case No. 215/2019 – Commercial, ruling of the Dubai Court of Cassation of 7 July 2019.
[139] See Case No. 32/2019, ruling of the Dubai Court of Appeal of 5 February 2020, affirmed by Case No. 339/2020, ruling of the Dubai Court of Cassation of 8 June 2020; and Case No. 38/2019, ruling of the Dubai Court of Appeal of 8 January 2020.

provisions contained in Articles 53-54 FAL.[140] Under Article 19(2), a party is empowered to request the competent curial court to rule on the matter of jurisdiction within 15 days from the date it has been notified of an affirmative ruling on jurisdiction.[141] The 15-day time-limit is strictly enforced by the competent court in accordance with Article 3 CPC.[142] For the avoidance of doubt, the competent court for present purposes is the court of appeal, and not the court of first instance, at the seat of the arbitration;[143] choice of the wrong court will likely affect the timely filing of the challenge, as a result of which the challenging party will be considered to have waived its right to challenge under Article 19(2).[144] According to prevailing court practice, the 30-day time-limit is regulatory and as such not strictly binding. Importantly, the UAE Courts have confirmed that the curial court's decision under Article 19(2) is final and binding and cannot be appealed.[145] Pending an application under Article 19(2), the arbitration proceedings will be stayed unless decided otherwise by the tribunal upon the request of a party[146]. In this sense, the stay of the proceedings is automatic.[147]

Under Article 19(2) FAL, the curial courts appear to enjoy a comparatively wide margin of discretion, being invited to review the actual merits of the tribunal's findings on jurisdiction and hence to decide the matter of jurisdiction afresh on the basis of the text of and the information provided by the award.[148] A supervisory court's negative finding on jurisdiction will result in the nullification of the tribunal's affirmative ruling on jurisdiction,[149] and require the parties to initiate a fresh arbitration unless they decide otherwise.

The UAE Courts have further confirmed that pursuant to Article 20(1) FAL, jurisdictional objections must be filed by the time of the submission of a statement of defence and counterclaim within the meaning of Article 30 FAL.[150] In the alternative, an objection that the other party's pleadings fall outside the proper limits of the tribunal's mandate and are as such *extra petita* must be raised in the hearing following the hearing in which those pleadings were originally made.[151] Failure to do so has been held to be tantamount to a waiver of right.[152]

Right to be heard. The UAE Courts have confirmed that a respondent's right to be heard is not violated by the exercise of a tribunal's discretion under Article 26.2 of the DIAC Rules to refuse the admission of counterclaims late in the arbitration process, especially in circumstances where those counterclaims were initially considered withdrawn given the respondent's failure to make payment of the corresponding DIAC advance on costs.[153]

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[140] See, e.g., Case No. 19/2020, ruling of the Dubai Court of Appeal of 9 September 2020.
[141] See Case No. 3/2018, ruling of the Dubai Court of Appeal of 26 September 2018; Case No. 8 of 2018, ruling of the Dubai Court of Appeal of 16 January 2019; Case No. 2/2020, ruling of the Dubai Court of Appeal of 6 October 2020; Case No. 7/2020, ruling of the Dubai Court of Appeal of 4 November 2020; Case No. 12/2020, ruling of the Dubai Court of Appeal of 21 October 2020; and Case No. 23/2020, ruling of the Dubai Court of Appeal of 9 September 2020.
[142] See Case No. 198/2020 – Commercial, ruling of the Dubai Court of Cassation of 13 May 2020; see also Case No. 33/2020, ruling of the Dubai Court of Appeal of 25 November 2020.
[143] See Case No. 198/2020 – Commercial, ruling of the Dubai Court of Cassation of 13 May 2020.
[144] *Id*.
[145] See Case 225/2019, Dubai Court of Cassation.
[146] See Case No. 32/2019, ruling of the Dubai Court of Appeal of 5 February 2020.
[147] See Case No. 8 of 2018, ruling of the Dubai Court of Cassation of 16 January 2019.
[148] See Case No. 32/2019, ruling of the Dubai Court of Appeal of 5 February 2020, affirmed by Case No. 339/2020, ruling of the Dubai Court of Cassation of 8 June 2020.
[149] See Case No. 32/2019, ruling of the Dubai Court of Appeal of 5 February 2020 affirmed by Case No. 339/2020, ruling of the Dubai Court of Cassation of 8 June 2020, in which the tribunal found in favour of its own jurisdiction despite the claimant's failure to comply with the FIDIC conditions precedent.
[150] See Case No. 3/2018, ruling of the Dubai Court of Appeal of 26 September 2018; Case No. 8/2018, ruling of the Dubai Court of Appeal of 16 January 2019; Case No. 1078/2019 - Commercial, ruling of the Dubai Court of Cassation of 22 January 2020; Case No. 5/2020, ruling of the Dubai Court of Appeal of 12 August 2020; Case No. 26/2020, ruling of the Dubai Court of Appeal of 30 September 2020; Case No. 33/2020, ruling of the Dubai Court of Appeal of 25 November 2020; Case No. 240/2020 – Commercial, ruling of the Dubai Court of Cassation of 6 March 2020; and Case No. 324/2020 – Civil, ruling of the Dubai Court of Cassation of 26 November 2020.
[151] See, e.g., Case No. 5/2020, ruling of the Dubai Court of Appeal of 12 August 2020; and Case No. 870/2020 – Commercial, ruling of the Dubai Court of Cassation of 25 November 2020.
[152] See, e.g., Case No. 324/2020 – Civil, ruling of the Dubai Court of Cassation of 26 November 2020; and Case No. 870/2020 – Commercial, ruling of the Dubai Court of Cassation of 25 November 2020.
[153] See Case No. 217/2019 – Commercial, ruling of the Dubai Court of Cassation of 19 May 2019.

Waiver of right. According to the waiver of right provision at Article 25 FAL, a party that fails to raise an objection to the violation of or a failure to comply with any requirement of the underlying arbitration agreement or a non-mandatory provision of the FAL within an agreed period of time or within seven days from becoming aware of the instance of the violation or non-compliance is deemed to have waived its right to object.[154] This has been found to include the challenge of arbitrators for lack of impartiality and independence or competence.[155] In reliance on this Article, the UAE Courts have found that an award debtor had waived its right to object to the appointment of a tribunal, the scope of the tribunal's jurisdiction and the language of the arbitration in favour of Arabic rather than English in circumstances where such objections were only raised by way of challenge under Article 53 FAL.[156]

Governing law. The UAE Courts have acknowledged that pursuant to Article 37(1) FAL, the parties are free to agree the rules applicable to the resolution of the merits of the dispute between them, including foreign, non-UAE law, such as English law.[157]

Court-ordered interim measures. In a ruling of 22 May 2019,[158] the Dubai Court of Appeal confirmed that pursuant to Article 18(2) FAL, the summary judge of the Dubai Court of First Instance – as opposed to the chief justice of Dubai Court of Appeal - was no longer competent to hear applications for interim and conservatory measures, including a freezing order over an award debtor's assets pending the arbitration process unless the parties expressly agree to refer to the summary judge.

Tribunal-ordered interim measures. Under Article 21(1)(c) FAL, the UAE Courts have considered tribunals empowered to adopt attachment orders, i.e., orders to ring-fence assets against which a prospective award creditor might be able to enforce a future award debt owed by the (prospective) award debtor.[159]

Hearings. It has been confirmed that in accordance with Article 33(1) FAL, hearings are to be held in private (*"in camera"*) in arbitrations under the FAL unless otherwise agreed by the parties.[160]

Further, according to recent case law precedent, Article 33(3) FAL allows hearings before the tribunal to be conducted electronically (*"through modern means of telecommunication")*.[161]

Finally, the UAE Courts have held that the choice of representatives within the meaning of Article 33(5) FAL includes foreign law firms, whether in their capacity as legal advisors registered with, e.g., the Dubai Legal Affairs Department (DLAD) or as non-resident legal consultants so registered.[162]

Electronic communication. According to the UAE Courts, under Article 28 FAL, the tribunal is empowered to conduct arbitration hearings remotely[163] through modern means of communication, such as video-conference and phone.[164] The use of electronic means of communication in the conduct of the arbitration process and the tribunal's deliberations has been found to take after UAE Law No. 10 of 2017, which introduces electronic communication into the conduct of civil procedures before the courts:

[154] See, e.g., Case No. 247/2020 – Real Estate, ruling of the Dubai Court of Cassation of 13 October 2020; and Case No. 27/2019, ruling of the Dubai Court of Appeal of 11 November 2019.
[155] See Case No. 36/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020.
[156] See Case No. 492/2020 – Commercial, ruling of the Dubai Court of Cassation of 15 July 2020.
[157] See, e.g., Case No. 205/2019 – Commercial, ruling of the Dubai Court of Cassation of 23 June 2019; and Case No. 271/2019 – Commercial, ruling of the Dubai Court of Cassation of 15 December 2019.
[158] Reported in H. Arab, S. Koleilat-Aranjo and M. Darwish, "Dubai Court Clarifies the Competent Authority to Rule on Interim and Conservatory Measures", Al Tamimi Law Update (October 2019).
[159] See Case No. 123/2019 – Real Estate, ruling of the Dubai Court of Cassation of 25 December 2019; Case No. 252/2019 – Real Estate, ruling of the Dubai Court of Cassation of 25 December 2019; and Case No. 281/2019 – Real Estate, ruling of the Dubai Court of Cassation of 25 December 2019.
[160] See, e.g., Case No. 29/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020; and Case No. 34/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020.
[161] See, e.g., see Case No. 36/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020.
[162] See Case No. 400/2019 – Commercial, ruling of the Dubai Court of Cassation of 27 October 2019.
[163] See, e.g., Case No. 29/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020; and Case No. 34/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020.
[164] See, e.g., Case No. 247/2020 – Real Estate, ruling of the Dubai Court of Cassation of 13 October 2020.

> "Decree-Law No. 10 of 2017 added a new section to the Civil Procedures Law related to the use of remote communication technology in civil procedures, with the aim of facilitating litigation procedures, as it allowed for the conduct of the trial to take place remotely, so that the litigants would attend and plead the case, express their defence and take evidence procedures in it. The deliberation of judges, the issuance of judgments, their implementation and appeals against them is done remotely by using the means of audio-visual communication and modern electronic technologies, in a manner that does not require the personal presence of the litigants before the court in order to facilitate the procedures of litigation and to achieve with it the principle of confrontation between the litigants in a way that guarantees allowing them to present their defence aspects in the lawsuit remotely; and that the new Arbitration Law No. 6 of 2018 came in line with the provisions of this Chapter Six of the Civil Procedure Code, as stipulated in Articles 28 and 33 of the permissibility of holding arbitration sessions with the parties to the dispute and deliberating the ruling between the arbitrators through means of communication and modern electronic technologies and the unnecessary presence of litigants in person." [165]

Signing of award. Recent case law precedent[166] confirms the public policy nature of the signature requirement and requires signature of both the reasoning and dispositive parts of the award in the same way and manner as used to be the case under former Article 212(5) CPC.[167] In doing so, the UAE Courts have acknowledged that in the event that the reasoning and the dispositive parts of the award overlap on one and the same page of the award, it is sufficient to sign that page of the award in addition to the final page provided that the dispositive part of the award extends beyond the overlapping page:

> "It is also established by the case law precedent of this Court that the arbitrator's signature is a form and content requirement that should be included in the award, given that the signature is the only evidence affirming that the award lawfully exists. If the award is not signed by the arbitrator, no one may attribute the award to the arbitrator. For that purpose, the arbitral award means the reasoning and the dispositive parts of the award. The arbitrator should sign both the reasoning and the dispositive part of the award. Otherwise, the award will be invalid. This excludes the case in which the reasoning of the award, or part thereof, is connected to the page which contains the dispositive part of the award and which is signed by the arbitrator. The legal effect of such a signature is that it extends to the reasoning of the award in a way that satisfies the legislator's intention with respect to the signature of the award. However, if the reasoning is contained in a page that are all separated from the dispositive part of the award, all pages shall be signed by the arbitrator in addition to the final page that contains the dispositive part of the award. Otherwise, the award will be invalid. Such invalidity is of public order, to be raised of the courts' own motion."[168]

Further, the UAE Courts have denied any requirement to sign the cover page of an award provided that the data that typically feature on that page, such as the names and addresses of the parties and their representatives, the seat of the arbitration, the (institutional) rules applicable to the arbitration and the date of issuance, are also contained in the body of the award.[169]

Further form and content requirements of award. It has been found that failure to state an arbitrator's nationality in the text of the award pursuant to Article 41(5) FAL will not be a valid ground for setting aside or nullifying the award.[170] An accurate summary of the underlying arbitration agreement has been found sufficient for inclusion in the arbitral award to satisfy Article 41(5) FAL.[171]

Time-limit for award. In application of Article 42(1) FAL, which empowers the parties to agree on a time-limit for rendering the award, the UAE Courts have found that to the extent that there are no specific

[165] See Case No. 36/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020.
[166] See Case No. 1083/2019 - *Ali & Sons Marine Engineering Factory LLC v E-Marine FZC*, ruling of the Dubai Court of Cassation of 14 June 2020.
[167] See G. Blanke, *Commentary on the UAE Arbitration Chapter*, Thomson Reuters/Sweet&Maxwell, 2017, at II-108.
[168] See Case No. 1083/2019 - *Ali & Sons Marine Engineering Factory LLC v E-Marine FZC*, ruling of the Dubai Court of Cassation of 14 June 2020.
[169] See, e.g., Case No. 51/2020 – Real Estate, ruling of the Dubai Court of Cassation of 14 May 2020.
[170] See, e.g., Case No. 29/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020; and Case No. 34/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020.
[171] See Case No. 933/2018, ruling of the Dubai Court of Cassation of 10 February 2019; and Case No. 1059/2018, ruling of the Dubai Court of Cassation of 17 March 2019.

provisions in the selected arbitration rules, such as the DIFC-LCIA Rules, that govern the time-limit for rendering an award, no such time-limits find application to the arbitration.[172] Further, a party who is responsible for a delay in the arbitration process that prompts the expiry of the time-limit may not raise the expiry of that time-limit as a ground for challenge on the basis that a party must not benefit from its own wrongdoing.[173]

Notification of award. According to recent case law precedent, notification of the award under Article 44 FAL needs to be effected on the parties in person as opposed to their legal representative[174] on the basis that pursuant to Article 45(1) FAL, an arbitral award terminates an arbitration process and as such, the notification provisions that apply over the course of that process do not extend to the notification of the award.[175] The burden to prove that the award has not been received on time rests upon the aggrieved party.[176]

Costs. In a ruling of 28 April 2019,[177] the Dubai Court of Cassation confirmed a restrictive interpretation of Article 46(1) FAL to exclude a tribunal's power to award party costs:

> "The text […] the meaning of th[e] text [of the first paragraph of Article (46) of Law No. (6) of 2018 regarding arbitration] is that the arbitration expenses assessed by the arbitral tribunal […] are the fees and expenses incurred by any member of the arbitral tribunal in order to implement its duties and the expenses of appointing experts by the tribunal. Therefore, the costs that the parties pay to the legal representatives who represent them in the arbitration procedures or prepare and attend the lawsuit and advise the parties before the start of the arbitration procedures do not fall within these legal expenses. And in the absence of a legal text or explicit wording in the arbitral clause to that effect and given that the arbitration deed concluded between the two parties to the lawsuit did not include an agreement that one of the parties would bear the legal expenses, so it is not obligatory […] and the agreement concluded between the two parties did not include an agreement on fees, expenses and legal costs […]."[178]

More recent case law precedent suggests that legal or party representatives are unable to confer upon a tribunal a power to award counsel fees unless having been specifically authorised to do so by the original rightsholder (e.g., by a special power of attorney in accordance with Article 58(2) CPC) on the basis that the entitlement to such fees arises from the contractual engagement between the legal or party representative and the original rightsholder, which in turn is distinct and as such separate from the contract subject to and of the dispute in arbitration.[179] Further, case law precedent of the UAE Courts confirms that in derogation from the limited scope of recoverable costs under the DIAC Rules, parties are free to confer an express power on the tribunal to award party costs.[180]

[172] See, e.g., Case No. 51/2020 – Real Estate, ruling of the Dubai Court of Cassation of 14 May 2020); to the extent that there are, such as Article 36 of the DIAC Rules, they do (see Case No. 764/2019 – Commercial, ruling of the Dubai Court of Cassation of 16 October 2019; and Case No. 1003/2019 – Commercial, ruling of the Dubai Court of Cassation of 1 January 2020.
[173] See Case No. 36/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020.
[174] See Case No. 1201/2018 – Commercial, ruling of the Dubai Court of Cassation of 26 May 2019; and Case No. 242/2019 - Commercial, ruling of the Dubai Court of Cassation of 26 May 2019.
[175] See Case No. 1201/2018 – Commercial, ruling of the Dubai Court of Cassation of 26 May 2019.
[176] See Case No. 33/2020 – Commercial, ruling of the Dubai Court of Cassation of 4 October 2020.
[177] Case No. 1029/2018 – Commercial, ruling of the Dubai Court of Cassation of 28 April 2019.
[178] See Case No. 1029/2018 – Commercial, ruling of the Dubai Court of Cassation of 28 April 2019.
[179] See Case No. 990/2019 – Commercial, ruling of the Dubai Court of Cassation of 5 January 2020.
[180] See, e.g., Case No. 205/2019 – Commercial, ruling of the Dubai Court of Cassation of 23 June 2019.

Challenge of awards. The UAE Courts have found that the grounds for challenge under the FAL are strictly limited to those listed at Article 53 FAL[181] and must be interpreted narrowly[182] and as such must not be expanded by analogical reasoning.[183] In their supervisory role under Article 53 FAL, the courts are limited to an examination of the form and content requirements of the subject award, its compliance with public policy, compliance of the arbitration process with due process (the *"basic principles of litigation"*)[184] and the absence of any conflict with a previous court ruling involving the same parties.[185] The burden to prove that the subject award is affected by one of the listed grounds rests with the challenging party;[186] according to more recent case law precedent, there is a presumption in favour of compliance unless proven otherwise[187].

All the grounds listed at Article 53(1) FAL are *procedural* in nature, go either to the existence or form of the underlying arbitration agreement or the conduct of the arbitration process[188] and do not allow the re-opening of the substance of the arbitrator's decision-making.[189] Accordingly, only procedural errors and not errors of assessment can form a successful ground for nullification.[190]

Public policy. The UAE Courts have found that the public policy concept under Article 53(2)(b) FAL encapsulates the definition of UAE public policy within the meaning of Article 3 of the UAE Civil Transactions Code:[191]

> "although [the Law] does not specify what is meant by public order, but it is agreed that it includes the rules that aim to achieve the supreme interest of the country, whether in terms of political, social

[181] See, e.g., Case No. 1029/2018 – Commercial, ruling of the Dubai Court of Cassation of 28 April 2019; Case No. 205/2019 – Commercial, ruling of the Dubai Court of Cassation of 23 June 2019; Case No. 217/2019 – Commercial, ruling of the Dubai Court of Cassation of 19 May 2019; Case No. 231/2019 – Real Estate, ruling of the Dubai Court of Cassation of 4 December 2019; Case No. 236/2019 – Real Estate, ruling of the Dubai Court of Cassation of 11 December 2019; Case No. 1003/2019 – Commercial, ruling of the Dubai Court of Cassation of 1 January 2020; Case No. 1013/2019 – Commercial, ruling of the Dubai Court of Cassation of 19 January 2020; Case No. 36/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020; Case No. 168/2020 – Commercial, ruling of the Dubai Court of Cassation of 18 March 2020; and Case No. 198/2020 – Commercial, ruling of the Dubai Court of Cassation of 13 May 2020; Case No. 412/2020 – Commercial, ruling of the Dubai Court of Cassation of 1 July 2020; Case No. 414/2020 – Commercial, ruling of the Dubai Court of Cassation of 1 July 2020; Case No. 516/2020 – Commercial, ruling of the Dubai Court of Cassation of 15 July 2020; Case No. 607/2020 – Commercial, ruling of the Dubai Court of Cassation of 11 October 2020; Case No. 735/2020 – Commercial, ruling of the Dubai Court of Cassation of 4 October 2020; and Case No. 807/2020 – Commercial, ruling of the Dubai Court of Cassation of 25 October 2020.

[182] See Case No. 372/2019 – Commercial, ruling of the Dubai Court of Cassation of 7 July 2019; Case No. 1003/2019 - Commercial, ruling of the Dubai Court of Cassation of 19 January 2020; Case No. 1013/2019, ruling of the Dubai Court of Cassation of 19 January 2020; Case No. 1078/2019 - Commercial, ruling of the Dubai Court of Cassation of 22 January 2020; Case No. 1118/2019 – Commercial, Dubai Court of Cassation of 19 February 2020.

[183] See Case No. 205/2019 – Commercial, ruling of the Dubai Court of Cassation of 23 June 2019; Case No. 29/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020; Case No. 34/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020; Case No. 412/2020 – Commercial, ruling of the Dubai Court of Cassation of 1 July 2020; and Case No. 414/2020 – Commercial, ruling of the Dubai Court of Cassation of 1 July 2020.

[184] See, e.g., Case No. 29/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020; Case No. 34/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020; Case No. 35/2020, ruling of the Dubai Court of Appeal of 30 December 2020; Case No. 247/2020 – Real Estate, ruling of the Dubai Court of Cassation of 13 October 2020; and Case No. 492/2020 – Commercial, ruling of the Dubai Court of Cassation of 15 July 2020.

[185] See Case No. 22/2019 – Real Estate, ruling of the Dubai Court of Cassation of 27 March 2019; Case No. 199/2020 – Commercial, ruling of the Dubai Court of Cassation of 20 May 2020; and Case No. 205/2020 – Commercial, ruling of the Dubai Court of Cassation of 20 May 2020.

[186] See, e.g., Case No. 236/2019 – Real Estate, ruling of the Dubai Court of Cassation of 11 December 2019; Case No. 1003/2019 – Commercial, ruling of the Dubai Court of Cassation of 1 January 2020; Case No. 1013/2019 – Commercial, ruling of the Dubai Court of Cassation of 19 January 2020; and Case No. 168/2020 – Commercial, ruling of the Dubai Court of Cassation of 18 March 2020.

[187] See Case No. 1003/2019 – Commercial, ruling of the Dubai Court of Cassation of 1 January 2020; Case No. 1013/2019 – Commercial, ruling of the Dubai Court of Cassation of 19 January 2020; and Case No. 735/2020 – Commercial, ruling of the Dubai Court of Cassation of 4 October 2020.

[188] See, e.g., Case No. 205/2019 – Commercial, ruling of the Dubai Court of Cassation of 23 June 2019; Case No. 29/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020; Case No. 34/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020; Case No. 36/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020; Case No. 412/2020 – Commercial, ruling of the Dubai Court of Cassation of 1 July 2020; Case No. 607/2020 – Commercial, ruling of the Dubai Court of Cassation of 11 October 2020; and Case No. 870/2020 – Commercial, ruling of the Dubai Court of Cassation of 25 November 2020.

[189] See, e.g., Case No. 492/2020 – Commercial, ruling of the Dubai Court of Cassation of 15 July 2020; and Case No. 246/2020 – Civil, ruling of the Dubai Court of Cassation of 24 September 2020.

[190] See, e.g., Case No. 372/2019 – Commercial, ruling of the Dubai Court of Cassation of 7 July 2019; Case No. 446/2019 – Commercial, ruling of the Dubai Court of Cassation of 21 July 2019; Case No. 909/2019 – Commercial, ruling of the Dubai Court of Cassation of 29 January 2020; and Case No. 144/2020 – Commercial, ruling of the Dubai Court of Cassation of 18 March 2020.

[191] See, e.g., Case No. 1003/2019 – Commercial, ruling of the Dubai Court of Cassation of 1 January 2020.

> or economic and related to the natural, material and moral condition of an organized society in it; this interest takes precedence over the interests of individuals, and its idea is based on the interest of the whole group, 'with what it leads', the idea of public order affecting the entity of the state or relating to a basic and general interest of the group. This and what I consider public order is stipulated in Article (3) of the Federal Civil Transactions Law promulgated by Law No. (5) of 1985 amended by Federal Law No. (1) of 1987. Among them are those related to personal status, freedom of trade and the circulation of wealth and other rules and foundations upon which society is based that do not violate the peremptory provisions and the basic principles of Islamic law."[192]

Given its public policy nature, failure to comply with the signature requirement prompts the absolute invalidity of the award, i.e., renders the award null and void *ab initio*[193] and as such constitutes a valid ground for nullification. That said, courts are required to give priority to the procedural validity of the arbitration process over reasons for annulment of an award in accordance with Article 54(6) FAL, including where the ground for annulment is one of violation of public policy, and allow the rectification of any clerical shortcomings within the meaning of Article 54(6) FAL:

> "under the new Arbitration Law [i.e., the FAL], the legislator reduced the causes of invalidity by stating that the requirements of procedural action should supersede the grounds of its invalidity or deficiency, considering that the objective of the action is to serve the right. For such purpose, the legislator provided for Art. 54(6) [FAL], allowing the tribunal – upon request from a party – to correct an invalidity in the form of the award, which in turn complies with the general principles of procedure according to which no invalidity may be adjudicated if the instance of invalidity is rectified […]."[194]

The termination of agreements relating to the sale and purchase of land (short of matters of registration) do not qualify as of public policy and are as such capable of being arbitrated.[195] Conversely, matters of registration with respect to off-plan lands or real estate do and therefore cannot be arbitrated.[196] The UAE Courts have also refused to nullify an award of contractually-agreed compound interest, which, according to the courts, does not constitute *riba* or usurious interest and falls within the arbitrator's discretionary powers to assess compensation, which in turn does not constitute a valid ground for nullification:

> "[I]t is well established that the contractually-agreed [compound] interest that is payable to the creditor upon the debtor's delay in paying the debt despite its due date does not qualify as riba, but rather is a form of compensation for the harm suffered by the creditor as a result of the debtor's delay in paying the debt despite its due date, and prevents the creditor from benefiting from it, which is a presumed damage that does not admit proof to the contrary and the creditor must be compensated for it in exchange for a debtor's fault, just for the delay in payment by itself, it does not change its nature as compensation and its legitimacy in determining it in a certain percentage as agreed upon by the two parties at the conclusion of the contract. The legislator did not intend to criminalize dealing with interest in civil and commercial transactions except between natural persons as explicitly stipulated in Article 409 of the Penal Code. […] As for the claim that the plaintiffs are not entitled to these benefits, it is in fact a controversy over the arbitrator's discretionary authority to assess compensation that does not fit a ground of nullity of the arbitration award, and then the court decides to reject this reason […]."[197]

More recently, the UAE Courts have confirmed that contracting parties cannot contract out of requirements of public policy.[198] As the UAE Courts stated in a ruling of 19 May 2019:

> "[I]t is decided that the legal rules that are considered public order are rules intended to achieve a general political, social or economic interest related to the higher society system and override the

[192] See Case No. 22/2019 – Real Estate, ruling of the Dubai Court of Cassation of 27 March 2019.
[193] See Case No. 1083/2019 - *Ali & Sons Marine Engineering Factory LLC v E-Marine FZC*, ruling of the Dubai Court of Cassation of 14 June 2020.
[194] *Id*.
[195] See, e.g., Case No. 231/2019 – Real Estate, ruling of the Dubai Court of Cassation of 4 December 2019; and Case No. 84/2020 – Real Estate, ruling of the Dubai Court of Cassation of 21 May 2020.
[196] See Case No. 5/2020 – Real Estate, ruling of the Dubai Court of Cassation of 19 March 2020; and Case No. 84/2020 – Real Estate, ruling of the Dubai Court of Cassation of 21 May 2020.
[197] See Case No. 217/2019 – Commercial, ruling of the Dubai Court of Cassation of 19 May 2019.
[198] See, e.g., Case No. 1003/2019 – Commercial, ruling of the Dubai Court of Cassation of 1 January 2020.

> interest of individuals, so that all individuals must take into account and realize this interest and they may not oppose it by agreements among themselves even if they have concluded these agreements for their own individual interests."[199]

Survival of arbitration agreement. Contrary to the position that prevailed under the former UAE Arbitration Chapter,[200] the UAE Courts have confirmed that the nullification or annulment of the award will not affect the underlying arbitration agreement, which in turn survives a successful challenge of the subject award, unless the ground for annulment is the absence, extinction, nullity or lack of enforceability of the arbitration agreement itself.[201] This will be the case in circumstances where the parties to a DIAC arbitration fail to defray the costs of the arbitration within the meaning of the DIAC Rules, resulting in the closure of the DIAC reference.[202]

New York Convention. Importantly, applying Article 88 of Cabinet Decision No. 57 of 2018[203], the UAE Courts have confirmed that by adoption of Federal Decree No. 43 of 2006, the provisions of the New York Convention form part of the domestic laws of the UAE and as a result, the courts are obliged to enforce foreign awards in accordance with the provisions of the New York Convention.[204] Enforcement of foreign awards may only be refused on one of the grounds listed under Article V. of the Convention.[205]

1.3 Case law precedent of the JT

The Dubai-DIFC Joint Judicial Tribunal (the "JT") was established by Decree of the Ruler of Dubai[206] to deal with conflicts of jurisdiction between the onshore Dubai and the offshore Dubai International Financial Centre ("DIFC") Courts. Generally speaking, the JT's competence is confined to situations of genuine jurisdictional conflict, that is where both the onshore and offshore courts have been seized simultaneously in related proceedings or where both courts have declined jurisdiction on the same or related subject-matter. In an arbitral context more specifically, a qualifying conflict of jurisdiction typically arises in circumstances where an award creditor seeks to enforce a domestic (whether on- or offshore) award before the DIFC Courts pending an action for nullification of the same award initiated by the award debtor before the onshore Dubai Courts. Some of these cases have given rise to the operation of the DIFC Courts as a conduit jurisdiction for the recognition and enforcement of onshore non-DIFC awards for onward execution against the award debtor's assets offshore by virtue of the area of free movement of judicial instruments, including ratified awards, established by Article 7 of the Judicial Authority Law (the "JAL").[207]

In a ruling of 11 December 2019,[208] the JT was required to deal with the conflicting jurisdiction between the onshore Dubai and the offshore DIFC Courts for nullification and enforcement of a domestic DIFC-award rendered under the DIFC Arbitration Law. In doing so, the JT essentially confirmed that the DIFC Courts were properly competent to hear actions for nullification of awards rendered under the DIFC Arbitration Law. Unwittingly, the JT also confirmed the DIFC Courts' role as a conduit for the enforcement of DIFC awards for onward execution against non-DIFC assets of award debtors based in Abu Dhabi. Interestingly, albeit that the present case appears straightforward on its face, dealing with the nullification and enforcement

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[199] See Case No. 217/2019 – Commercial, ruling of the Dubai Court of Cassation of 19 May 2019.
[200] See G. Blanke, *Commentary on the UAE Arbitration Chapter*, Thomson Reuters/Sweet&Maxwell, 2017, at II-147.
[201] See Case No. 134/2018 – Commercial, ruling of the Dubai Court of Cassation of 29 July 2018; and Case No. 215/2019 – Commercial, ruling of the Dubai Court of Cassation of 7 July 2019.
[202] See Case No. 215/2019 – Commercial, ruling of the Dubai Court of Cassation of 7 July 2019; and Case No. 791/2019 – Commercial, ruling of the Dubai Court of Cassation of 19 January 2020.
[203] In relation to the Executive Regulation of the UAE Civil Procedures Law, 9 December 2018.
[204] See Case No. 1016/2020 – Commercial, ruling of the Dubai Court of Cassation of 27 December 2020.
[205] *Id*.
[206] Decree No. (19) of 2016 forming the Judicial Committee of the Dubai Court and the DIFC Courts, dated 9 June 2016.
[207] Dubai Law No. 12 of 2004, as amended by Dubai Law No. 16 of 2011.
[208] See Cassation No. 8/2019 (JT) – *Al Taena: AF Construction Company LLC (formerly Al Futtaim Carillion – Abu Dhabi LLC v. Power Transmission Gulf* https://www.difccourts.ae/wp-content/uploads/2019/12/Cassation-No-8-2019-AL-TAENA-AF-CONSTRUCTION-COMPANY-LLC-v-POWER-TRANSMISSION-GULF.pdf). This section is based on G. Blanke, "The Judicial Tribunal confirms DIFC Courts' proper jurisdiction for challenge of awards under the DIFC Arbitration Law and the role of the DIFC Courts as a conduit", Kluwer Arbitration Blog, 13 February 2020, available online at http://arbitrationblog.kluwerarbitration.com/2020/02/13/the-judicial-tribunal-confirms-difc-courts-proper-jurisdiction-for-challenge-of-awards-under-the-difc-arbitration-law-and-the-role-of-the-difc-courts-as-a-conduit/.

of a DIFC Award through the DIFC Courts, it is evident that given the registration of both Parties in onshore Abu Dhabi, this is, more likely than not, a case that will ultimately require *execution* of the award, once ratified by the DIFC Courts, against assets of the award debtor in onshore Abu Dhabi, and in this sense require the DIFC Courts to act as a conduit. To say the least, no mention is made in the JT's ruling of the presence of any of the award debtor's assets in the DIFC.[209]

By way of background, the Appellant, Al Taena, a subcontractor with registered offices in mainland Abu Dhabi, entered into a subcontract agreement with the respondent, Power Transmission Gulf, equally registered in mainland Abu Dhabi, for the supply, manufacture, installation, operation and testing of mechanical and electrical works and the plumbing for New York University in Abu Dhabi (the "Subcontract"). The Subcontract contained an arbitration clause providing for any disputes between the Parties to be referred to arbitration under the Arbitration Regulations of the Abu Dhabi Commercial Conciliation and Arbitration Centre (the "ADCCAC"), to be held in Abu Dhabi before a sole arbitrator (the "Arbitration Clause"). The Arbitration Clause was subsequently amended, shifting the arbitral forum from ADCCAC to the DIFC-London Court of International Arbitration (the "DIFC-LCIA") and providing for a three-member panel to conduct any arbitration under the Rules of Arbitration of the DIFC-LCIA (the "DIFC-LCIA Rules") and the DIFC Arbitration Law (the "Arbitration Agreement"). In addition, Clause 10 of the Subcontract provided for the exclusive jurisdiction of the DIFC Courts in relation to any dispute arising between the Parties with respect to the Arbitration Agreement.

Subsequently, a dispute arose between the Parties and was referred to DIFC-LCIA arbitration under the DIFC Arbitration Law.[210] The arbitral proceedings were conducted in Dubai Marina, that is onshore, i.e., outside the DIFC. On 15 March 2019, the Tribunal rendered an award in favour of the respondent. In further course, the respondent in its capacity as award creditor filed for recognition and enforcement before DIFCCFI.[211] Around the same time, the Appellant in its capacity as award debtor applied for the nullification of the award to the onshore Dubai Courts[212] on the basis of the purported invalidity of the award and the purported exclusive jurisdiction of the Dubai Courts given the fact that the arbitral proceedings had been conducted in mainland Dubai and hence outside the DIFC.

Against this background, the JT held as follows:

- To start, the JT cited in relevant part Article 5(1) and (2) of the DIFC Courts Law[213] in order to conclude:

> "Although the DIFC and the DIFC Arbitration Centre - London International Arbitration Tribunal are separate entities, the DIFC Arbitration Centre is an established institution in the DIFC, and therefore pursuant to Article 5, paragraph 1 / a above, the DIFC Court shall be responsible for monitoring the aforementioned arbitration award and not the Dubai Court."[214]

  It is somewhat difficult to follow this type of reasoning. The DIFCCFI's competence to hear actions for recognition and enforcement of DIFC awards stems from Article 42(1) of the DIFC Arbitration Law, which provides that *"[a]n arbitral award, irrespective of the State or jurisdiction in which it was made, shall be recognised as binding within the DIFC and, upon application in writing to the DIFC Court, shall be enforced"*. Further, the DIFC Courts' powers conferred by the DIFC Arbitration Law originate in Article 5(1)(E) of the DIFC Court Law, which provides for the *"exclusive jurisdiction"* of the DIFCCFI *"to hear and determine […] any [a]pplication or action that the courts have the power to consider under the Centre's laws and regulations"*, one of those laws being the DIFC Arbitration Law. Contrary to the JT's proposition, the DIFCCFI's competence in the present circumstances does not result from Article 5(1)(A), which confers exclusive

[209] Despite the passing reference to the purported *execution* of the subject award by the DIFC Courts, see the ruling in Cassation No. 8/2019 (JT), at para. 4.
[210] See Arbitration Case No. 16068 DL.
[211] See DIFCCFI Case No. ARB-009-2019.
[212] See Petition No. 13/2019.
[213] See DIFC Law No. 10/2004.
[214] See the ruling in Cassation No. 8/2019 (JT), at para. 9.

jurisdiction upon the DIFCCFI for any *"[c]ivil or commercial applications and claims to which the Centre or any of the Centre's bodies, the Centre's institutions or the Centre's licensed institutions are a party"* (no such bodies or institutions being involved in the present proceedings).

- The JT also emphasised the apparent agreement between the Parties to arbitration in the terms set out in the Arbitration Agreement, including in particular the DIFC Courts' competence to hear actions for recognition and nullification of awards under the DIFC Arbitration Law.[215] This, no doubt, is a correct assessment of the position under the DIFC Arbitration Law, including in particular Article 42(1) in the terms set out above.

- The JT further confirmed that according to Article 16(2) of the DIFC-LCIA Rules, a DIFC-LCIA tribunal is empowered to hold meetings and hearings outside the legal place or the seat of the arbitration: A resultant award would still be considered issued by the DIFC-LCIA.[216] This proposition is correct in principle, but would benefit from the clarification that Article 38(3) of the DIFC Arbitration Law equally confirms that *"[t]he award shall be deemed to have been made at the Seat of the Arbitration"* and according to Article 27(2) of the DIFC Arbitration Law, *"the Arbitral Tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties […]."*

- That said, the JT also made reference to the *"general jurisdiction"* of the onshore Dubai Courts.[217] It is not clear what this general jurisdiction is. Given that there is no judicial hierarchy between the onshore Dubai and the offshore DIFC Courts, the two courts are of equal status and are as such empowered to determine the limits of their own jurisdiction, neither of the having a "general" jurisdiction that trumps the jurisdiction of the respectively other.

In the light of the foregoing, the JT, correctly in our view, concluded in favour of the DIFC Courts' jurisdiction. For the avoidance of doubt, even without the provision at Clause 10 of the Subcontract, the DIFC Courts are competent to hear actions for nullification in their curial capacity in the terms of Article 41 of the DIFC Arbitration Law. To the extent that parties contract into the DIFC Arbitration Law, the DIFC Courts have competence to exert such curial functions.

On a further note, the JT's ruling in *Al Taena v. Power Transmission Gulf* raises the question of the extent to which the DIFC Courts are competent to serve as a conduit for the enforcement of awards (whether on- or offshore) for onward execution outside the DIFC, here in mainland Abu Dhabi. This could be facilitated by the operation of Article 7 JAL, which establishes a system of mutual recognition of DIFC Court orders for enforcement of on- and offshore awards before onshore Dubai Courts, without a review on the merits. A mainland Dubai Court order recognizing the DIFC Court order for recognition and enforcement would in further course be subject to recognition by the Abu Dhabi onshore courts under Article 11 of the UAE Federal Law No. 11/1973.[218]

In the alternative, the DIFC Court order might benefit directly from the terms of UAE Federal Law No. 11/1973, the DIFC Courts qualifying as a court of the Federation. In a further alternative, the DIFC award itself might be enforceable in the terms of Article 13 of UAE Federal Law No. 11/1973,[219] there being no need for the more cumbersome enforcement process via the Dubai onshore courts or even the DIFCCFI.

[215] *Id.*, at para. 8.
[216] *Id.*, at para. 10.
[217] *Id.*, at para. 10.
[218] Concerning the Organization of Judicial Relationships Amongst Emirates Members in the Federation, issued 25 July 1973.
[219] Which provides verbatim as follows: *"The decisions of the arbitrators issued in one of the emirates shall be executable in any other emirate member of the federation. The juridical body being demanded to carry out the execution cannot reinvestigate the same incident concerning which the decision of the arbitrators was issued."*

2. Developments in the DIFC[220]

The DIFC has seen a number of positive developments in 2020, both at the level of case law precedent and in terms of its regulatory framework, giving rise in particular to the launch of the 2021 DIFC-LCIA Rules.

2.1 Case law developments

The DIFCCFI has issued at least five arbitration-relevant rulings in 2021 that deserve specific mention.

2.1.1 Loralia Group LLC v. Landen Saudi Company[221]

In a ruling published in 2020[222], the DIFCCFI contemplated the application of UAE public policy within the meaning of Articles 41(2)(b)(iii) and 44(1)(b)(vii) of the DIFC Arbitration Law. These Articles encapsulate the public policy exception as a ground for challenging or refusing to enforce an arbitral award rendered in the DIFC. More specifically, Article 41(2)(b)(iii) empowers the DIFC Courts to nullify or set aside an award that *"is in conflict with the public policy of the UAE"* whereas Article 44(1)(b)(vii) provides a corresponding tool to the DIFC Courts to refuse enforcement for violation of that same public policy. Importantly, the public policy concerned here is that of the UAE and as such suggests that the public policy applicable in the DIFC is identical to the public policy applicable onshore. Albeit that the ruling under discussion appears to confirm as much, it suggests that even though UAE public policy is identical as a concept and in content onshore and offshore, it might *apply differently* in the DIFC.

By way of background, in the main action, the DIFCCFI was asked to deal with a Part 8 application for the setting aside of a DIFC award rendered under the DIFC-LCIA Rules in favour of Landen Saudi Company ("LSC"), the respondent. LSC was awarded US$ 7,356,016.22 plus costs and post-award interest for breach by Loralia Group LLC ("Loralia"), the applicant, of a distribution agreement in relation to the promotion and sale of the applicant's products in the Kingdom of Saudi Arabia. Importantly, the costs element of the award included an award of the respondent's legal fees in an amount of US$ 692,002.66, US$ 514,921.11 of which were calculated on the basis of 7% of the amount awarded to the respondent in the terms of the award and as such, according to the applicant, constituted a contingency fee in violation of UAE public policy, both under Article 41(2)(b)(iii) and under Article 44(1)(b)(vii) of the DIFC Arbitration Law, the latter in response to the LSC's cross-application for enforcement of the award.

In Loralia's submission, public policy within the meaning of these Articles was to be construed as federal UAE public policy, a public policy that was unitary and indivisible in its application throughout the UAE. According to Loralia, there was more specifically a UAE public policy against contingency fees, derived from and supported by the following sources, both onshore and offshore:

- Article 31 of Federal Law No. 23/1991 regarding the Regulation of the Legal Profession ("Law No. 23"), according to which *"it shall not be permitted for a lawyer to buy all of part of the rights which are in dispute, nor to agree to take a part thereof in respect of fees."*;

- Ministerial Resolution No. 666/2015 on the Code of Ethics and Professional Conduct of the Legal Procession in the UAE ("Resolution No. 666"), which ensured that Law No. 23 applied to all lawyers providing legal services in the UAE, including those acting in the DIFC and those involved in arbitration;

[220] For some background on free zone arbitration in the DIFC, see G. Blanke, "Free Zone Arbitration in the United Arab Emirates: DIFC v. ADGM (Part I)", 35(5) J. of Int. Arb. (2018), pp. 541-573.
[221] This section is based on G. Blanke, "UAE public policy at the crossroads between onshore and offshore: a variable geometry of sorts", Practical Law Arbitration Blog, Thomson Reuters, 18 June 2020, available online at http:// arbitrationblog.practicallaw.com/uae-public-policy-at-the-crossroads-between-onshore-and-offshore-a-variable-geometry-of-sorts/. For a contextual analysis, taking account of an inchoate differentiation of the UAE public policy concept onshore and offshore, see G. Blanke, "UAE Public Policy in the DIFC: Towards a Differentiated Approach", Westlaw Middle East, Thomson Reuters, May 2020.
[222] See *Loralia Group LLC v. Landen Saudi Company* [2018] DIFC ARB 004.

- Article 7(c) of the Draft Charter for the Conduct of Advocates and Legal Consultants in the Emirate of Dubai, which stated that fees *"must not be a share in kind of the disputed property rights."*;

- Article 9.3 of the DIFC Courts' Code of Best Legal Professional Practice (the "DIFC Courts' Best Practice Code"), according to which *"[a] Lawyer may not receive a contingency fee in respect of any litigious or contentious action."*; and

- Article 8(2) of the Mandatory Code of Conduct for Legal Practitioners in the DIFC Courts (the "DIFC Courts' Mandatory COC"), according to which *"[p]ractitioners shall not […] undertake work in a manner which improperly increases the fees payable to them."* For the avoidance of doubt, LSC's lawyers in the arbitration being registered with the DIFC Courts and representing a party in a DIFC-seated arbitration under the DIFC-LCIA Rules, Loralia submitted that the disputed contingency fee arrangement fell within the scope of Article 8(2), DIFC Courts' Mandatory COC.

In response, LSC essentially contended for a transnational approach to UAE public policy, which did not prohibit contingency fee arrangements, failing which LSC invited the Court to differentiate between DIFC and onshore Dubai public policy, advocating in favour of a transnational approach to public policy in the DIFC, which – according to LSC - was allowed to operate differently from onshore Dubai.

Against this background, H.E. Justice Shamlan Al Sawaheli, handing down the ruling of the DIFCCFI, concurred with the submission that contingency fees formed part of onshore UAE public policy, placing reliance in particular on Law No. 23 read together with Resolution No. 666. According to the Justice, the prohibition of contingency fees applied both to litigation and arbitration. That said, the Justice ultimately concluded against the linear application to the DIFC of the prohibition on contingency fees that prevailed in the UAE and introduced a variable geometry of sorts in the application of UAE public policy onshore/offshore.

More specifically, in the Justice's reasoning, the structured body of legal instruments with respect to lawyer conduct and remuneration applicable in the DIFC warranted a *differentiation* in the application of the UAE public policy against contingency fees in the DIFC and onshore Dubai. Focusing on the DIFC as the main area of concern, the Justice concluded that even though contingency fee arrangements applied to lawyers' fees might be illegal *per se* in onshore Dubai (on the basis of a plain reading of Article 31 of Law No. 23, combined with the various provisions of Resolution No. 666)[223], the legal instruments in place with respect to lawyers' fees in the DIFC warranted a more *nuanced* approach (the DIFC Courts' Mandatory COC not containing any express reference to contingency fees)[224], inviting in turn – in the Justice's words – a *"case-by-case scrutiny in the DIFC"*[225]. In the Justice's reasoning, the common point of reference to which considerations on the admissibility of contingency fee arrangements were anchored both onshore and offshore was the question as to whether they qualified as *"reasonable fees"*[226]. Whereas the onshore answer to this question might be categorically in the negative in that contingency fees were regarded as falling within the category of unreasonable legal fees by definition, in the Justice's view, not all contingency fees were unreasonable within the DIFC: To the extent that they were not, they would be regarded as being compliant with UAE public policy.[227] Whether or not a specific contingency fee arrangement qualified as reasonable and was hence compliant or not was a question left for determination by the merits judge or an arbitral tribunal on a case-by-case basis.

Applied to the facts at hand, Justice Shamlan found that the subject Tribunal had made sure in its award that the assessment of LSC lawyers' fees was reasonable and concurred with that assessment. On that basis, the Justice concluded that the award of costs, including the contingency fee arrangement, did not violate UAE public policy under Articles 41(2)(b)(iii) and 44(1)(b)(vii) of the DIFC Arbitration Law, rejected Loralia's

[223] Ruling in *Loralia v. Landen*, at para. 38.
[224] *Id*., at paras 39-40.
[225] *Id*., at para. 43.
[226] *Id*., at para. 43.
[227] *Id*., at para. 44.

application for setting aside and granted LSC's cross-application for recognition and enforcement of the award.

In long hand, Justice Shamlan held in the relevant part as follows:

> 38. I find that it is clear from the Applicant's arguments that UAE Federal Law prohibits contingency or success fees for legal representatives in onshore-Dubai, as regards both litigation and arbitration. This is established by Article 31 of Law No. 23, combined with the various provisions of Resolution [No.] 666. It is therefore possible that the application of these provisions contributes to a public policy against all contingency fees in onshore-Dubai and most other parts of the UAE such that an arbitral award which gives effect to a contingency fee arrangement may be set aside in full or in relevant part. However, I need only be concerned with UAE public policy as it correctly applies within the DIFC and thus I make no comment as to the content of UAE public policy as to contingency fees outside of the DIFC.
>
> 39. Therefore, I must move on to whether this alleged public policy against contingency fees can be said to apply within the DIFC. In speaking to this issue, it is important to note that Law No. 23, enacted well before the establishment of the DIFC, cannot be said to apply in full within the DIFC. The DIFC Courts have a separate system for registering legal practitioners and governing their conduct. The qualifications and requirements of lawyers under Law No. 23 are not compatible with the requirements to register before the DIFC Courts and vice versa. Furthermore, Resolution [No.] 666, which the Applicant contends applies the provisions of Law No. 23 to all lawyers within the UAE, is a Resolution and cannot have the effect of changing the law such that Law No. 23 will apply in full within the DIFC.
>
> 40. Even if Law No. 23 does not specifically apply within the DIFC, it is still possible that Article 31 of Law No. 23, combined with Resolution [No.] 666, support an overarching UAE public policy that outlaws contingency fees even within the DIFC. However, I find that the structure of legal instruments applicable within the DIFC as regards the conduct of lawyers supports the finding that while UAE public policy may outlaw contingency fees outside of the DIFC, it does not do so within the DIFC. Instead, the DIFC Courts' Mandatory COC does not mention contingency or success fees. While the DIFC Courts' Best Practice Code does specify that contingency fees were not considered best practice at the time of the guide's issuance in 2015, this guide does not have the status of law or mandatory regulation. It is of note that the DIFC Courts' Mandatory COC has been amended since the issuance of the DIFC Courts' Best Practice Code and no provisions regarding contingency fees have been added.
>
> 41. While the Applicant argues that Part C-8(2) of the DIFC Courts' Mandatory COC prohibits the improper increase of fees, which may cover contingency fee agreements, I find that this provision does not prohibit all contingency fees. The specific identification of contingency fee arrangements would clearly have been mentioned should the DIFC Courts' Mandatory COC have been intended to outlaw all such arrangements. Failure to mention contingency fee arrangements implies that they are not de facto outlawed, however they may constitute a violation of Part C-8(2) if they improperly increase the fees payable.
>
> 42. It is not my place at this time to assess whether the contingency fee in question would fail scrutiny under Part C-8(2) of the DIFC Courts' Mandatory COC as this would constitute reopening the merits of the arbitral dispute. Violation of the DIFC Courts' Mandatory COC itself requires disciplinary action against the lawyer in question and would not necessarily require invalidation of a corresponding judgment or award. In any event, I can see from the Award that the Tribunal took care to assess whether the fees awarded were reasonable given the circumstances of the arbitral dispute as a whole and therefore there is no need to reinvestigate this matter.
>
> 43. Based on the legal instruments in place in the DIFC and in onshore-Dubai, contingency fees for legal representatives may be de facto illegal onshore. However, they merit more case-by-case scrutiny in the DIFC. They may not be considered "best practice" in the DIFC

> but this label cannot be sufficient to create and support a public policy against contingency fees within the DIFC. Instead, the public policy followed in all of the UAE towards ensuring that reasonable fees are granted to legal representatives applies with slight differences within the DIFC. Within the DIFC, unreasonable fee arrangements may include contingency fee arrangements but not all contingency fee arrangements are automatically invalid. Instead, judges and arbiters are required to assess whether a fee arrangement is reasonable and proper, and this requirement speaks to the overall public policy as regards legal fees.
>
> 44. In sum, unreasonable contingency fee arrangements are prohibited in the DIFC and may in fact violate the public policy of the UAE as it applies within the DIFC. In this case, I need not assess further whether the contingency fee arrangement was reasonable. Instead, I look to the Award itself, where the Arbitral Tribunal made sure to assess the reasonable nature of the fees awarded. I have no criticism of the Award in this regard. Thus, it is not required for me to determine whether or not there is a public policy against unreasonable fee agreements within the DIFC strong enough to merit setting aside part or all of an otherwise valid arbitral award. This is because the Award in question gives effect to reasonable fees in the assessment of the Arbitral Tribunal, an assessment I find no reason to reopen at this time.[228]

In the light of the forgoing, it is compelling to conclude that the Justice's ruling in *Loralia Group LLC v. Landen Saudi Company* lays the foundation stone for a variable geometry of UAE public policy onshore/offshore across the Emirates. This will allow the UAE's judicial free zones, including both the DIFC and the Abu Dhabi Global Market (ADGM), to develop their own application of binding concepts of UAE public policy without running the risk of violating the public policy parameters set by the courts for application in the wider Union. As a result, this will enable the informed *practical differentiation* of the application of the UAE public policy concept at the crossroads between onshore and offshore, which in turn, from a comparative law perspective, will facilitate the deeper systemic integration between the offshore common law and the onshore civil law legal systems. For all intents and purposes, the DIFCCFI's ruling in *Loralia* demonstrates integrational (judicial) forces at their best in full motion.

2.1.2 Lucinethlucineth v. Lutinalutina[229]

In this ruling,[230] the DIFCCFI declined to grant an extension of time to Lutina Telecom Limited ("Lutina"), a company registered in the DIFC, to enable it to apply, under Article 44(2) of the DIFC Arbitration Law read together with RDC[231] Part 43, for the setting aside of an Order for Recognition and Enforcement issued by the DIFC Courts with respect to a Final Award rendered in favour of Lucineth Universal Inc. ("Lucineth") under the Rules of Arbitration of the International Chamber of Commerce International Court of Arbitration (the "ICC Rules") in a Paris-seated arbitration. In the terms of the Final Award, Lutina was ordered to pay Lucineth in excess of USD 5 million for the sale and purchase of shares in a third-party telecommunications company ("Lurina") owned by Lucineth. The DIFCCFI's Order for Recognition and Enforcement was issued on 1 April 2019, and the 14-day time-limit accorded to Lutina as the award debtor to apply for setting aside expired, Lutina's application for an extension of time being made on 17 June 2019 and thus being two months out of time. Meanwhile, Lucineth, in its capacity as the award creditor, proceeded with execution of the Order for Recognition and Enforcement, securing in support an interim charging order over shares held by Lutina in a third-party company in accordance with Article 43 of the DIFC Law of Damages[232] read together with RDC 46.17, an order confirmed by the instant ruling. In the meantime, Lurina had gone into liquidation, reducing its share value to nil, and Lutina had commenced an action for nullification of the Final Award before the Paris Court of Appeal.

The DIFCCFI's reasons for rejecting Lutina's application for an extension of time were two-fold:

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[228] *Id*., at paras 38-44.
[229] *Lucinethlucineth v. Lutinalutina Telecom Group Ltd* [2019] DIFC ARB 005, Order with reasons of H.E. Justice Sir Jeremy Cooke.
[230] Published on the DIFC Court website portal in early 2020, hence reported on in this 2020 annual review only.
[231] Rules of the DIFC Courts.
[232] DIFC Law No. 7 of 2995, DIFC Law of Damages and Remedies.

- According to the Court, relying on the factors that require consideration for granting an extension of time for challenging an arbitral award in *Terna v. Al Shamshi,*[233] *"[c]ogent reasons are required for the extension of time and a distinction is drawn between inadvertent delay, incompetence or honest mistakes on the one hand and deliberate decisions on the other"* and *"[t]he length of the delay is to be judged against the yardstick of the prescribed period".*[234] In application to the facts of the case, the DIFCCFI concluded that delays caused by Lutina's counsel seeking clarification from the onshore Dubai Courts on the question of whether they were competent to hear an action for nullification on grounds of violation of UAE – as opposed to DIFC – public policy were completely unwarranted in circumstances where it was evident that the DIFC Courts had proper competence, Lutina being based in the DIFC and did, as such, not provide any good reason for an extension to be granted. [235]

- In addition, the DIFCCFI confirmed that Lutina's grounds for challenge of the Final Award were *"extremely weak".*[236] In doing so, the Court rejected Lutina's submission that

  (i) enforcement of the Final Award would be contrary to UAE public policy in circumstances where the outstanding payment for the shares in Lurina – given their loss of value – would result in unjust enrichment on part of Lucineth, the purpose and subject-matter of the share sale being vitiated and the outstanding payment being made without any consideration moving from Lucineth.[237] According to the DIFCCFI, Lutina's argument in favour of the application of UAE public policy had no prospect of success. To start, Lutina had failed to adduce any relevant case law precedent in support of the sole possible basis of a challenge of the DIFCCFI's Order for Recognition and Enforcement, which – according to the Court – was the UAE public policy defence under Article 44(1)(b)(vii) of the DIFC Arbitration Law, which in turn only applied in very limited circumstances.[238][239] The ordered payment having been outstanding since 2010, there was an obvious risk that the value of the shares might start fluctuating over time. In the DFICCFI's conclusion: *"There is no injustice in a party [here Lutina] being kept to its bargain and being required to pay a sum which it agreed to pay for the assets in question [i.e., the shares in Lurina], even if the value of those shares has diminished to zero. No question of unjust enrichment can arise. No question of disproportionate payment can arise. No question of lack of consideration can arise."*[240] According to the Court, there was equally no prospect of Lutina's arguments succeeding under French law, Lutina having relied upon a 2010 French Court of Cassation relating to disproportionate payments and Articles 1131[241] and 1303[242] of the French Civil Code in support.[243] As confirmed by French law evidence adduced before the Court: *"In the present case the whole arbitration case was about a contractual breach unrelated to Lurina's insolvency. Furthermore, it is apparent both that the debt has a cause and that the amount is due. In consequence, neither Article 1302 nor 1303 of the Civil Code applies, still less could the result of which the defendant [i.e., Lutina] complains achieve the status of a wrong that would be contrary to international public policy."*[244] With this in mind, the

[233] *Terna Bahrain Holding Company WI v. Al Shamshi* [2013] 1 All ER (Comm) 580, at paras 27-31.
[234] Ruling in *Lucinethlucineth v. Lutinalutina*, at para. 7.
[235] *Id*., at paras 8-9.
[236] *Id*., at para. 9.
[237] *Id*., at para. 11.
[238] *Id*., at para. 13: *"As articulated in earlier cases, the public policy defence can be applied only if the [a]rbitral award fundamentally offends the most basic and explicit principles of justice and fairness in the enforcing state or evidence shows intolerable ignorance or corruption on the part of the arbitral tribunal. Not every infringement of mandatory law amounts to a violation of public policy but without any such infringement it is hard to see how any question of public policy can arise unless the Award is contrary to the essential morality of the state in question or discloses errors that affect the basic principles of public and economic life."*
[239] *Id*., at paras 12-16.
[240] *Id*., at para. 18.
[241] Which provides that *"an obligation without consideration or with a false consideration or with an unlawful consideration cannot have any effect."*
[242] Which provides that *"the person who benefits from unjust enrichment to the expense of another person who is the latter compensation equal to the lower value between the enrichment and the impoverishment."*
[243] Ruling in *Lucinethlucineth v. Lutinalutina*, at para. 17.
[244] *Id*., at para. 19.

DIFCCFI concluded as follows: *"Lucineth will not be unjustly enriched in receiving the contractual purchase price to which it is entitled, both as a matter of contract and as a debt due under an award. There is no impossibility of performance nor vitiation of the purpose and subject matter of the Sale and Purchase Agreement. There is nothing disproportionate about such a payment being made nor any difficulty about consideration which was constituted by the contractual promises which can still be fulfilled."*[245]

(ii) Lucineth had deliberately and as such in bad faith waited with its application for enforcement of the Final Award until Lurina's insolvency. The DIFCCFI rejected this argument, stating as follows: *"There can be no question of bad faith in enforcing contractual rights nor any abuse of such rights in circumstances where the arbitrators have considered in full the merits of the parties' respective positions and come to a reasoned conclusion which is not the subject of challenge. Lutina specifically abjured any contention that the arbitrators had erred in any way, and relied solely on the ex post facto event of the liquidation of Lurina."*[246]

In the light of the foregoing, the DIFCCFI concluded that there was no reason to extend the stay of the proceedings, ordered the stay to be lifted and the action for execution of the Final Award to proceed.[247]

2.1.3 Limeo v. Landia[248]

In this ruling, the DIFCCFI was asked to decide within the meaning of Article 23(3) of the DIFC Arbitration Law[249] whether Landia Educational Services SAL ("Landia") had properly commenced arbitration against Limeo Investment & Real Estate LLC ("Limeo") before the DIFC-LCIA under the DIFC-LCIA Rules. The DIFCCFI held that it had. This being a question of construction, the Court focused more specifically on the interpretation of the underlying arbitration agreement. This was contained in Clause XVI of the subject contract between Limeo and Landia for the provision of educational services, from which the dispute between the parties referred to arbitration arose, (the "Contract") and provided as follows:

> Any dispute shall be finally settled in accordance with the rules of the London Court of International Arbitration ("LCIA") (which rules are deemed incorporated by reference in this MOU). The arbitration shall take place in the LCIA Arbitration Centre in Dubai International Centre, in Dubai, the UAE. Arbitration shall be conducted in the English Language.[250] (the "Arbitration Agreement")

Importantly, to assist in the Court's exercise of construction, the parties agreed to the application of DIFC law to the issue of construction and that in the terms of Article 23(3), the Court was mandated to decide upon the question of arbitral jurisdiction afresh (rather than reviewing the affirmative partial award on jurisdiction previously rendered by the sole arbitrator in the reference).[251] In doing so, the Court relied upon Articles 49(1) and (2)[252] of the DIFC Contract Law.[253]

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[245] *Id*., at para. 20.
[246] *Id*., at para. 22.
[247] *Id*., at paras 24-25.
[248] *Limeo Investment & Real Estate LLC v. Landia Educational Services S.A.L.* [DIFC] 2019 ARB 012, Amended Judgment of H. E. Justice Shamlan Al Sawalehi.
[249] Which provides as follows: *"The Arbitral Tribunal may rule on a plea [by a respondent or other party that the Arbitral Tribunal does not have Jurisdiction] either as a preliminary question or in an award on the merits. If the Arbitral Tribunal rules as a preliminary question that it has jurisdiction, any party may request, subject to any process agreed between the parties, within thirty days after having received notice of that ruling, the DIFC Court of First Instance to decide the matter, which decision shall not be subject to appeal; while such a request is pending, the Arbitral Tribunal may continue the arbitral proceedings and make an award."*
[250] Ruling in *Limeo v. Landia*, at para. 2.
[251] *Id*., at para. 9.
[252] Which provide as follows: *"Intention of the parties (1) A contract shall be interpreted according to the common intention of the parties. (2) If such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances."*
[253] DIFC Law No. 6 of 2004.

In Limeo's submission,[254] adopting a literal interpretation in relevant part, the Arbitration Agreement required referral to arbitration under the LCIA Rules, the reference to the DIFC-LCIA being no more than a reference to the potential venue or the seat of the arbitration. Landia therefore erred in filing its request for arbitration with the DIFC-LCIA rather than the LCIA. In support of its argument, Limeo relied in particular on the fact that at the time that the parties concluded the Contract in 2012, the DIFC-LCIA had only been established for four years and as such could hardly have been within the common intention of the parties at the time as the administering institution of a prospective dispute whereas the LCIA had, at that time, been operating for well over 100 years and was known to both parties as a worldwide leading arbitral institution. Reasonable companies like Limeo and Landia and business common sense would dictate a contemporaneous preference for LCIA arbitration. Landia argued the reverse.[255] In support, it contended that following their re-launch in 2014, the DIFC-LCIA, and not the LCIA, stood in the stead of the original joint-venture arrangement between the LCIA and the DIFC.

In the DIFCCFI's view, it was clear that the Arbitration Agreement had to be read as providing for arbitration administered by the DIFC-LCIA under the DIFC-LCIA Rules. In long hand, Justice Shamlan of the DIFCCFI reasoned as follows:

> 21. […] insofar as there is no need to depart from a plain reading of "the LCIA Arbitration Centre," this reference must be to an LCIA arbitration centre which existed in the DIFC at the time that the Arbitration Agreement was entered into. This can only have been the DIFC-LCIA Arbitration Centre.
>
> […]
>
> 23. […] It will be noted that both the choice of rules and centre provided for by the Arbitration Agreement are those of "the LCIA." As such – and leaving aside the reference to the centre as being "in the DIFC" for a moment – there is no reason to suppose that the Arbitration Agreement provides for arbitration rules other than those of the arbitration centre also stipulated therein. In other words, the choice of rules and centre provided for in the Arbitration Agreement pertain, prima facie, to one and the same institution, namely "the LCIA." Yet as has been shown above, the arbitration centre is referred to in the Arbitration Agreement as "the LCIA Arbitration Centre in the [DIFC]," while this could only have been the DIFC-LCIA Arbitration Centre. If, again, the choice of rules and centre provided for by the Arbitration Agreement pertain to one and the same institution, it follows that the rules which are the analogue of the DIFC-LCIA Arbitration Centre can only be those of the DIFC-LCIA. As such, far from being unimportant to the present Application, in my regard, the reference to "the LCIA Arbitration Centre in the [DIFC]" provides some of the clearest evidence that the rules provided for in the Arbitration Agreement are those of the DIFC-LCIA.
>
> 24. The position is strengthened when regard is had to Landia's submissions on the 2014 changes. At the time the Arbitration Agreement was entered into, the DIFC-LCIA was a joint venture within the DIFC, and so the LCIA still had a separate existence. In such circumstances, it can be argued that a reference to only the LCIA in an Arbitration Agreement that intended the DIFC-LCIA would not be, strictly speaking, deficient. While such a reference could indeed have been clearer, again, the LCIA had a separate existence and so it was capable of being referred to separately.
>
> 25. For me, the above is sufficient to demonstrate the common intention of the parties at the time of concluding the Arbitration Agreement for the purposes of Article 49 (1) of the [DIFC] Contract Law. The same observations would be made, I think, by reasonable

[254] Ruling in *Limeo v. Landia*, at paras 10 *et seq*.
[255] *Id*., at paras 14 *et seq*.

> persons or companies of the same kind as Limeo and Landia and in the same circumstances for the purposes of Article 49 (2) of the Contract Law, too.
>
> 26. Landia has asked the Court to consider how the 2014 changes might have changed the operation of the Arbitration Agreement: did the DIFC-LCIA Centre or the LCIA Centre in London replace the centre referred to in the Arbitration Agreement? That the LCIA itself considered the DIFC-LCIA to be a "relaunch" of the centre that preceded it is, for me, somewhat conclusive. And if the matter is to be resolved by reference to the presumed intention of the Parties pursuant to Article 49(2) of the [DIFC] Contract Law, I think it is hardly to be supposed that reasonable parties of the same kind as Limeo and Landia in the same circumstances would not have chosen to adopt the DIFC-LCIA as the centre for their arbitration. That would have produced the result closest to their original agreement and engaged supervisory and enforcement arrangements which were unchanged. This is quite clearly the case due to the continuing institutional links between the DIFC-LCIA Arbitration Centre and the LCIA, the fact that the seat would, on Limeo's view, change to London and the virtual identity of the rules of the respective bodies.[256]

In the light of the foregoing, the DIFCCFI ultimately concluded in favour of the sole arbitrator having proper jurisdiction to hear and determine the parties' dispute under the DIFC-LCIA Rules.[257]

2.1.4 Limsa v. Lordon et al.[258]

In this case, Limsa (Pty) Ltd ("Limsa"), a company registered for the trade of commodities on a trading platform owned by X Centre, an entity of the Government of Dubai, ("Lordon") in the Dubai Multi-Commodities Centre (DMCC), filed for an order to set aside a disciplinary decision issued by Lordon pursuant to the bye-laws promulgated in relation to the operation of Lordon (the "Disciplinary Decision") under Article 41(1) of the DIFC Arbitration Law. Realising in the further course of the proceedings that the Disciplinary Decision was not capable of qualification of an arbitral award and as such could not be challenged under Article 41(1), Limsa served a notice of discontinuance of all its claims (the "Notice of Discontinuance") apart from a claim for costs.

In the circumstances, the DIFCCFI was prompted to consider the application of RDC 34.15, according to which *"[u]nless the Court orders otherwise, a claimant who discontinues a claim is liable for the defendant's costs incurred up to and on the date on which the Notice of Discontinuance was served on him or his legal representative."* In doing so, the DIFCCFI contemplated more specifically whether, in the prevailing circumstances, the presumption by reason of RDC 34.15 that the defendants recover their costs where the claimant discontinues the proceedings could be displaced in favour of the claimant. According to the Court, relying on its earlier decision in *Firas Esreb v. ES Bankers (Dubai) Limited (In Liquidation)*[259], *"[a] claimant must show some unreasonable conduct on the part of the Defendant for there to be a departure from [the] default rule [under RDC 34.15]."* In Limsa's submission, it was the defendants that had originally insisted on the qualification of the Disciplinary Decision as an arbitral award and only conceded the true nature of that decision after commencement of the proceedings for setting aside before the DIFCCFI. Therefore, the Court should exercise its discretion under RDC 34.15 to award costs against the defendants.

The DIFCCFI disagreed and found that in the prevailing circumstances, Limsa's service of the Notice of Discontinuance confirmed its acceptance of the position that its claim for setting aside under Article 41(1) of the DIFC Arbitration Law had to fail and that the DIFCCFI lacked jurisdiction to entertain that claim, a

[256] *Id*., at paras 21-26.
[257] *Id*., at para. 27.
[258] *Limsa (Pty) Ltd v. (1) Lordon A Trading Platform of Dubai Multi Commodities Centre (2) Lendi (3) Lander (4) Leone* [2020] DIFC ARB 008, Amended Judgment of Justice Wayne Martin.
[259] CFI 035/2016 Firas Esreb v ES Bankers (Dubai) Limited (In Liquidation), ruling of the DIFC Court of First Instance of 6 March 2017, at para. 15.

position also conceded by Lordon in oral argument before the Court.[260] More specifically, the Court found that Limsa's assertion of jurisdiction was doomed to fail from the outset for two main reasons:

(i) The decision presented for a challenge under Article 41(1) of the DIFC Arbitration Law, i.e., the Disciplinary Decision, did not constitute an arbitral award – but a disciplinary decision – in the first place and as such did not fall for considerations of setting aside within the meaning of Article 41(1), which is limited in its application to arbitral awards.[261]

(ii) On the assumption that the decision presented for a challenge, i.e., the Disciplinary Decision, did qualify as an arbitral award, it was, as a matter of fact, issued outside the DIFC, hence the seat of the underlying arbitration process was outside the DIFC.[262] As such, Article 41(1) of the DIFC Arbitration Law[263] could not apply as its application was expressly limited to awards originating in a DIFC seat.[264] Further, being contained in Part 3 of the DIFC Arbitration Law, Article 41 did not apply to a non-DIFC seat by virtue of Article 7(1) of the DIFC Arbitration Law, according to which *"Parts 1 to 4 […] of this Law shall all apply where the Seat of the Arbitration is the DIFC."* To reach this conclusion, the Court also relied on Justice Steel's dictum in *Meydan Group LLC v. Banyan Tree Corporation Pte Ltd*[265] to the effect that *"[a]challenge to the validity of an award (as a matter of DIFC law and practice) should prima facie only be made in the court of the seat of the arbitration."*[266] From this it followed, according to the Court, that *"if what occurred is properly characterised as an arbitration, it was seated outside the DIFC, in the Emirate of Dubai, and that any challenge to an Award or purported Award should have been made under Articles 53 and 54 of the Federal Arbitration Law, in a court of competent jurisdiction. This Court is not such a court because, as I have noted, Federal civil and commercial laws (including the Federal Arbitration Law) do not form part of the substantive law of the DIFC."*[267]

In addition, the DIFCCFI found that Limsa had failed to comply with the pre-action protocol relating to steps to be taken before commencing proceedings against an entity comprising the Dubai Government,[268] such as Lordon.

In the light of the foregoing, the DIFCCFI held that Limsa had failed to displace the presumption under RDC 34.15 that it was to bear all the costs incurred by the parties in the proceedings.[269]

2.1.5 Multiplex v. Elemec

In a ruling of November 2020,[270] which – to date – has remained unpublished (albeit not unreported[271]), the DIFCCFI pronounced the first ever antisuit injunction over competing proceedings commenced in violation of an arbitration agreement before the onshore Dubai courts. By way of background, in 2015, Multiplex Constructions LLC, an Australian construction company, ("Multiplex") entered into a contract with a Dubai-based subcontractor, Elemec Electromechanical Contracting LLC ("Elemec"), (the "Subcontract

[260] Ruling in *Limsa v. Lordon et al.*, at para. 59.
[261] *Id*., at paras 85-86.
[262] *Id*., at para. 87.
[263] Which provides verbatim as follows: *"Recourse to a Court against an Arbitral Award made in the Seat of the DIFC may be made only by application for setting aside in accordance with paragraphs (2) and (3) of this Article."*
[264] Ruling in *Limsa v. Lordon et al.*, at para. 90.
[265] *Banyan Tree Corporate Pte Ltd v Meydan Group LLC* [2013] DIFC ARB 003, ruling of the Dubai Court of First Instance of 2 April 2015.
[266] Ruling in *Limsa v. Lordon et al.*, at para. 93.
[267] *Id*., at para. 94; original footnotes omitted.
[268] See in particular RDC 41.19, which requires service of a 15-day notice of intention to commence proceedings against the Government; and Article 3(d) of Dubai Law No. 3 of 1996, which prescribes further steps with respect to claims against the Government of Dubai, such as notification of the office of the Legal Advisor of the Government of Dubai and a period of two months for amicable settlement.
[269] Ruling in *Limsa v. Lordon et al.*, at para. 105.
[270] *Multiplex Constructions LLC v. Elemec Electromechanical Contracting LLC*, CFI.
[271] See J. Ballantyne, "DIFC courts block onshore lawsuit", GAR, 17 November 2020.

Agreement"). The Subcontract Agreement was governed by UAE law but provided for arbitration under the DIFC-LCIA Rules with seat in the DIFC (and hence contemplating the application of the DIFC Arbitration Law to any prospective arbitration) in the event of any disputes (the "Arbitration Agreement").

Before completion of the subcontract works, a dispute, the details of which are presently unknown, arose between the parties. As a result, Elemec filed proceedings before the onshore Dubai courts in violation of the arbitration clause contained in the Subcontract Agreement. Whilst reserving its position on jurisdiction in the onshore courts, Multiplex commenced arbitration proceedings before the DIFC-LCIA in accordance with the Arbitration Agreement. At the same time, it applied to the DIFC Courts in their capacity as the offshore supervisory courts of the arbitration for a declaration confirming the binding nature of the Arbitration Agreement coupled with an antisuit injunction restraining Elemec from continuing the onshore proceedings before the Dubai courts.

Given the clarity of the terms of the Arbitration Agreement, Justice Shamlan Al Sawalehi, rendering the ruling of the DIFCCFI, found in favour of the binding nature of the Arbitration Agreement and confirmed that the onshore court proceedings had been commenced in violation of the obligation to arbitrate under the Arbitration Agreement. On that basis, Justice Shamlan did not hesitate to pronounce an antisuit that required Elemec to discontinue the proceedings before the onshore Dubai courts. In support, he relied upon an *obiter dictum* of Justice Sir Jeremy Cooke in *Brookfield Multiplex Construction LLC v. DIFC Investments* CFI 020/2016,[272] which reads in relevant part as follows:

> "If the seat of the Arbitration is DIFC, however, the position is different, because the primary responsibility for the enforcement of the arbitration agreement would lie on the courts of the seat, if relief was sought. This court would then be concerned, first to protect its own exclusive jurisdiction under the Judicial Authority Law and, secondly, as the court of the seat, to protect the agreement of the parties to refer their disputes to the determination of arbitrators, if there was some infringement of the parties right to arbitrate their dispute."

In the light of the foregoing, it is evident that *Multiplex v. Elemec* goes beyond the previous limits set by *Brookfield* and confirms that the DIFCFI have the power to pronounce anti-suit injunctions over competing proceedings before the onshore courts that have been commenced in disregard of a prevailing obligation to arbitrate offshore. Importantly, to lend its antisuit injunction the required force, the DIFCCFI also issued a penal notice, as a result of which Elemec may, at the hands of the Dubai Public Prosecutor, face criminal liability before the onshore courts should it fail to comply with the terms of the injunction.

By way of conclusion, it is important to note that under Article 7 JAL, which codifies a free area of movement of judicial instruments between the onshore Dubai and the offshore DIFC Courts and *vice versa*, the onshore Dubai Courts will be under an obligation to recognise the DIFCCFI's antisuit order restraining Elemec from continuing the proceedings onshore without any review of the merits of that order. It is encouraging to see the resolve with which an Emirati judge of the DIFCCFI affirms the enforcement of an offshore arbitration agreement at the cost of local onshore court proceedings. It must evidently be borne in mind that the DIFCCFI's antisuit operates *in personam*, i.e., as against Elemec, and not *in curiam*, i.e., against the local onshore Dubai courts, before which the competing proceedings have been commenced. Hence, little friction is to be expected in its implementation onshore.

2.2 Revised DIFC-LCIA Rules[273]

Following their adoption in November 2020, the revised DIFC-LCIA Rules of Arbitration (the "2021 DIFC-LCIA Rules")[274] entered into force with effect from 1 January 2021. Closely related to and taking guidance from the London-based LCIA, the DIFC-LCIA tends to follow any revisions to the LCIA Rules of Arbitration

[272] CFI 020/2016 – *Brookfield Multiplex Constructions LLC v. (1) DIFC Investments LLC (2) Dubai International Financial Centre Authority*, ruling of the DIFC Court of First Instance of 28 July 2016.

[273] This section is based on G. Blanke, "A Happy New Year with the 2021 DIFC-LCIA Rules", Kluwer Arbitration Blog, 13 February 2021, available online at http://arbitrationblog.kluwerarbitration.com/2021/02/13/a-happy-new-year-with-the-2021-difc-lcia-rules/.

[274] See http://www.difc-lcia.org/arbitration-rules-2021.aspx.

(the "LCIA Rules"): The 2021 DIFC-LCIA Rules are no exception and take after the recent revisions introduced to the recently adopted 2020 LCIA Rules.[275]

The 2021 DIFC-LCIA Rules introduce a number of important changes, which – in their majority – are intended to assist the effective and efficient conduct of an arbitration process within a DIFC-LCIA forum. Such changes include the introduction of a so-called "early determination" procedure, improvements to the existing consolidation mechanism, and the digitalisation of the arbitration process coupled with the adoption of enhanced confidentiality measures and the establishment of a new data protection regime. Other changes include the formalisation of the role played by administrative secretaries in DIFC-LCIA arbitration, the expedition of tribunal appointments, the clarification of the emergency arbitrator's powers, and enhanced transparency around the nationality requirement and *ex parte* communications with the Registrar. The following discusses these and other changes for some initial guidance.

Early determination. The 2021 DIFC-LCIA Rules allow summary treatment of claims, counterclaims and defences by introducing a regime of early determination. More specifically, according to Article 22.1(viii) of the 2021 DIFC-LCIA Rules, a DIFC-LCIA tribunal has the power to *"determine that any claim, defence, counterclaim, cross-claim, defence to counterclaim or defence to cross-claim is manifestly outside the jurisdiction of the Arbitral Tribunal, or is inadmissible or manifestly without merit; and where appropriate to issue an order or award to that effect."* This will facilitate an early disposal of vexatious cases that do not stand a reasonable chance of success, whether by reason of a tribunal's manifest lack of jurisdiction or a manifest lack of merit.

Consolidation. The new Rules allow for the submission of so-called composite Requests and Responses: These allow parties to file a single request for arbitration for a multi-party or multi-contract arbitration (involving more than one arbitration agreement), inviting, in turn, a composite Response[276] albeit that it does not facilitate automatic consolidation (a subject that might benefit from closer scrutiny in a future revision of the existing rules).

In a related context, a new Article 22A introduces an enhanced consolidation regime which allows the consolidation of arbitrations that deal with related transactional disputes, there being no strict requirement for the identity of the parties and/or the underlying arbitration agreements. Consolidation is also facilitated upon express party agreement.

Digitalisation. The 2021 DIFC-LCIA Rules introduce the use of technology across the arbitration process, thus accommodating in particular requirements that have arisen from the currently pending pandemic. By way of example, the Request for Arbitration and the Response are now required to be submitted electronically, rather than in hard copy,[277] *"either by email or other electronic means including via any electronic filing system operated by the DIFC-LCIA Arbitration Centre"*[278]. Further, written communications with respect to the arbitration must be delivered *"by email or any other electronic means of communication that provides a record of […] transmission"* unless otherwise advised by the Registrar or the tribunal as the case may be.[279]

Article 19.2 of the 2021 DIFC-LCIA Rules expressly authorises the remote conduct of hearings, stating that *"a hearing may take place in person, or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form)."*

Finally, Article 26.2 of the 2021 DIFC-LCIA Rules allows an award to be signed electronically, with the electronic copy of the award prevailing over any inconsistent paper copy.[280]

Taking account of the heightened use of digital communication under the 2021 DIFC-LCIA Rules, a new Article 30A introduces a set of powers and duties that require a DIFC-LCIA tribunal and the DIFC-LCIA to

[275] See https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx.
[276] See Articles 1.2 and 2.2, 2021 DIFC-LCIA Rules.
[277] See Articles 1.3 and 2.3, 2021 DIFC-LCIA Rules.
[278] See Article 4.1, 2021 DIFC-LCIA Rules.
[279] See Article 4.2, 2021 DIFC-LCIA Rules.
[280] See Article 26.7, 2021 DIFC-LCIA Rules.

protect personal data by adopting information security measures as appropriate with respect to references pending before them.

Administrative secretaries. The 2021 DIFC-LCIA Rules introduce a new Article 14A, which transposes in relevant part the provisions on tribunal secretaries contained in the LCIA Notes for Arbitrators into the Rules. Article 14A strictly prohibits delegation of the tribunal's decision-making function to tribunal secretaries, the tribunal remaining responsible for any tasks performed by them[281] and makes the appointment of a tribunal secretary subject to party approval.[282] Like arbitrators, administrative secretaries are under a standing disclosure obligation with respect to any conflicts of interest and must declare their availability to devote sufficient time to the reference.[283] Any change in the scope of the tribunal secretary's works or increase in his or her fees[284] must be approved by the parties.[285] Importantly, the costs of the administrative secretary qualify as Arbitration Costs within the meaning of Article 28.1 of the 2021 DIFC-LCIA Rules[286] and are as such readily awardable to a winning party in the arbitration.

Expedited tribunal appointments. The 2021 DIFC-LCIA Rules reduce the time within which the LCIA Court is to appoint a tribunal in the event of a respondent's failure to submit a Response: As a result, the LCIA Court must now appoint the tribunal promptly after 28 days – as opposed to 35 days under the old Rules – from the date of official registration of the reference (i.e., from receipt of the Request and the registration fee).

Nationality requirement. Nationality has now been further defined to allow a more precise assessment of the nationality requirement in the appointment of arbitrators. By way of reminder, a sole arbitrator or a chair must not share the nationality of either of the parties where these are of different nationalities unless agreed otherwise by the parties in writing.[287] Pursuant to Article 6.2 of the 2021 DIFC-LCIA Rules, nationality means a natural person's citizenship and a legal person's seat of incorporation or effective management; where these differ, the legal person is treated as a national of both.

Communication with the Registrar. The strict prohibition to engage in unilateral communications with other stakeholders, in particular the tribunal members, the administrative secretary and the administrative staff of the DIFC-LCIA, in the arbitration in the terms of Article 3.3 read together with Article 13.4 of the 2021 DIFC-LCIA Rules is relaxed in favour of *ex parte* communication with the DIFC-LCIA Registrar with respect to *"administrative matters".*[288] This will allow less experienced parties to engage in unilateral conduct with the Registrar for, e.g., a better understanding of the operation of the 2021 DIFC-LCIA Rules.

Amendments to Request/ Response. Under the 2021 DIFC-LCIA Rules, parties may now make amendments to the Request or the Response, as the case may be, with the permission of the LCIA Court prior to the constitution of the arbitral tribunal. Such amendments are expressly stated to be limited to the correction of *"any error in computation, any clerical or typographical error, any ambiguity or any mistake of a similar nature"* and are subject to the parties having been afforded *"a reasonable opportunity to state their views"* and to *"such terms as the LCIA Court may decide."*[289] Provided this provision is exercised to the letter, it is to be welcomed as no more than procedural common sense, there being no benefit to wait until later in the arbitration process for any correction of clerical mistakes (especially such that could materially affect the nature or value of the arbitration and thus the choice of arbitrators).

Confidentiality. In the interest of safeguarding the continued confidentiality of the arbitration process (and more specifically the deliberations of the tribunal, the arbitral award and any material divulged in the arbitration), confidentiality undertakings are now imposed on all participants in the arbitration: arbitrators,

[281] See Article 14.8, 2021 DIFC-LCIA Rules.
[282] See Article 14.10, 2021 DIFC-LCIA Rules.
[283] See Articles 14.9 and 14.14, 2021 DIFC-LCIA Rules.
[284] Ranging hourly between AED 370 and AED 860: See Schedule of Arbitration Costs 2021, DIFC-LCIA Rules, at Clause 6.
[285] See Article 14.11, 2021 DIFC-LCIA Rules.
[286] See Article 14.13, 2021 DIFC-LCIA Rules.
[287] See Article 6.1, 2021 DIFC-LCIA Rules.
[288] See Article 13.4, 2021 DIFC-LCIA Rules.
[289] See Articles 1.5 and 2.5, 2021 DIFC-LCIA Rules.

administrative secretaries, party representatives, both fact and expert witnesses, and third-party service providers.[290]

New time-limit for awards. Article 15.10 of the 2021 DIFC-LCIA Rules seeks to expedite the issuance of awards, requiring a DIFC-LCIA tribunal to render an award *"as soon as reasonably possibly"* (replicating the old wording of Article 15.10), with an endeavour to do so *"no later than three months following the last submission from the parties"* (additional new wording).

Tribunal's powers to expedite. The 2021 DIFC-LCIA Rules confer a number of powers on a DIFC-LCIA tribunal to expedite the proceedings. This includes a power to limit or dispense with a party's written submissions, oral testimony or a hearing and to employ technology to promote the expeditious conduct of the proceedings, including the hearing.[291] The tribunal is more generally empowered to *"make any procedural order it considers appropriate with regard to the fair, efficient and expeditious conduct of the arbitration."*[292] Evidently, to the extent that any of these powers limit a party's right to be heard, they must be exercised with caution.

Emergency arbitrator's powers. Under the new Rules, emergency arbitrators have been empowered to award costs, including legal costs, in the emergency arbitration proceedings, to revoke/vary/discharge any order they make, to issue additional orders, correct any clerical mistakes in any award rendered by the emergency arbitrator, and to render additional awards with respect to emergency relief previously overlooked.[293]

3. Developments in the ADGM[294]

The Abu Dhabi Global Market (ADGM) has pushed further ahead in its arbitration offering over the course of 2020, leading the way with the promulgation of a number of soft law measures that, apart from enhancing the perception of UAE free zone arbitration more specifically, assist in the conduct of arbitrations in the UAE more generally.

3.1 Legislative developments

There has been one major legislative development in the ADGM in 2020, championing amendments to the ADGM Founding Law.

3.1.1 The ADGM Founding Law: Latest Amendment[295]

Abu Dhabi Law No. 4/2013,[296] which led to the foundation of the Abu Dhabi Global Market (ADGM), the Abu Dhabi-based financial free zone, in 2015 (the "ADGM Founding Law" or simply the "Founding Law"), has been amended in relevant part by the recent adoption of Abu Dhabi Law No. 12/2020[297] (the "2020 Amendment"). The 2020 Amendment focuses on clarifying the application of the ADGM Founding Law to aspects of dispute resolution, in particular litigation and arbitration, in matters involving the ADGM, including ADGM-seated arbitrations. In order to afford some initial guidance to the core amendments as well as their scope and objectives, the ADGM Courts published - in tandem with the adoption of the 2020

[290] See Article 30, 2021 DIFC-LCIA Rules.
[291] See Article 14, 2021 DIFC-LCIA Rules.
[292] See Article 14.5, 2021 DIFC-LCIA Rules.
[293] See Article 9, 2021 DIFC-LCIA Rules.
[294] For some background on free zone arbitration in the ADGM, see G. Blanke, "Free Zone Arbitration in the United Arab Emirates: DIFC v. ADGM (Part II)", 35(6) J. of Int. Arb. (2018), pp. 1-19.
[295] This section is based on G. Blanke, "The ADGM Founding Law: Latest Amendment", Westlaw Middle East, Thomson Reuters, June 2020.
[296] Concerning the Abu Dhabi Global Market.
[297] Amending Some of the Provisions of Law No. 4 of 2013 Concerning the Abu Dhabi Global Market.

Amendment - a seven-page bi-lingual (English/Arabic) guide,[298] with a focus on Article 13 of the Founding Law, which has been significantly amended to reflect changes relevant to ADGM dispute resolution.

In brief, the core amendments on ADGM dispute resolution introduced to Article 13 of the ADGM Founding Law by the 2020 Amendment can be summarized under the following main subject-matter headings.

Status of the ADGM Courts. Pursuant to Article 13(1) as amended, the ADGM Courts are expressly recognised as *"courts of the Emirate"*, i.e., as courts of Abu Dhabi. For the avoidance of doubt, this does not mark any fundamental change to the status quo, according to which the ADGM Courts have always been regarded as courts of the Emirate. Having been decreed by the Ruler of Abu Dhabi, the ADGM Courts form, constitutionally speaking, part of the UAE family of courts and are as such considered an integral part of the UAE and more specifically the Abu Dhabi court system. In recognition of the close affinity of the ADGM Courts to the Ruler of Abu Dhabi, pursuant to Article 13(2) as amended, judgments of the ADGM Courts are to be issued in the Ruler's name going forward.

According to the Guide, *"[t]his may become of particular relevance when it comes to the enforcement of ADGM Courts' judgments and awards under international treaties and conventions to which the United Arab Emirates is a signatory."*[299] This will include the New York Convention[300] as the primary international enforcement instrument with respect to foreign arbitral awards as well as instruments designed for the regional enforcement of both judgments and arbitral awards, including in particular the Riyadh[301] and the GCC[302] Conventions. Judicial instruments emanating from the ADGM Courts – whether ADGM Court judgments or ratified awards – that have been endorsed by the onshore Abu Dhabi Courts will no doubt benefit from an enhanced recognition effect, both regionally and internationally.

Exclusive jurisdiction of the ADGMCFI and ADGMCA. Article 13(7) as amended confers *"exclusive jurisdiction"* upon the ADGM Court of First Instance (ADGMCFI) in matters with an ADGM nexus, such as (i) civil and commercial disputes involving the ADGM or any of its authorities or establishments, and (ii) civil and commercial disputes arising out of a contract executed or performed in whole or in part in the ADGM. With respect to these matters, Article 13(9) as amended allows contracting parties to opt into any other jurisdiction outside the ADGM[303] whereas pursuant to Article 13(8) as amended, *"exclusive jurisdiction"* for appeals on these matters lies with the ADGM Court of Appeal (ADGMCA).

This is to provide some clarity of language for common law parties and practitioners where the ADGM Founding Law in its original 2013 version provided for the Courts to *"solely consider and decide"* rather than emphasising the "exclusive" nature of the ADGM Courts' jurisdiction.[304] In addition, taking account of practical reality, Article 13(7) now delegates statutory interpretation to the ADGMCFI in a first instance, with the ADGMCA hearing disputes on interpretation on appeal only.[305]

Opt-in for arbitration. Importantly, pursuant to Article 13(9) as amended, *"[n]otwithstanding the provisions of paragraph (7) of this Article [i.e., Article 13(7) as amended], the parties may agree to refer their claims or disputes to arbitration"*: This means that parties are at liberty to contract into ADGM arbitration in relation to *any* disputes, irrespective of whether these have an ADGM nexus or not.

This amendment addresses a criticism that had been levelled at the old wording of the corresponding provision in the original version of the Founding Law, which limited the application of ADGM arbitration to civil and commercial disputes with an ADGM nexus (i.e., essentially the disputes listed as attracting the

[298] Guide to amendments to Article 13 of Abu Dhabi Law No. 4 of 2013, available online at https://www.adgm.com/documents/courts/legislation-and-procedures/guidance-papers/adgm-courts-guide-to-amendments-to-article-13-of-the-founding-law.pdf.
[299] Guide, at para. 17.
[300] On the recognition and enforcement of foreign arbitral awards, made in New York, 10 June 1958.
[301] Riyadh Convention on Judicial Cooperation between States of the Arab League (1983).
[302] GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications (1987).
[303] For the avoidance of doubt, this excludes matters of statutory interpretation with respect to ADGM law (or regulations).
[304] To this effect, see Guide, at paras 6-7.
[305] *Id*., at para. 10.

exclusive jurisdiction of the ADGMCFI above).[306] By way of explanation, a plain reading of Articles 13(6) [307] and (7)[308] in their original version suggested that under the ADGM Founding Law, arbitration in the ADGM was limited to disputes with an ADGM nexus. This is because Article 13(7) made strict reference to the first and second paragraphs of Article 13(6) as the limits within which parties may agree to resort to arbitration in the ADGM. More specifically, only the disputes that were listed at those paragraphs, each of which had a nexus with the ADGM, qualified for referral to arbitration. In other words, referrals to arbitration of disputes that fell outside this scope, i.e., those without any ADGM nexus, would be unenforceable.[309]

Against this background, the amended Article 13(9) is a welcome amendment that dispels any doubt as to the true permissible scope of ADGM arbitration and confirms that international commercial disputes may be submitted for resolution by ADGM arbitration (subject, evidently, to the usual threshold question of arbitrability). In addition, the Guide reminds that any contractual opt-in, e.g., in favour of the exclusive jurisdiction of the ADGM Courts in matters without an ADGM nexus or in favour of ADGM-seated arbitration requires an agreement in writing.[310]

Codification of the ADJD-ADGM MoU. [311] Articles 13(15) and 13(16) as amended[312] codify the corresponding provisions of the ADJD-ADGM MoU, facilitating the mutual recognition and enforcement of judicial instruments, including in particular judgments, orders and ratified awards issued by the respective other court without a re-examination on the merits by the receiving court before which enforcement is sought.[313] The regime, which is one for *"expedited enforcement"*, allows either for direct enforcement before

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[306] With respect to the original limitations, see in particular G. Blanke, "The Arbitral Jurisdiction of The ADGM: How Far Does It Reach … Really?", Kluwer Arbitration Blog, 23 August 2019, available online at http://arbitrationblog. kluwerarbitration.com/ 2019/08/23/ the-arbitral-jurisdiction-of-the-adgm-how-far-does-it-reach-really/, contending for a limited reading of then Article 13(7) of the Founding Law. *Contra*, see J. P. Gaffney, "The Abu Dhabi Global Market: An Arbitral Seat Open to All", Kluwer Arbitration Blog, 14 May 2019, available online at http://arbitrationblog. kluwerarbitration.com/2019/05/14/the-abu-dhabi-global-market-an-arbitral-seat-open-to-all/?doing_wp_cron=15912072 53.1764960289001464843750.

[307] Which provided in pertinent part as follows: *"6. The [ADGM or Global Market] Court of First Instance shall **solely** consider and decide on matters relating to the activities of the Global Market according to the following:*

- *Civil or commercial cases and disputes involving the Global Market or any of the Global Market's Authorities or any of the Global Market's Establishments;*
- *Lawsuits and civil or commercial disputes arising out of or relating to a contract or a transaction conducted in whole or in part in the Global Market or to an incident that occurred in the Global Market;*
- *[….]*
- *Any request which the Global Market Courts has the jurisdiction to consider under the Global Market Regulations."*

(emphasis added)

[308] Which provided as follows: "*7. Notwithstanding the provisions of paragraph (6) of this Article, the parties in relation to the issues specified in the first and second paragraphs may agree in their commercial contracts and transactions to the jurisdiction of any court other than the Global Market Court of First Instance or agree to refer their disputes to arbitration."*

[309] Importantly, the fourth paragraph of Article 13(6), which might have allowed for a wider reading, was excluded from the reference to arbitration under Article 13(7).

[310] See the Guide, at para. 4.

[311] Executed Memorandum of Understanding between the Judicial Department of the Emirate of Abu Dhabi and Abu Dhabi Global Market Courts concerning the Reciprocal Enforcement of Judgments, dated 11 February 2018. For comment, see G. Blanke, "The Abu Dhabi Global Market adopts Memorandum of Understanding with Abu Dhabi Judicial Department on enforcement of awards", Practical Law Arbitration Blog, Thomson Reuters, 3 May 2018, available online at http://arbitrationblog.practicallaw.com/the-abu-dhabi-global-market-adopts-memorandum-of-understanding-with-abu-dhabi-judicial-department-on-enforcement-of-awards/.

[312] Which provide in relevant part as follows: *"Subject to the provisions of paragraph 13 of this Article, the following shall be taken into consideration when judgments or orders made by the Global Market's Courts[/the courts of the Emirate], or arbitral awards recognised by the Global Market's Courts[/such courts]are to be enforced by the courts of the Emirate[/Global Market's Courts]: a) A judgment creditor may, upon direct application to any of the Emirate's courts[/Global Market's Courts], request that court to take any measure or action to enforce any judgments or orders made by the Global Market's Courts[/courts of the Emirate], or arbitral awards recognised by the Global Market's Courts[/such courts]; b) The Global Market's Courts[Courts of the Emirate] may, upon the application of a judgment creditor, deputise an enforcement judge from the courts of the Emirate[/Global Market's Courts] to take any measure or action to enforce any judgments or orders made by the Global Market's Courts[/courts of the Emirate], or arbitral awards recognised by the Global Market's Courts[/such courts]; c) The enforcement judge of the court of the Emirate[/Global Market's Courts] shall apply the enforcement procedures set out in the Federal Law No. (11) of 1992[/Global Market's Courts' procedural rules] referred to without re-examining the merits of the judgment, order or recognised arbitral award."*

[313] In the terms of the Guide, para. 15: *"This provides for the mutual enforcement by the Abu Dhabi sister courts of each other's judgments and recognised or ratified arbitral awards – without any review on the merits being undertaken by the enforcing court."*

the execution judge at the enforcing court[314] or for deputisation of an Abu Dhabi or ADGM Court enforcement judge[315] as the case may be. That said and for the avoidance of doubt, the ADJD-ADGM MoU has not been repealed by the 2020 Amendment and remains in force in its own right.

This amendment no doubt assists in promoting the full mutual integration of the onshore and offshore legal systems in the Emirate of Abu Dhabi and as such will provide reassurance to ADGM Court and arbitration users that ADGM judgments and ratified awards will have full legal force and will as such be enforced in mainland Abu Dhabi.[316] In the terms of the Guide,

> [t]hese amendments to the Founding Law are an important development because it elevates the enforcement mechanism contained in the Memorandum of Understanding [i.e., the ADJD-ADGM] to a matter of law – and should provide parties with increased confidence that ADGM Courts' judgments and recognised awards will be enforced by its sister court, Abu Dhabi Judicial Department.[317]

For the avoidance of doubt, Articles 13(5) and 13(6) are expressly stated to be subject to the limitations of the ADGM as a conduit (on which see below).

ADGM as a conduit. Article 13(11) in its original 2013 version enabled the operation of the ADGM as a conduit jurisdiction, whereby the ADGM Courts could be regarded as competent to entertain the recognition and enforcement of non-ADGM judgments and awards for onward execution outside the ADGM (even absent any assets of a judgment or award debtor from the ADGM). A new Article 13(14) appears to limit the operation of the ADGM Courts as a conduit to judgments and orders issued by *"a court inside the Emirate",*[318] hence apparently retaining the potential role of the onshore Abu Dhabi and offshore ADGM Courts as a conduit with respect to each other's judgments and orders. By contrast, arbitral awards are systematically excluded from the scope of the ADGM Courts' conduit jurisdiction.[319] The Guide provides the following guidance, which – given the importance of the subject – deserves citation in full:

> 11. Article 13(14) of the Amended Founding Law deals with what some members of the legal profession refer to as the "conduit route" for the enforcement of judgments and orders ("judgments") that originated outside the Emirate and awards made outside ADGM. Put simply, parties cannot use ADGM for the enforcement of non-ADGM judgments and awards in other jurisdictions – the limited exception being where the originating judgment comes from another court within the Emirate.
> 12. As a matter of principle, it has always been ADGM Courts' position that parties should go to the place where the relevant assets are located for the purpose of enforcement.[320] This principle has now been given effect through the amendments to the Founding Law.

[314] Requiring the judgment or award creditor to apply to the execution judge for enforcement.
[315] Requiring the judgment or award creditor to apply to the issuing court for it to deputise an enforcement judge before the courts where execution is sought.
[316] For confirmation of this latter point, also see the Guide, at para. 16.
[317] See the Guide, at para. 16.
[318] See Article 14(a) as amended, according to which Article 13 as amended, which codifies the obligation of the onshore Abu Dhabi and offshore ADGM Courts to deal with the recognition and enforcement of each other's judicial instruments, including judgments, orders and ratified awards, by reference to the applicable court rules and any memoranda of understanding designed for that purpose, including the ADJD-ADGM MoU, *"shall not apply to a judgment or order rendered by the Global Market's Courts in respect of (a) a judgment or order issued by a court outside the Emirate".*
[319] See Article 14(b) as amended, expressly excluding from the above-described regime *"any arbitral award rendered by a tribunal where the seat is outside the Global Market"*, i.e. non-ADGM awards in general, i.e. any arbitral awards rendered outside the ADGM as a seat, including awards rendered in onshore Abu Dhabi.
[320] This is reflected in Memorandum of Understanding entered into by ADGM Courts with Abu Dhabi Judicial Department on 11 February 2018, Ras Al Khaimah Courts on 5 May 2019 and Ministry of Justice on 4 November 2019. [Footnote 5 in the original. Note, however, that on the basis of their arguably broader language, the referenced instruments did give reasoned ground for the ADGM Courts' service as a conduit jurisdiction. To this effect, see Blanke (2018), *op. cit*., at fn 16; G. Blanke, "The ADGM adopts memorandum of understanding with Ras Al Khaimah Courts on enforcement of awards", Practical Law Arbitration Blog, Thomson Reuters, 11 July 2019, available online at http://arbitrationblog.practicallaw.com/ the-adgm-adopts-memorandum-of-understanding-with-ras-al-khaimah-courts-on-enforcement-of-awards/; and G. Blanke, "The ADGM courts adopt memorandum of understanding on enforcement of awards with UAE MoJ", Practical Law Arbitration Blog, Thomson Reuters, 18 May 2020, available online at http://arbitrationblog.practicallaw.com/the-adgm-courts-adopt-memorandum-of-understanding-on-enforcement-of-awards-with-uae-moj/.]

> 13. What that means is that if parties wish to take advantage of the favourable enforcement framework that ADGM Courts have in place with other jurisdictions (including with Abu Dhabi Judicial Department), they must submit their original dispute for determination by ADGM Courts or by arbitration in ADGM. If parties do not do this, and execution against debtor assets is to take place in a jurisdiction other than ADGM, then the judgment or award creditor must bring an enforcement application in that other jurisdiction.
> 14. In practice, parties are still able to apply to ADGM Courts for the recognition and enforcement of non-ADGM judgments and awards even if there are no relevant assets in ADGM. But, save for the limited exception referred to in paragraph 11, the Registry of ADGM Courts will not affix the "executory formula" to any subsequent ADGM Courts judgment or order for the purpose of enforcement (including execution) in other jurisdictions.

The carve-out or exception in favour of judgments rendered inside the Emirate stands confirmed by a combined reading of paras 14 and 11 of the Guide. Needless to say that what must be understood as the abolition of the ADGM as a conduit causes great disappointment[321] and adversely impacts, in our view, the considered forum shopping opportunities offered by the conduit regime option across on- and offshore, promoting the mutual integration between the UAE's mainland and free zone jurisdictions.

For the avoidance of doubt, albeit marking a set-back for the enforcement of foreign judgments and arbitral awards, the limitations of the ADGM as a conduit were arguably foreshadowed by the ADGMCFI's ruling in *A4 v. B4*[322].[323] In this case, Smith J considered an award rendered under the LCIA Rules in London for recognition and enforcement in the ADGM, without any reported nexus to the ADGM and absent any assets of the award debtor from the ADGM. Importantly for present purposes, on the assets point more specifically, J Smith stated *obiter* as follows:

> […] there is no evidence that B4 do not have assets within the ADGM, and still less is there any proper basis to conclude that they will not have assets within the ADGM in the foreseeable future or that A4 have no reason to believe that they will do so. Accordingly, there is no proper reason to suppose that A4 seek recognition and enforcement in these proceedings simply as a device to execute against assets elsewhere in the UAE. [324]

The question that this analysis raised more specifically was whether the ADGM courts were able to operate as a conduit jurisdiction for the recognition and enforcement of non-ADGM awards for onward execution against award debtor's assets onshore. Smith J seemed to intimate that if the sole purpose behind the offshore enforcement application was execution outside the ADGM (no assets of the award debtor being present within), the ADGMCFI should not entertain the application. In similar terms, Smith J asked the following rhetorical questions:

> B4 are an Abu Dhabi registered company, as indeed are A4. Should this Court be concerned about whether A4 might be seeking recognition and enforcement of the Award not in order to enforce it against assets in the ADGM, but as a device to have an order of this Court (rather than the Award itself) enforced elsewhere in the UAE, and in particular elsewhere in Abu Dhabi, without having other UAE Courts, including those of the Abu Dhabi Judicial Department ("ADJD"), examine for themselves whether the Award should be recognised and enforced within their jurisdictions? [325]

Netting agreements. Last but not least, Article 13(17) as amended provides for the application of the recognition and enforcement regime under the ADGM Founding Law with respect to non-ADGM judicial instruments, including judgment, order and ratified awards, as well as (foreign) arbitral awards more generally

[321] The Guide referring to the conduit option as an *"impermissible device for enforcement"*: See the Guide, at p. 5.
[322] [2019] ADGMCFI 0007, ruling of 8 October 2019.
[323] For comment, see G. Blanke, "The First Arbitration-Related Cases of the ADGM Courts (Part 2): [2019] ADGMCFI 0007", Practical Law Arbitration Blog, Thomson Reuters, 16 January 2020, available online at http:/ arbitrationblog.practicallaw.com/the-first-arbitration-related-cases-of-the-adgm-courts-part-2-2019-adgmcfi-0007/. See also G. Blanke, "Arbitration in the UAE: 2019 in Review", in G. Al Hajeri and Z. Penot (eds), *The UAE Arbitration Yearbook 2019*, LexisNexis, 2020, pp. 54-85, at pp. 70-73.
[324] Ruling in *A4 v. B4*, at para. 23.
[325] *Id*., at para. 20.

for the protection of so-called Netting Agreements. In the terms of the 2020 Amendment, qualifies as a netting agreement *"any agreement or master agreement between two parties which provides for the netting of present or future payment or delivery obligations or entitlements and any related margin, collateral or security arrangements, in connection with those types of qualified financial contracts as the Board of Directors may designate."*[326]

Taking all the amendments to Article 13 of the ADGM Founding Law in the round, it difficult to hide some disappointment at the more radical changes, in particular the quasi prohibition of the ADGM Courts to operate as a conduit jurisdiction. This is no doubt a trade-off initiated by the onshore Abu Dhabi authorities out of a desire to remain a *primus inter pares*.

That said, to conclude on a positive note, the expansion of the opt-in to go to arbitration marks a welcome end to the more limited scope of the arbitration option under the original version of the Founding Law, severing the ADGM arbitration option from any geographic nexus to the ADGM (bar the seat of the arbitration or the application of the 2015 ADGM Arbitration Regulations).

3.2 Soft law measures of the ADGM

The ADGM has adopted a number of soft law measures that assist in the conduct of arbitration in the UAE more generally and enhance the perception of UAE free zone arbitration more specifically. Importantly, this includes measures to support the mutual recognition and enforcement of ADGM awards by courts within the UAE.

3.2.1 MoJ-ADGM MoU on enforcement of awards[327]

In another push to expand the area of free movement of onshore and offshore ratified awards, the ADGM Courts have recently entered into a memorandum of understanding with the Ministry of Justice of the United Arab Emirates.[328] Following its adoption on 4 November 2019, the 2019 MoJ-ADGM MoU entered into force with immediate effect.[329] It follows the adoption of the related MoU on judicial co-operation between the UAE Ministry of Justice and the ADGM Courts[330], which has for one of its main objectives the pursuit of the reciprocal recognition and enforcement of arbitral awards between the federal and the ADGM Courts and *vice versa*.[331]

The 2019 MoJ-ADGM MoU is closely aligned with and as such modelled on the wording of two previous memoranda that were adopted with corresponding objectives in mind: The MoU between the ADGM Courts and the Abu Dhabi Judicial Department of 16 April 2016 on the one hand[332] and the MoU between the ADGM Courts and the Ras Al Khaimah Courts of 5 May 2019 on the other;[333] both deal with the

[326] See Article 1 as amended.
[327] This section is based on G. Blanke, "The ADGM courts adopt memorandum of understanding on enforcement of awards with UAE MoJ", Practical Law Arbitration Blog, Thomson Reuters, 18 May 2020, available online at http://arbitrationblog.practicallaw.com/the-adgm-courts-adopt-memorandum-of-understanding-on-enforcement-of-awards-with-uae-moj/.
[328] See Memorandum of Understanding between Ministry of Justice United Arab Emirates and Abu Dhabi Global Market Courts Concerning the Reciprocal Enforcement of Judgments, dated 4 November 2019 (the "2019 MoJ-ADGM MoU" or simply the "MoU").
[329] See Clause 19.
[330] See Memorandum of Understanding between Ministry of Justice and Abu Dhabi Global Market Courts concerning cooperation in legal and judicial matters, dated 15 May 2016 (the "2016 MoJ-ADGM MoU"). For contemporaneous commentary, see G. Blanke, "Recent Developments of Arbitration in the UAE: The Year in Review" in G. Al Hajeri and Z. Penot (eds), *The UAE Arbitration Yearbook 2016*, 2017, pp. 80-102, at pp. 93 *et seq*.
[331] See Clause 3(4) read together with Clauses 3(3) and 2(5), 2016 MoJ-ADGM MoU.
[332] For contemporaneous commentary, see G. Blanke, "The Abu Dhabi Global Market adopts Memorandum of Understanding with Abu Dhabi Judicial Department on enforcement of awards", Practical Law Arbitration Blog, Thomson Reuters, 3 May 2018, available online at http://arbitrationblog.practicallaw.com/the-abu-dhabi-global-market-adopts-memorandum-of-understanding-with-abu-dhabi-judicial-department-on-enforcement-of-awards/. Also see G. Blanke, "Arbitration in the UAE: 2018 in Review", in G. Al Hajeri and Z. Penot (eds), The UAE Arbitration Yearbook 2018, LexisNexis, 2019, pp. 31-61, at pp. 54-56.
[333] For contemporaneous commentary, see G. Blanke, "The ADGM adopts memorandum of understanding with Ras Al Khaimah Courts on enforcement of awards", Practical Law Arbitration Blog, Thomson Reuters, 11 July 2019, available online at http://arbitrationblog.practicallaw.com/the-adgm-adopts-memorandum-of-understanding-with-ras-al-khaimah-courts-on-enforcement-of-awards/. Also see G. Blanke, "Arbitration in the UAE: 2019 in Review", in G. Al Hajeri and Z. Penot (eds), *The UAE Arbitration Yearbook 2019*, LexisNexis, 2020, pp. 54-85, at pp. 79-81.

onshore/offshore recognition and enforcement of judicial instruments, including ratified awards, between the respectively designated courts, proscribing any review on the merits of the instrument of which recognition and enforcement is being sought before the enforcing court. Taken together, these MoUs strive for the judicial integration between onshore and offshore by establishing a UAE-wide regime of mutual recognition and enforcement of judicial instruments, including ratified awards. Importantly, the MoU extends to the federal UAE Courts, i.e., those courts that form part of the federal UAE court system, i.e., the courts of the Emirates of Sharjah, Ajman, Umm Al Quwain and Fujairah.[334] This means that taking account of the number of onshore courts that have now entered into an MoU with the ADGM Courts for creating a pan-UAE area of free movement, only the Dubai courts, including their free zone counterparts, the DIFC Courts, stay marginalised and will have to rely on the terms of UAE Federal Law No. 11 of 1973 for want of a better-suited and more avantgarde instrument to assist in the enforcement of an onshore Dubai or offshore DIFC award in the ADGM or *vice versa*.

The reference in the title of the 2019 MoJ-ADGM MoU to "reciprocal" recognition and enforcement is a misnomer of sorts given the ambition of the MoU to create a regime for *mutual* recognition and enforcement that dispenses with a *substantive* review by the enforcing court of the instrument presented for enforcement, i.e., that requires enforcement *"without re-examining the substance of the dispute on which [the instrument] has been issued"*[335]. In this sense, the 2019 MoJ-ADGM MoU expressly prohibits a re-examination on the merits by the respectively other court of awards ratified by the Federal Courts[336] or of awards ratified by the ADGM Courts[337], as the case may be. This approach is also confirmed by the definition of arbitral awards under the MoU, according to which *"[a] ratified or recognised arbitral award by the Federal Courts or the ADGM Courts has the same force as a judgment of either of the courts and therefore does not require any further ratification or recognition by the other court"*[338], thus proscribing any form of double *exequatur*. Following the regime introduced by the previous two MoUs, in order to qualify for mutual recognition and enforcement without a second look by the enforcing court, the ratified arbitral award presented for enforcement must be accompanied by an official translation into the working language of the enforcing court, i.e., English in the case of the ADGM[339] and Arabic in the case of the Federal Courts[340] and bear the following executory formula[341]:

> "The authorities and competent bodies must proceed to execute this instrument and to carry out the requirements thereof, and they must give assistance in the execution thereof even by force if so requested."

In order to ensure the seamless operation of the 2019 MoJ-ADGM MoU in practice, each of the Federal and the ADGM Courts is required to assign officers to assist award creditors whose ratified awards have been referred to the respectively other court for enforcement[342] and to ensure that there is no duplication in court actions between the on- and offshore courts.[343]

Taken in the round, the 2019 MoJ-ADGM MoU promotes the establishment of a pan-UAE regime of mutual recognition and enforcement of ratified awards between the onshore UAE and the offshore ADGM Courts. Once perfected, this regime will lead to the full judicial integration of the civil law courts in mainland UAE and the ADGM free zone courts. From a comparative law perspective, the adoption of these MoUs unleash integrational forces that will consolidate the systemic interaction between the civil and common law traditions in everyday legal practice and in particular in the enforcement of domestic onshore and offshore awards.

[334] See Clause 2, 2019 MoJ-ADGM MoU.
[335] See Clause 2, 2019 MoJ-ADGM MoU.
[336] See Clause 10, 2019 MoJ-ADGM MoU.
[337] See Clause 15, 2019 MoJ-ADGM MoU.
[338] See Clause 5(a)(ii)), 2019 MoJ-ADGM MoU.
[339] See Clause 7(b), 2019 MoJ-ADGM MoU.
[340] See Clause 12(b), 2019 MoJ-ADGM MoU.
[341] See Clauses 7(a) and 12(a), 2019 MoJ-ADGM MoU.
[342] See Clause 16(a)(ii), 2019 MoJ-ADGM MoU
[343] See Clause 16(a)(i), 2019 MoJ-ADGM MoU.

3.3 Revised 2015 ADGM Arbitration Regulations[344]

The ADGM Arbitration Regulations [345] have recently been subject to their first revision: Amendment No. 1 of 2020,[346] as it is known, was enacted just before Christmas, that is on 23 December 2020, and has entered into full force at the time of writing. The Amendment focuses on a number of areas to enhance the efficient operation of the 2015 ADGM Arbitration Regulations, including in particular a clarification of the scope of an arbitration agreement under the Regulations, the ADGM Courts' powers to grant interim measures, the pervasive use of technology throughout the arbitration process, the summary disposal of claims, counterclaims and defences, the imposition of certain disclosure requirements with respect to third-party funding, and the regulation of party and party representative conduct.

The following discusses each of these and other amendments together with their respective objectives in an attempt to provide some initial guidance. In doing so, it takes account of Consultation Paper No. 8 of 2020 – Proposed Amendments to the ADGM Arbitration Regulations 2015, dated 25 November 2020[347] (the "Consultation Paper"), which was circulated to inform and assist the public consultation process initiated by the ADGM before adoption of the amended Regulations. The Consultation Paper explains the rationale behind a number of the amendments that were ultimately adopted.

The scope of the arbitration agreement. Inspired by Section 5 of the 1996 English Arbitration Act, Section 14(2) of the Regulations as amended allows arbitration agreements to qualify as having been made in writing if their recording in written form is by a(n) (authorised) third party as opposed to the contracting party that is subject to the obligation to arbitrate itself. As a corollary, Section 14(2) also expressly recognises the formation of arbitration agreements that are in writing but have not been signed orally or by conduct. This is intended to facilitate the conclusion of binding arbitration obligations arising from bills of lading that provide for arbitration or from articles of association that provide for arbitration in shareholder disputes.[348]

A new Section 14(6) expressly recognizes the enforceability of unilateral arbitration options under the Regulations as amended: *"An arbitration agreement giving any party a unilateral or asymmetrical right to refer a dispute either to an arbitral tribunal or a court does not contravene these Regulations and shall not be rendered invalid for that reason*." This helpfully clarifies the position under the Regulations on a subject that remains unclear in onshore arbitration albeit that unilateral options to resort to court rather than arbitration have been found enforceable onshore.[349]

The ADGM Courts' powers to grant interim measures. A new Section 29 confers upon the ADGM Courts the power to order a claimant to provide security for the costs of the arbitration irrespective of the claimant's place of residency or incorporation, even if outside the ADGM.

Amended Section 31 has been significantly broadened in its application and now empowers the ADGM Courts to adopt *"any interim measure in relation to arbitration proceedings as [they] ha[ve] in relation to proceedings in the Court"*[350], reflecting corresponding powers of the DIFC Courts in DIFC-seated arbitrations under the 2008 DIFC Arbitration Law. In addition, Section 31(3) now relieves the ADGM Courts' power to award interim relief from any geographic nexus to the ADGM in circumstances where the seat of arbitration is outside the ADGM (other than the location of the subject of the relief being in the ADGM). In addition, it expressly empowers the ADGM Courts to adopt interim measures against third parties, i.e., non-parties to the underlying arbitration agreement. This will facilitate the Courts' role in providing interim relief outside a strictly curial context and - taking guidance from recent case law precedent

[344] This section is based on G. Blanke, "Amendment No. 1 of 2020: The 2015 ADGM Arbitration Regulations in focus", Kluwer Arbitration Blog, forthcoming March 2021.
[345] For a consolidated text, see https://en.adgm.thomsonreuters.com/sites/default/files/net_file_store/ADGM1547_ 19075_ VER231220. pd.
[346] See https://en.adgm.thomsonreuters.com/sites/default/files/net_file_store/ADGM_Arbitration_Regulations_Amendment_No_1 _of _2020-23122020.pdf.
[347] See https://www.adgm.com/documents/legal-framework/public-consultations/2020/consultation-paper-no-8/consultation-paper-no-8-of-2020--adgm-arbitration-regulations.pdf.
[348] See Consultation Paper, at para. 12.
[349] See Case No. 116/2018, ruling of the Dubai Court of Cassation of 16 September 2018.
[350] See Section 31(2), amended Regulations.

of the English Court of Appeal in A v. C. [2020] EWCA Civ. 409[351] - the production of third-party witness evidence by non-parties in an ADGM-seated arbitration. *Ex parte* applications for interim relief by parties and non-parties alike are permissible in cases of urgency only.[352]

Finally, an amended Section 48(1) now provides for a non-exhaustive list of self-explanatory measures that may be adopted by the ADGM Courts to lend assistance in the taking of evidence:

> (a) the examination of witnesses, either orally or in writing;
>
> (b) the production of documents;
>
> (c) the inspection, photographing, recording, preservation, custody or detention of any property; and
>
> (d) the taking of samples of any property and the carrying out of any experiment on or with any property.

Procedural rules. In an endeavour to assist in the fair and efficient procedural conduct of the arbitration, a new Section 34(2) expressly authorises the adoption – in whole or in part – of the ADGM Arbitration Centre Arbitration Guidelines[353]. These entered into force in September 2019 with the objective to *"provide parties and tribunals with a set of innovative best practice procedures to assist in bringing greater certainty and efficiency to the arbitral process, while ensuring fairness, equality and due process".*[354]

The use of technology. A new Section 34(5) introduces seven *"technology-related solutions"*[355] that facilitate the remote procedural conduct of an ADGM-seated arbitration:

> (a) the submission, exchange or communication of documents by electronic means;
>
> (b) the use of electronic signatures for documents submitted, exchanged or communicated;
>
> (c) documents being provided in electronic searchable form;
>
> (d) the use of an electronic document review system for disclosure or document production;
>
> (e) the use of an electronic document management system for hearings;
>
> (f) the use of an online case management platform;
>
> (g) conducting hearings, in whole or in part, by video conference, telephone or other communication technology;

Section 34(5) also offers a residual solution which leaves it to an ADGM tribunal to identify any other suitable technological measures for the expeditious and efficient conduct of the arbitration. Helpful guidance is also provided by the Consultation Paper, which states that *"the technology-related solutions set out in section 34(5) are not mandatory as the tribunal retains a broad discretion as to whether they are appropriate to use in any particular case"* and that *"[t]he seven solutions are also not exclusive, as there is an eighth catch-all*

[351] See Consultation Paper, at para. 16.
[352] See Section 31(4) and (5), amended Regulations.
[353] See https://www.adgmac.com/wp-content/uploads/2019/09/ADGM-Arbitration-Centre-Guidelines.pdf. For some initial commentary, see G. Blanke, "The ADGM Arbitration Centre Guidelines: soft law hardcore…", Practical Law Arbitration Blog, Thomson Reuters, 8 November 2019, available online at http://arbitrationblog.practicallaw.com/the-adgm-arbitration-centre-arbitration-guidelines-soft-law-hardcore/. See also G. Blanke, "Arbitration in the UAE: 2019 in Review", in G. Al Hajeri and Z. Penot (eds), *The UAE Arbitration Yearbook 2019*, LexisNexis, 2020, pp. 54-85, at pp. 75-77.
[354] See Introduction to the Guidelines.
[355] See Consultation Paper, at para. 19.

category which relates to any other technology that will enhance the efficient and expeditious conduct of the arbitration".[356]

Further, a new Section 35(5) confirms that arbitration under the Regulations may be conducted at any venue by electronic means, *"in whole or in part, in person or by video conference, telephone or other communications technology (or any combination thereof) in one or more geographical places."* This creates an opportunity for the remote hearing of the parties' legal pleadings and for remote oral testimony tendered by both fact and expert witnesses.[357] In similar terms, Section 43, which deals with the conduct of hearings and the written proceedings in ADGM arbitration, has been amended to reflect the permitted use of technology throughout: hearings may hence be held *"[…], in whole or in part, in person, by video conference, telephone or other communication technology",*[358] a party having liberty to apply for the hearing of expert or fact witnesses in the same manner;[359] legal pleadings together with evidence may be *"supplied or communicated electronically".*[360]

Finally, the amended Regulations provide that an award is deemed made at the seat of the arbitration even if *"signed by electronic means"*[361] and that *"[a]n award signed by electronic means shall have the same legal validity and enforceability and constitute the original award for the purposes of section 61(2)(a) of these Regulations [i.e., for enforcement purposes], as an award with manually executed signatures of arbitral tribunal"*[362], with a soft copy of the award being delivered to a party upon issuance, subject to delivery of an original hard copy upon party request.[363] Amended Section 55(6) also expressly includes within the term of (recoverable) "cost of the arbitration" *"other costs for the conduct of the arbitration, including those for […] technological solutions such as electronic document management and virtual hearing platforms […]".*[364]

To be sure, the pervasive use of technology throughout the arbitration process under the amended Regulations follows recent trends in favour of digitalization prompted by the currently pending pandemic across the arbitration industry. That said, it bears mentioning that the regime for the treatment of electronic awards and the digitalization of the arbitration process is by far the most comprehensive and advanced in any arbitration law to date. As explained by the Consultation Paper, *"technology-related solutions are part of ADGM's arbitration DNA".*[365]

Seat of arbitration. Following the wording of Article 14(b) of the ADGM Founding Law as amended,[366] a new Section 35(2) disassociates the application of the Regulations from an ADGM-nexus requirement other than the seat of the arbitration being the ADGM. This finally settles the debate on the proper scope of application of the 2015 ADGM Arbitration Regulations in favour of their application absent any geographic nexus to the ADGM other than the seat of the arbitration.[367]

Disclosure and third-party funding. Following contemporary trends in international arbitration more generally, a new Section 37 requires a party to disclose to the tribunal and the other parties in the arbitration third-party funding arrangements and the identity of any third-party funder in order, inter alia, to avoid conflicts of interest.

Summary dismissal. A new Section 42 introduces a regime for the early summary disposal of claims, counterclaims and defence in whole or in part on the basis that there is *"no real prospect of success in respect*

[356] *Id*., at para. 21.
[357] See Section 35(4), amended Regulations.
[358] See Section 43(2), amended Regulations.
[359] See Section 43(3), amended Regulations.
[360] See Section 43(6), amended Regulations.
[361] See amended Section 55(3).
[362] See amended Section 55(4).
[363] See amended Section 55(5).
[364] See amended Section 55(6)(e).
[365] See Consultation Paper, at para. 20.
[366] See L. Pitts, Y. Hefti-Rossier and K. Kalantarian, "ADGM Courts: Not Open for Business as a Conduit Jurisdiction?", Kluwer Arbitration Blog, 7 October 2020, available online at http://arbitrationblog.kluwerarbitration.com/2020/10/07/adgm-courts-not-open-for-business-as-a-conduit-jurisdiction/.
[367] For further discussion, see G. Blanke, "The Arbitral Jurisdiction of The ADGM: How Far Does It Reach … Really?", Kluwer Arbitration Blog, 23 August 2019, available online at http://arbitrationblog.kluwerarbitration.com/ 2019/08/23/ the-arbitral-jurisdiction-of-the-adgm-how-far-does-it-reach-really/.

of the relevant part or whole of the claim, counterclaim or defence".[368] It bears mentioning that the Consultation Paper also expressly envisages a summary disposal on the basis that the tribunal *"manifestly"* lacks jurisdiction (referred to as the "jurisdiction limb") in addition to the "merits limb"[369] albeit that the jurisdictional limb is in any event dealt with in detail under Chapter 4 of the 2015 ADGM Arbitration Regulations (*"Jurisdiction of arbitral tribunal"*). Importantly, in order to preserve the efficiency of the arbitral process, the summary disposal procedure is at the tribunal's *"full discretion"* following consultation with the parties albeit that the tribunal's summary determination must be in the form of an award, thus making it enforceable before the competent courts.[370]

Tribunal-appointed expert. New Subsections 47(4) and (5) require the communication of a Tribunal-appointed expert report upon which tribunal relies in its decision to the parties but allows this to be done electronically unless otherwise agreed by the parties.

Party and party representative conduct. A new Section 44 regulates party and party representative conduct in the arbitration, providing for a sanctioning mechanism in the event of non-compliance. This regime is closely modelled on Module 6 of the ADGM Arbitration Centre Arbitration Guidelines.

Recognition and enforcement. Apart from the comments of relevance made with respect to the use of technology above, amended Section 61(2) dispenses with the requirement to submit an original or certified copy of the arbitration agreement in favour of a simple copy (to accommodate the unintended loss by a party of that agreement in its original). Amended Section 61(5) makes that Section expressly subject to Article 13 of the ADGM Founding Law as amended, which in turn prohibits the operation of the ADGM Courts as a conduit.

Conclusion

2020 has been another interesting year for both onshore and offshore arbitration in the UAE. Most importantly, a first body of case law precedent under the FAL has now gradually been shaping. From those developments it is evident that the UAE courts' interpretation of the provisions of the FAL have so far remained closely aligned with case law precedent under the former UAE Arbitration Chapter. Similarly, offshore developments have further consolidated the attractive offering of free zone arbitration in the UAE by virtue of a targeted refinement of case law precedent and the regulatory framework for arbitration offshore

[368] See Section 42(1), amended Regulations.
[369] See Consultation Paper, at para. 27.
[370] See Section 42(2) and (3), amended Regulations.

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).

Procedural Islamic Criminal Justice in Terms of Human Rights: Beyond the Zero-Sum Game

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Abstract

This article discusses the main principles of criminal law substantially and procedurally under Islamic law. The essential features of Islamic criminal law are outlined and discussed.

Some scholars have argued that international human rights values should be interpreted, applied, and practiced by domestic cultural and religious ideals. Islamic criminal law is genuinely rooted in the revelations' tests and as such is divinely based and driven, not to mention circuitously mingled with spirituality and ethics while instructing human dignity's philosophies and life appreciation's values. Given that the Islamic Human Rights Charter predates the Human Rights Declaration, we may not ask ourselves if Islamic law is compatible with human rights. Instead, this article asks which parts of Islamic criminal *Shari'*a (procedural) norms are similar to the Human Rights Declaration and how they are applied in each country.

As there is no way to truly know the detailed Islamic perspective on human rights, it is well established that the general norms support it. Instead of dwelling on an unwinnable debate, this article encourages moderate Muslim scholars to endeavour to prove the positive aspect that Islam does support human rights via moderate and flexible interpretation of the law.

Keywords

Criminal justice; Islamic law; human rights; *Shari'a* law; criminal procedure; religious law

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Introduction

International law, especially international criminal law and international human rights law, assures numerous fundamental principles of procedural criminal justice, such as presumption of innocence, in that the guilt of the offender must be proven beyond reasonable doubt, as emphasised within the criminal American federal common law (Model Penal Code and States' criminal laws) paradigm, the right against self-incrimination, the right to be tried without excessive and unjustified delay, the right to cross-examine witnesses, and the right to legal assistance (having a defence lawyer), among many others.[1] Liberal Muslims respond in the confirmatory to the question of whether Islam supports human rights. In this respect, such a perspective to human rights falls into the same fallacy that causes more conventional classical Muslims to reject or deny human rights.[2] Just as pineapples are not mentioned in the *Qura'nic* texts, human rights are also not precisely stated because neither concept existed in 7th century Arabia.[3]

Islamic criminal law serves as the system linked to the legal system of law and Islamic norms. *Shari'a* is the driving path precisely associated with the teachings of the *Qura'n* and *Sunnah* that cannot be contested and hence are mandatory to follow. The criminal law of mainly Muslim countries is based on modern current European criminal laws (penal codes). The Islamic criminal justice system recognises privacy rights and sanctity, names, and personal correspondences on search and seizures among many others, and thus Islamic criminal law is undeniably rooted in the revelations for ensuring dignity and appreciation of – modern – human life standards.

Islam and Islamic law cannot support or deny human rights because human divine knowledge on the issue is necessarily incomplete.[4] Moderate Muslim scholars should make this argument and then present practical reasons and logical reasonable ideals why human rights are right for Muslim societies, as such a move will bring the discourse about human rights back to the sequential realm and away from a doctrinal debate which can never be won.[5] Generally speaking, positive codified international law provides procedural justice on the

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[1] *See generally* MATTHEW LIPPMAN, SEAN MCCONVILLE, & MORDECHAI YERUSHALMI, ISLAMIC CRIMINAL LAW AND PROCEDURE: AN INTRODUCTION (1988).

[2] Mashood A. Baderin and Manisuli Ssenyonjo, *International Human Rights Law*: *Six Decades after the UDHR and Beyond* (Ashgate Publishing 2010), at 3.

[3] *Id*. Thus, it does make sense to argue whether there are pineapples in paradise or whether Islam proport human rights. In this regard, Khan argued:

> Images of Islam pervade the Western world. The bombings of American embassies in Kenya and Tanzania allegedly by Saudi terrorist, Osama bin Ladin and the US subsequent retaliation, the Persian Gulf War and the recent US air strikes on Iraq, are among the many recent world events involving Islam that have been profiled in the media. Other incidents, such as the *fatwa* issued on Salman Rushdie, the revival of fundamentalism in Algeria forcing all women to veil themselves, and the conflict in the Middle East between Israel and Palestine, are perpetual sources of international contention and international media coverage. It is rarely noted that many of these incidents involve the actions of radical groups that are no more representative of Islam than the actions of David Koresh, who died in the confrontation between law enforcement authorities and the Branch Davidians in Waco, Texas, are representative of Christianity. The Western media often obscures the line between common practice and extremism by being selective in the publicity given to incidents involving Muslims and Islam. The media's portrayal of Islamic law as being restrictive of individual rights, patriarchal and demeaning to women is consistently shrouded by political strategizing, inherent bias and the fear that Islam will threaten the current global power structure. The media has accordingly responded to the revival of Islam by pushing Islam to the forefront of international human rights dialogue. This has allowed the West to suppress the Islamic revivalist movement and the rise of radical Islamic fundamentalism by rallying the international human rights community, which itself is largely grounded in Western rights and values, to assert its abhorrence for the human rights violations taking place in parts of the Islamic world. Because human rights in these Islamic countries are rooted in Islamic theology but are also tempered by political and economic relations whit the West, the West has used this means to assert its power in the international community, and to protect its secular, socio-democratic power structure . . .

See Isha Khan, *Islamic Human Rights and International Human Rights Standards*, 5 APPEAL. REV. CURRENT L. & L. REFORM 74 (1999).

[4] *Id*. The exponential growth of Islam in the world has attracted the attention of the international agenda, especially in the human rights field. With a contingent of followers close to one fifth of earth's population, young Muslims have surpassed the Middle East borders, towards tradition Christian countries like the United States and Canada. This event reveals much more than a simple immigration process, triggered by social and economic issues, but the challenge of coexistence between different world views, though linked in their roots.

[5] William E. Shepard, *Islam and Ideology*: *Towards A Typology*, 19 INT'L. J. OF MIDDLE EAST STUDIES (1987), at 47. Either by geopolitical disputes or by simple misconceptions and fear, the biggest challenge for the mankind has always been to translate, in peace, in promising fruitful coexistence, the different shades of the same color, seen by so many different points of view. This grief tone which features the western's media coverage, leads, of course, to noxious effects. Without a deeper understanding of the historical foundations of the Islamic law, the massive display, on global scale, of alleged violations of human rights committed in Muslim countries, only exacerbates the feeling of fear and the distance contrary to the desired integration of the nations. Hence, the urgent need to understand

basis of several norms embodied in different international legal documents. These comprise the right to be presumed innocent until proven guilty according to the law, the right against self-incrimination (the right not to be compelled to testify against yourself), the right to be tried on fairly and just basis, the right to "examine [...] the witnesses against him/her," and the right to legal assistance, including the right to "communicate freely and confidentially with their lawyer."[6] The question becomes whether Islamic law provides similar procedural protections. In other words, whether Islamic criminal law guarantees comparable procedural defences and establishes how Islamic law provides for basic human rights as well as basic principles that may serve as guidelines in the procedural justice and the criminal policy.

As defined by common law traditions or the codification of laws, the Islamic criminal system varies from other legal methodologies based on binding judicial precedents practiced under codified (written) civil law.[7] There is neither an apprehending of mandatory legal precedents, nor a history of law's codification in *Shari'a* law. Thus, the case law analysis is relatively like the process of *ijtihad* (analogical deduction and reasoning) in Islamic *fiqh* (law).[8] The political, legal, and social aspects of all Muslim nations are implanted within the roots of Islamic criminal law and so, it is their ruling legal foundation. Specifically, Islamic law is an explicitly instructive paradigm of sacred legal system and one of the most identified legal perspective universally, which differs from other systems to enforce its crucial significance for rejoicing the legal phenomena accessible excessively.[9] The creation and presence of international criminal justice institutions were endorsed earlier by Islamic justice institution during the Rome negotiations.[10] In contrast, scholars precisely have argued that Islamic criminal justice system lacks a comprehensive observation to view Islamic criminal law as a non-progressive legal system or a static legal system without any robust or accurate analysis of the highly standardized legal criminal rules, bound to follow philosophies executed through divine texts.[11]

Western jurists' commentary has focused on Islamic criminal law on fundamental concepts irrespective of any unambiguous focus of the subject. The reasoning behind such lacking is due to the lacuna in English Western literature on Islamic criminal justice system. It is debatably unfeasible for Islamic criminal law to be according to the Western legal system due to its foundations, which are based on Islamic states' doctrines.[12] These values pave the path to the enhancement of a debate between international institutions and

Islam not by a fundamentalist point of view (which always manifests the violent struggle to a *status quo* [maintenance]), but through its humanistic version, which is not antagonize with it.

[6] *See* INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, GA Res. 2200A (XXI), at 52, UN Doc. A/ 6316 (1966); 999 UNTS 171; 6 ILM 368 (December 16, 1966), at art.14(2), at http://treaties.un.org/doc/Treaties/1976/03/19760323%2006-17%20AM/ChIV-4.pdf. *See also*, BODY OF PRINCIPLES FOR THE PROTECTION OF ALL PERSONS UNDER ANY FORM OF DETENTION OR IMPRISONMENT, GA Res. 43/173, UN Doc. A/RES/43/173 (Dec.9, 1988), which stipulates that "A detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law." Also, Art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, regarding the right to a fair trial, reads simply that "[e]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law," Art.7(1)(b) of the African Charter on Human and Peoples' Rights provides that the accused will have "the right to be presumed innocent until proved guilty by a competent court or tribunal", Art.8(2) of the American Convention on Human Rights, states that "[e]very person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law," and Art. 16 of the Arab Charter on Human Rights states that "Everyone charged with a criminal offence shall be presumed innocent until proved guilty by a final judgment rendered according to law." *See also* ICCPR, at arts. 14(3)(g), 14(3)(c), & 14(3)(e) & ARAB CHARTER OF HUMAN RIGHTS, at art. 16(3) *League of Arab States*, *Arab Charter on Human Rights* [May 22, 2004, *reprinted in* 12 INT'L. HUM. RTS. REP. 893 (2005), *entered into force* Mar.15, 2008], http://hrlibrary.umn.edu/instree/loas2005.html. For further discussion of the various rights afforded in the Charter, *see* M.Y. Mattar, *Article 43 of the Arab Charter on Human Rights*: *Reconciling National*, *Regional*, *and International Standards*, 23 HARVARD HUMAN RIGHTS J. (2013), at 91.

[7] Mohamed 'Arafa and Jonathan Burns, *Judicial Corporal Punishment in the United States*: *Lessons from Islamic Criminal Law for Curing the Ills of Mass Incarceration*, 25 INDIANA INT'L & COMP. L. REV. 3 (2015), at 385.

[8] Mohamed Badar, *Islamic Law* (*Shari'a*) *and the Jurisdiction of the International Criminal Court*, 24 LEIDEN J. OF INT'L L. 2 (2011), at 411– 433.

[9] *See generally* Mohamed 'Arafa, *Islamic Criminal Law*: *The Divine Criminal Justice System between Lacuna and Possible Routes*, 2 J. OF FORENSIC & CRIME STU. 102 (2018). *See*, *e.g.*, Anver M. Emon, *Shari`a and the Rule of Law* in SHARI'A LAW AND MODERN MUSLIM ETHICS (ed. Robert W. Hefner), Indiana Univ. Press (2016), at 37-64.

[10] Tamer Moustafa and Jeffery A. Sachs, *Law and Society Review Special Issue Introduction*: *Islamic Law*, *Society*, *and the State*, 52 LAW & SOC'Y REV. 560 (2018).

[11] Mathias Rohe, *Islamic Law and Justice* in SHARIA AND JUSTICE: AN ETHICAL, LEGAL, POLITICAL, AND CROSS-CULTURAL APPROACH, 105 (2018).

[12] *See generally* Jan Michiel Otto, *Sharia and National Law in Muslim Countries*: *Tensions and Opportunies for Dutch and EU Foreign Policy* (2008).

Islamic law, as it possesses numerous aspects that are not similar to western codes even though it remains sacred. Indeed, it is a positive law and requires credible testimony, witnesses, and evidence.[13]

It should be noted that based on *maslaha* (public interest) to safeguard public order and social security, the officers might investigate the individual's properties, communications, and houses. Under Islamic evidentiary rules, *qadis* (judges) and characters' qualifications are critical and stringent upon physical evidence or trustworthy witnesses' testimony and to confirm that the culprit receives an impartial and fair trial.[14] In this regard, procedural guarantees (due process) are left to the discretion of a ruler who is in charge of maintaining the society's common good and preserving public welfare as these are neither in the *Qur'an* nor the *Sunnah*, but it is yet driven by numerous Islamic standards.[15] In the same vein, a leader should err in favour of '*fw* (pardon) compared to in favour of punishment if the leader errs – and as a general rule – criminal evidence must fulfil the conclusiveness prerequisite until the execution of sentence and its illustration must not be delayed as the main importance for the criminal conviction.[16]

Pre-trial detention mode and release on financial bail is usually not recognised in Islamic criminal justice system, and hence, Muslim scholars confirmed that there should be no custody for the defendant before the trial since an indictment of sentence is not adequate for justifying the incarceration of an accused as this contradicts the freedom of movement stated by Islamic rules.[17] Based on the Islamic theory of protected interests, the right of both the defendant and the plaintiff is recognized under Islamic criminal law to illustrate evidence at trial and the sentence's execution upon conviction. This assures freedom of religion, knowledge, expression, right to self-preservation, and thought. It encourages the significance to receive the assistance of others in protecting interests.[18] The evidentiary rules protect the integrity of the Islamic criminal process that confirms that punishments and criminal convictions are executed in cases of a precise detailed explicit penalty and the presentation(s) of evidence/proof are legalised under *Shari'a*, which is regarded to have an extensive extent of authenticity and direct reliability.[19]

Based on this brief framework, this article will attempt to answer this question. Part I will briefly investigate the concepts of human rights, justice, and *maslahaa*(*h*) (protected interests), which institute the basis upon which procedural protections may be addressed. Part II will cover the basic principles that provide guidelines on procedural justice, such as the principles of non-retroactivity, individual accountability, and legality, along with the explanation of the main evidentiary rules (modes of evidence) that are designed to protect the accused (defendant) by Islamic law. Finally, this article concludes that the axiomatic view of Islamic criminal human rights law is fashioned by religious theories, laws, and divine practices and that Islamic law is more than appropriate to create a comprehensive design for procedural human rights from the criminal perspective and totally compatible with the universal norms, but national statutes must meet its condescending criterions and lofty standards.

1. Justice and *Masalah* (protected interests) as the basis of Islamic procedural human rights law: compatible or not?

[13] Badar, *supra* note 8.
[14] *Id*. One should bear in mind that both male or female *qadis* must possess acknowledged wisdom, intelligence, and '*adalah*. Muslim jurists have underscored that a just judge cannot give discriminatory law or bias ruling under classical *Shari'a* law.
[15] Arif A. Jamal, *Authority and Plurality in Muslim Legal Traditions*: *The Case of Ismaili Law*, 67 AMERICAN J. OF COMP. L. 3 (2019), at 491–514.
[16] Ahmed S. Hassanein, *The Impact of Islamic Criminal Law on the Qatari Penal Code*, 32 ARAB L. QUARTERLY 1 (2018), at 60-79.
[17] *Id*. The *Wali alMazalim* (complaints secretary/minster) executes this, and any recorded inhuman or cruel treatment (including beatings) or torture is prohibited by the *Qur'anic* texts as it is against the accused's dignity, especially in the pre-trial interrogation phase. Any legal *iqrar* (confessions) achieved under coercion is strictly forbidden and invalid.
[18] Jamal, *supra* note 15.
[19] Nur Kareelawati Binti Abdkarim, *Revisiting the Discourses of the 'Clash' for the Study of Culture in a Muslim Television Production*, 10 J. OF ARAB & MUSLIM MEDIA RESEARCH 2 (2017), at 177-197. Abdkarim ("adopts the discourses of the '*clash*' drawn from culturalist Samuel Huntington and reformist Edward Said's theses to identify the power dynamics facing the Channel" by analyzing the sociocultural environment along with the institutional context. (examining the debates of the 'clash' that exist in the western community, and the missionary (*da'wah*) purposes and the culture created the 'clash' between the western and Muslim cultures).

It has been argued that "the failure of the Western world to apply international human rights standards in their own territories, has weakened the legitimacy of those standards."[20] However, it is certain that the struggle for dignity and freedom, the main goals of the human rights thesis, is continuous and tireless, revealing the most important trait of the rational, dialectical and (why not?) spiritual evolution of man, against all historical forms of tyranny, precisely triggered by the (no less relentless) violations of that universal and ethical quest.[21] In this regard, that situation can be labelled as one of the Ronald Dworkin's central idea, supported by Immanuel Kant's thesis in which "we can only respect properly our own humanity if we respect humanity in others."[22]

In terms of the recognition of human rights under the umbrella of Islamic law, Coulson argues that Islamic law does not recognize the concept of "individual rights" or the notion of "defined liberties" of the people and "the formulation of a list of specific liberties of individual as against the state, in the manner, for instance of the United States Constitution, would in fact be entirely foreign to its whole spirit" and that "the stress [...] throughout the entire *Shari'a*, lies upon the duty of the individual to act in accordance with the divine injunctions."[23] Moreover, he argued that "the interests of the state and not those of the individual will constitute the Supreme Criterion of the law."[24] The principle of individual liberty, he states, is 'subordinate' to that of public interest and public welfare.[25]

However, Islamic *fiqh* (jurisprudence), including its two main textual sources, the *Qur'an* and the *Sunnah* (Mohammad's teachings) provides for the rudimentary human rights that are known in the modern era.[26] Freedom of religion is not only absolute but also fully protected, as the *Qur'an* reads "there is no compulsion in religion."[27] Additionally, the right to equality and dignity is obvious in the *Qura'nic* verse "O people, we created you from the same male and female, and rendered you distinct peoples and tribes, that you may recognize one another."[28] The right to privacy is explicitly provided for by the *Qur'an*, whether residential

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[20] *See generally* ANN ELIZABETH MAYER, ISLAM AND HUMAN RIGHTS (Westview Press 2013).

[21] *See* JOHN L. ESPOSITO AND JOHN O. VOLL, MAKERS OF CONTEMPORARY ISLAM (Oxford Univ. Press 2001).

[22] Khan, *supra* note 3, at 75. In this respect:

> The concept of dignity has been tampered with inconsistent abuse in political rhetoric; all politicians manifest acceptance to the idea, and almost all human rights defenders give it a prominent place. But we need the idea, and the cognate idea of self-respect, if we want to give meaning to our very lives and our ambitions. We all love life and fear death: we are the only animal aware of this absurd situation. The only value that we can find to live in death's edge, which is our impending situation, it is its "adverbial value." We should find the value of living – the meaning of life – to live well, as we find value in love, painting, writing, singing or dive well. There is no other value or lasting senses in our lives, but they are sufficient values and meanings. In fact, it's wonderful. Dignity and self-respect – whatever it means – are indispensable conditions to live well. We find evidence of this in the way most people want to live: head high while fighting for all other things they want. We find evidences of this in the mysterious phenomenology of shame and insult. So, we must explore the dimensions of dignity. At first, in this summary, […] described two fundamental principles of the policy: the requirement that government treats those who it governs with equal concern and respect, as we now say, and the ethical responsibilities of whom is governed. […] We can rescue the crucial idea of Kant's metaphysics; we can affirm it as what we call the Kant's principle. A person can only achieve dignity and indispensable self-respect for a successful life if he shows respect for humanity itself in all its forms. This is a model for ethics and morality unification . . .

Ronald Dworkin, JUSTIÇA PARA OURIÇOS [*translated by Pedro Elói Duarte*, *Coimbra*: *Almedina*] (2012), at 25.

[23] N.J. Coulson, *The State and the Individual in Islamic Law*, 6 INT'L. & COMP. L. QUARTERLY 1 (1957), at 50.

[24] *Id*.

[25] *Id*. The same discourse is made by Ann Mayer, who states that guarantees for individual rights were chiefly ignored in Islamic *fiqh* (jurisprudence).

[26] *Id*., at 51. Coulson concludes that "The problem, therefore, which today confronts those Muslim countries whose aim is the establishment of a system of guaranteed individual liberties, is no small one. For the possibility of such a system is denied by the fundamental doctrines of the *Sharia* itself, . . ." *Id*., at 60.

[27] The *Qur'an* states: "O disbelievers, I do not worship what you worship. Nor are you worshippers of what I worship. Nor will I be a worshipper of what you worship. Nor will you be worshippers of what I worship. For you is your religion, and for me is my religion." *Qur'an* 109:1-6.

[28] *Qur'an* 49:13. In the same vein, Prophet Mohammad declared in the Great pilgrimage "All Muslims are brothers unto one another", "there is no superiority of an Arab over a non-Arab except as his devotion is concerned", and "the noblest among you is the most God fearing." Also, he said, "truly your blood, your property, and your honor are inviolable." *See Sahih Bukhari* & *Muslim*. Dworkin said "at a stage of his evolving theory, Kant said that freedom is an essential condition for dignity – in fact, this freedom is dignity – and only formulating a moral law and acting in obedience to this law can an agent find genuine freedom. Therefore, what looks like a morality of self-abnegation becomes a deeper level, a morality of self-assertion." As always, the main human dilemma lays in how to deal with freedom, with such an inherent power, yielded by every single person, born so equal in essence, but in so different ways, for so different lives and personal ways to experience life.

privacy or communication privacy.[29] The right to assembly and association may be inferred from the *Qura'nic* verse "Let there be a community among you, who will invite (people) to [do] good, command what is proper and forbid what is improper" and the freedom of expression is embodied in Mohammad's *hadith* "the best *jihad* is to speak the truth in front of an unjust king."[30] The right to life is well established in the *Qur'anic* code as one of the fundamental human rights.[31] Islam – like the other major Abrahamic religions – deals with a standard human behaviour as universal, correct, and true life's objective, according to the unquestionable divine commandments, as Khan reported in this domain that:

> "In Islam, there is only one reality, ruled by Islamic law, under which the government must rule and the faithful must live. *Shari'a*, the Arabic word for Islamic law, literally means 'the way to follow.' Its main purpose is to direct Muslims, in their daily lives, to live in accordance with God's law, as it is revealed in the *Qur'an*. *Shari'a* distinguishes itself from the most of the world's other legal systems by imposing legal and religious obligations on its adherents. [...] Islamic law derives from four main sources. It includes the *Qur'an* (literal and final word of God); the *Sunnah* (the traditions based on the life of the Prophet Mohammad which describe model behaviour); *Qiyyas*, (juristic reasoning by analogy), and *ijm'a* (consensus of Muslim scholars). These sources work in conjunction with one another to create a comprehensive moral and legal ordering . . ." [32]

In this domain, that tension could only be undone by a human "dignity sense," based on both rational and argumentative approaches: something that goes a little further than religion [without disregarding it], and a little deeper into the unfinished spiritual human quest and their questions.[33] A track which does not end in the "knowledge" of God, but it leads to recognize Him in the next person (be it a person of my people, be it a completely foreign stranger). In other words, there is always something new about God in ourselves and thus, it's possible to see Islam *per se* blooming towards the recognition of human rights.[34] Khan says:

> "At the time of the Prophet 'differences' of opinion within the community were recognized as a sign of the bounty of *Allah*. […] The fact that the international community, including Islamic nations, has already recognized the mints of the UN and its human rights monitoring mechanisms implies an obvious acceptance of universal human rights standards. Modern Islamic reformers have also attempted to legitimize contentious *Sharia* principles by advocating a contemporary and liberal interpretative approach, consistent with the moderate cultural relativist perspective . . ." [35]

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[29] *Id*. The *Qur'an* reads "Enter not houses other than yours until ye have asked permission and saluted those in them. If ye find no one is in the house, enter it not until permission is given to you. If ye are asked to go back, go back" and "spy not on each other behind their backs."

[30] *Id*., at *Qur'an* 49:13. A tradition of 'Umar ibn al-Khattab, related by one of the Prophet's companions, reads:

> I went out in the city with 'Umar one night, and while we were walking, we saw the light of a lamp. We proceeded toward it, and when we reached it, we found a closed door and the sounds of revelry from inside. 'Umar took my hand and asked me, 'Do you know whose home this is?' I said I did not. 'Umar said, 'It is the home of [so-and-so]. They are drinking. What do you think?' I said: 'I think we have committed a forbidden act; God said we should not spy.' So, 'Umar left them alone.

[31] The *Qur'an* reads: "And whoever kills a believer intentionally, his punishment is hell; he shall abide in it, and *Allah* (God) will send His wrath on him and curse him and prepare for him a painful chastisement" and "whoever slays a soul, unless it be for manslaughter or for mischief in the land, it is as though he slew all men; and whoever keeps it alive, it is as though he kept alive all men." *Id.*, at *Qur'an* 3:14, 4:93, & 5:32.

[32] Khan, *supra* note 3, at 76. *See also* Dworkin, *supra* note 22, at 24-31. Khan pointed out:

> While Western countries may suggest that the countries applying traditional or conservative Islamic law have no regard for human rights, the Islamic world asserts itself as a champion of the human rights provided by God, […] It is difficult to determine whether there is a mean of reconciling the two positions as they both operate on different principles . . . Many Muslims use the concept of cultural relativism to legitimize their adherence to *Sharia* law. These Muslims believe that it is difficult, if not entirely impossible, to create universal human rights standards that will apply equally to all members of the human community. Their position generally suggests that given the diversity of cultural traditions, political structures, and levels of development in the world, it is virtually impossible to define a single distinctive and coherent human rights regime. Cultural relativists may vary in terms of the degree to which they find the universal ideal to be an impossible feat. For example, strict cultural relativists view the world in relative terms . . . *Id*., at 79.

[33] *Id*., at 84. As the global power-play changes to meet the challenges of the twenty-first century, the fundamental human rights of all people must not be abandoned. International human rights advocates should continue to work with Muslim governments and the Arab Middle Eastern countries should continue to put forth their own initiatives to resolve the tension between the traditional interpretation of the *Shari'a* and international human rights protocols.

[34] *Id*. *See also* WAEL HALLAQ, AN INTRODUCTION TO ISLAMIC LAW (Cambridge Univ. Press 2009), at 14–19.

[35] Khan, *supra* note 3. Furthermore, she argued that:

> These reformers argue that the sources of *Sharia* law should be examined from a strictly historical perspective, and that much of the literal interpretation of *Qura'nic* scripture should be contextualized, and in some cases abandoned. The reformers legitimize Islamic law by selectively highlighting aspects of the *Shari'a* that were progressive and revolutionary for its time. To do this, the reformers index some of the same provisions that Western critics index as celebrating inequality. By employing a historical perspective, the reformers depict the contentious provisions as innovative *Qura'nic* concessions made

Under Islamic jurisprudence, justice counts as one of the central basis of Islamic human rights law affirmed by the *Qura'nic* texts and *Sunnah* teachings.[36] Accordingly, justice is a predominant value within Islam, and is certainly one of the main objectives of the Islamic legal theory.[37] On the other hand, in terms of the protection of human rights within the Islamic theory of the *almasslaa*(*h*) *almhami*(*h*) (protected interests), Muslim scholars differentiate among three sorts of interests upon which various rights and freedoms may be considered.[38] These are the five *maqasid* and *daruriyyat* (essentials, and necessities or objectives) of Islamic legislation.[39] They comprise freedom of religion, right to self-presentation, freedom of thought and expression and knowledge, right to procreation and right to property.[40] Therefore, to enable the implementation and fulfilment of these necessities, *Shari'a* provides for what Muslim jurists theorized as *hajiyyat* (complementariness or conveniences) along with the third category of interest is *tahsiniyyat* (embellishments or refinements), which refer to interests that may cause faultlessness and improvement of human conduct and its proper realization.[41]

It is significant, if rights are to be protected and harm is to be repaired, that the judiciary exercises its power with full independence and in separation from the executive authority, which should also be subject to accountability.[42] Yet, some argue that the *qadi* (judge) derives its authority from the *Calipha* (leader).[43] In the same vein, a judge must be impartial, fair, equitable, honest to deliver unbiased justice, and may not apply

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with the noble intention of protecting women in the event of marriage breakdown while Western critics counter with the suggestion that the provisions reflect unfounded gender inequity. The reformers use the example that, under pre-Islamic custom, the bride was regarded as an object to be purchased, but explain that with the advent of the *Qur'an*, the woman's status was altered so that a bride was to be considered a person whose consent must be obtained to validate the marriage contract. They also bring attention to other *Qura'nic* concessions which include improving the financial status of women in the event of divorce or widowhood through the alteration of the dowry concept. In pre-Islamic times, the dower was owed to the father, but the *Qur'an* changed things by mandating that the dower be paid to the bride. This would entitle the woman to dispose of her own property, and in turn provide herself with some independence and basic social security . . .

[36] God says, "Stand firmly for justice as witnesses to God", "Even if it be against yourselves, your parents or your relatives, and whether it be (against) the rich or poor, for God can best protect both. Follow not the lust (of your hearts) lest it detract you from the cause of justice", "Allow not your rancor for a people for that is closer to heeding", "And I was commanded to deal justly between you", and "Surely, *Allah* commands justice and the doing of good", "God commands justice and good-doing [...] and He forbids indecency, dishonor, and insolence", "God commands you to deliver trusts back to their owners, and when you judge among men, you should judge with justice", and "Of these we created are a people who guide by the truth, and by it act with justice." *Id*., at *Qur'an*, at 4:135, 42:15, 5:8, 16:90, XV:92, IV:61, & VIII:180. *See generally* M. Khadduri, *The Islamic Conception of Justice*, JOHNS HOPKINS UNIV. PRESS (Baltimore 2001).

[37] *See generally* J. Naify, *Al-Ghazali in THE PIMLICO HISTORY OF WESTERN PHILOSOPHY*, R.H. Popkin (ed.) (1999).

[38] *See* Mohamed 'Arafa, *Islamic Policy of Environmental Conservation*: *1,500 Years Old – Yet Thoroughly Modern*, 16 EUROPEAN J. L. REFORM 2 (EJLR), *Special Issue on Islamic Law* (2014), at 494 ("Social interests and public benefits are addressed according to their significance, actuality, and certainty in this regard. Islamic law classifies interests into (a) *daruriyat* (necessities), or those things indispensable to the preservation of the *al-adaruriat al-khams* (five *Shari'a* objectives of life, religion, lineage, property, and prosperity); (b) *hajiyat* (needs), meaning those things whose absence leads to actual hardship and suffering and (c) *tahsinyyat* (supplementary benefits), which means things that refine life and enhance ethical values.").

[39] *Id*. ("According to the Islamic *fiqh* rules, Muslim scholars emphasized that urgency and precedence should be given to the basic desires and needs. In the case of conflict between the less needs and supplementary benefits, lesser needs should have priority over the supplemental needs. As Islamic jurisprudence is unique in assuring the right of personal security and social order, *Al- Imam Al-Ghazali* recognized what are known today as the ("Five Essentials") and these became the neutral criteria for scholars to identify whether an idea or solution stimulates the public interest. Accordingly, Islam reassures five essential things (*makasid al-Sharia al-islamia*/*al-daruriat al-khams*) to all individuals and prohibits unjustified violation of them by the State. These essentials are (a) protecting religion; (b) protecting lives; (c) protecting mind; (d) protecting posterity and intellect and (e) protecting property. On the other hand, Islamic law presents the structural framework for the community by maintaining the legal relationships among persons and protecting the interest of one person from being attacked by another.").

[40] *See generally* M. HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE (3rd ed, 2003), at 238.

[41] Several norms are followed in Islamic jurisprudence, including that "harm shall be removed", "harm is to be repelled as far as possible", "harm is not to be removed by the like of it", "greater harm is to be avoided by a lesser harm", "repelling harm is preferred to the attainment of benefits", and "to repel public harm, private harm is to be tolerated." All in all, "God does not want to place you in a difficulty, but He wants to purify you, and to complete His favor to you, that you may be grateful", "God intends for you ease, and He does not want to make things difficult for you." Further, the rule is "no harm and no infliction of harm" or in other words, "there should be neither harming nor reciprocating harm." *Id*., at *Qur'an*, at 5:6 & 2:185.

[42] A. ur Rehman, M. Ibrahim, & I. Abu Bakar, *The Concept of Independence of Judiciary in Islam*, 4 INT'L. J. OF BUSINESS & SOCIAL SCIENCE (2013), at 2.

[43] As Abou Bakr (the first Prophet's Companion) put it in his first address after he became *Chalifa*, "I have been given authority over you, but I am not the best of you. If I do well help me and if I do ill, then put me right." And when 'Omar (the second one) attempted to reduce the amount of *mahr* (dowry), an old woman in the mosque objected by saying, "You shall not deprive us of what God gave us", he responded, "A woman is right, and Omar is wrong."

a law in contradiction to the Islamic *Shari'a* (and to its general principles).[44] Moreover, it has been argued that Islamic law does not allow a process of appeal, though this argument may be rebutted because once a judge deduce or deviates from the basic principles of *ijtihad* (interpretation), their decision amounts to an ostensible miscarriage of justice, and not only a leaving from another judicial view, and thus, it may be subject to review (judicial review notion).[45]

2. What are the Islamic norms that serve as guiding legal principles for the rights of the accused in the criminal justice system?

Even though Islamic law may not provide thorough rules concerning every procedural right, it does propose general strategies, including the principles of legality, non-retroactivity, the individual accountability, along with the right to be presumed innocent until proven guilty and the right to defence.

2.1 The principle of non-retroactivity of the Criminal Codes

The accused' fundamental rights are provided in the *Qur'an*, and thus, Islamic law has comprehended the principle of non-retroactivity of penal laws as one of the most significant foundations of its criminal justice system.[46] At its core, this rule means that criminal laws have only prospective and *not* retroactive effect to protect individual security and prevent the abuse of power, so individuals cannot be accused of misconducts for acts which were permitted when committed.[47]

2.2 The principle of individual criminal accountability (punishment's personality)

This rule is considered one of the most vital basics of personal security in Islam, as it means that the actor (perpetrator) themself is the only person who can be accused of a criminal act, and no one shall escape impunity irrespective of blood ties or friendship to the victim (or to the judge or ruler).[48] A person who has contributed to a forbidden act, whether as principal or accomplice (accessory), must be convicted according to the rules of criminal culpability.[49]

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[44] The *Qura'nic* verse is obvious in that regard, "they were entrusted the protection of *Allah's* Book and they themselves were witnesses. [...t]hose who do not judge by the law which *Allah* had revealed are indeed unbelievers." The constitutionality clause guarantees that laws are compatible with Islamic law. For example, Art. 3 of the Afghan Constitution reads "In Afghanistan, no law can be contrary to the beliefs and provisions of the sacred religion of Islam." *See* M. Lau, *The Independence of the Judges Under Islamic Law*: *International Law and the New Afghan Constitution*, ZEITSCHRIFT FUE AUSLAENDISCHES OEFFENTLICHES RECHT UND VOELKERRECHT [64 HEIDELBERG J. OF INT'L. L.] (2004), at 917-927. Also, Art. 2 of the Iraqi Constitution stipulates, "First: Islam is the official religion of the State and it is a fundamental source of legislation: (a) no law that contradicts the established provisions of Islam may be established; (b) no law that contradicts the principles of democracy may be established, and (c) no law that contradicts the rights and basic freedoms stipulated in this constitution may be established." *See* M.Y. Mattar, *Unresolved Questions in the Bill of Rights of the New Iraqi Constitution*: *How Will the Clash Between* "*Human Rights*" *and* "*Islamic Law*" *Be Reconciled in Future Legislative Enactments and Judicial Interpretations*, 30 FORDHAM INT'L. L. J. (2006), at 1.

[45] *See* M. Shapiro, *Islam and Appeal*, 68 CALIFORNIA L. REV. (1980), at 350-381. He concludes that ("In Islam a peculiar institutional combination of dual legal systems and absence of hierarchy accounts for the absence of the institution of appeal present in almost all other legal systems. The Islamic experience suggests, therefore, that concern for political control rather than justice under law is the basic motivation for the implementation of appellate institutions.").

[46] On the non-retroactivity rule, the *Qur'an* says, "Say to the unbelievers that if they desist (from unbelief), what they have done in the past would be forgiven" and "God forgives what is past: For repetition God will exact from him the penalty. For God is Exalted and Lord of Retribution." *Qur'an* 8:38 & 5:95.

[47] *See* Mohamed 'Arafa, *Corruption and Bribery in Islamic Law*: *Are Islamic Ideals Being Met in Practice*? 18 GOLDEN GATE ANN. SURV. INT'L. & COMP. L. 171 (2012), at 195 ("The only exception to this principle in Islamic jurisprudence is that a criminal law has retroactive effect if it favors the accused. For example, if the new law provides for a lesser penalty than the existing law at the time the crime was committed then in that case the less severe punishment is applicable. This is very similar to the principle of lenity in Western legal systems.").

[48] M. CHERIF BASSIOUNI, THE ISLAMIC CRIMINAL JUSTICE SYSTEM (1982), at 58.

[49] The *Qur'an* notes this criminal norm and says, "Everyone is accountable for his own deeds, and no soul shall bear the burden of another" and "Whoever commits a sin only makes himself liable for it [...] and whoever commits a delinquency and then throws the blame thereof upon the innocent has burdened himself with falsehood and a *flagrant* crime" and "no bearer of burdens can bear the burden of another." *Qur'an* 6:164, 4:11-12, & XVII:15.

2.3 The principle of legality of crimes and punishments

According to this notion, there shall be no offense and no punishment except by law; thus, no act may be considered an abuse of law if it has not been obviously anticipated in a penal law or any criminal legislation in force at the time the act was committed.[50] The law may punish only those acts committed after their prohibition by law; the judge may impose upon the offender only those penalties which are sanctioned by law.[51]

2.4 The right to be presumed innocent until proven guilty (beyond reasonable doubt)

The presumption of innocence is one of the fundamental principles in the Islamic criminal procedural law. This principle is based on the so-called *istishab* (presumption of continuity), as one of the secondary sources of Islamic law, means that the presumption in the evidence law that a state of affairs known to have existed in the past continues to exist until a change is proved."[52]

2.5 The right to defence (due process guarantees)

One of the main principles of fair and impartial trial is the guarantee of defence in Islamic law, as it has been seen in the Prophet Mohammad's traditions that allow the defendant to be informed about the charges against them.[53] *Caliph* 'Omar (the second Prophet's companion) is reported to have advised judges by saying, "If an adversary whose eye had been blinded by another comes to you, do not rule until the other party attends. For perhaps the latter had been blinded in both eyes" and, *mere* suspicion is not sufficient to justify a warrant of arrest and detention.[54]

2.6 Strict criminal evidentiary and forensic rules

[50] Bassiouni, *supra* note 48, at 160.

[51] God says in that respect, "We never punish until we have a messenger", "*Allah* forgives whatever may have happened in the past, but whoso relapsed, *Allah* will take retribution from him", "Who received guidance, received it for his own benefit: who goth astray doth so to his own loss: Nor would we visit with our wrath until we had sent an apostle (to give warning)", and "Nor was thy Lord the one to destroy a population until he had sent to its center an apostle rehearsing to them our signs; nor are we going to destroy a population except when its members iniquity." *See Qur'an*, at *id*., V:95, 17:15, & 28:59. *See also* 'Arafa, *supra* note 35, at 189 ("Therefore, the scope of its application differs depending on whether crimes of *Hudud*, *Quesas* and *Diyya*, or *Ta'azir* are in question. Generally speaking, *Hudud* offenses are based on the principle of legality, with precise determination of both crime and punishment and some flexibility for the judge depending upon the intent of the accused and the quality of the evidence. On the other hand, *Quesas* and *Diyya* crimes, which are left to individuals and families to punish, show their basis in the legality principle by being bound to specific procedures and appropriate penalties in the process of retribution and compensation. *Ta'azir* crimes allow a great deal of flexibility to the judge but are still implicitly tied to the general principle of legality.").

[52] S. Tellenbach, *Fair Trial Guarantees in Criminal Proceedings under Islamic Afghan Constitutional and International Law*, 64 ZaidRV (2004), at 933-935. *See also*, *e.g*., art. 14(2) ICCPR, which reads: "Everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to the law."

[53] When 'Ali was granted governorship of Yemen by the Prophet, he said to him: "O 'Ali, people will appeal to you for justice. If two adversaries come to you for arbitration, do not rule for the one, before you have similarly heard from the other. It is more proper for justice to become evident to you and for you to know what is right."

[54] Bassiouni, *supra* note 48, at 92-100. *See also* A. M. Awad, *The Rights of the Accused under Islamic Criminal Procedure in* THE ISLAMIC CRIMINAL JUSTICE SYSTEM, M.C. Bassiouni (ed.) (1982), at 93-107, M. H. Kamali, *The Right to haqq al-amn* (*Personal Safety*) *and the Principle of Right Legality in Islamic Sharia in* CRIMINAL JUSTICE IN ISLAM, M.A. Haleem et al. (eds.) (2003), at 83. *See the* ARAB CHARTER ON HUMAN RIGHTS, at art. 12, "All persons are equal before the courts and tribunals. The States parties shall guarantee the independence of the judiciary and protect magistrates against any interference, pressure, or threats. They shall also guarantee every person subject to their jurisdiction the right to seek a legal remedy before courts of all levels"; art. 13 "1. Everyone has the right to a fair trial that affords adequate guarantees before a competent, independent, and impartial court that has been constituted by law to hear any criminal charge against him or to decide on his rights or his obligations. Each State party shall guarantee to those without the requisite financial resources legal aid to enable them to defend their rights. 2. Trials shall be public, except in exceptional cases that may be warranted by the interests of justice in a society that respects human freedoms and rights"; art. 23 "Each State party to the present Charter undertakes to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity", and art. 44 "The states parties undertake to adopt, in conformity with their constitutional procedures and with the provisions of the present Charter, whatever legislative or non-legislative measures that may be necessary to give effect to the rights set forth herein."

The rules relating to evidence are penetratingly significant in a criminal proceeding. Very strict rules of proof guarantee are imposed only in cases where there is guilt's certainty, not only evidence beyond reasonable doubt.[55] Islamic criminal law entails direct evidence, as opposed to circumstantial evidence, as for example, the *Qur'an* requires four male eyewitnesses or four confessions to sustain a conviction for the crime of *zina*(*h*) (adultery).[56] All this for the "avoidance of *shubbha* (doubt)" will result in nullification of *hudud* (fixed) punishments, as Mohammad reported "nullify the *hudud* if there is doubt and lift the death penalty as much as you can" and "avert *hudud* punishments by suspicions or doubts and if the accused has a way out, release him."[57] Further, the Prophet Mohammad reported that "if the judge makes a mistake in amnesty it is better than a mistake in punishment" and his traditions states that "acts are not to be judged except by motives" and "actions are but by intentions and every man shall have only that which he intended" based on a rule that the proof of a clear *mens rea* (criminal intent composed of free will and knowledge of the *actus reus*) is required and mandatory.[58]

al-ie'trafa wa al-iqrar (confessions) are the most mutual method for launching proof in criminal cases under Islamic paradigm, provided that the admission is voluntary.[59] A confession may be withdrawn at any part of the hearing, though, until the sentence is being executed.[60] Hence, gaining a confession through illegitimate means is strictly forbidden and this standard applies even if such means would be in the public good or welfare.[61] Furthermore and in accordance with the principle of repentance, a confession of a *hadd* offense may always be retracted, withdrawn, even at the time of execution.[62] According to the *Qura'nic* provisions, temporary detention of a witness to verify their evidence as a precautionary measure is acceptable.[63] The classic method for proof is the testimony of an eyewitness to sustain the conviction; as for instance in the

[55] Bassiouni *supra* note 48, at 119.

[56] *See* Asifa Quraishi, *Her Home*: *An Islamic Critique of the Rape Laws of Pakistan From a Woman-Sensitive Perspective*, 18 MICHIGAN J. INT'L. L. (1997), at 287. *See also*, R. Aslan, *The Problem of Stoning in the Islamic Penal Code*: *An Argument for Reform*, 23 UCLA J. of ISLAMIC & NEAR EASTERN L. (2003-2004), at 91. Even some Muslim scholars consider some circumstances as presumptions to establish one's guilt. For instance, The *Maliki* school of thought allows fornication to be legally established by the child's birth to a female who has never been married and who has not alleged rape and some jurists recognize the possession of stolen property as presumption of a crime of theft.

[57] *See Sahih Muslim & Bukhari*. *See generally* H. Esmaeihi & J. Gans, *Islamic Law Across Cultural Borders*: *The Involvement of Western Nationals in Saudi Murder Trials*, 28 DENVER J. INT'L. POLICY (2000), at 145, 156-157; B. Wells & M. Burnett, *When Cultures Collide*: *An Australian Citizen*'s *Power to Demand the Death Penalty under Islamic Law*, 22 SYDNEY L. REV. (2000), at 5.

[58] M.C. Duncan, *Playing by Their Rules*: *The Death Penalty and Foreigners in Saudi Arabia*, 27 J. INT'L. & COMP. L. (1998), at 231. *See also* Bassiouni, *supra* note 48, at 120.

[59] *Id*. 'Arafa, *supra* note 47, at 225. ("In order for a confession to be admitted as criminal evidence, six requirements must be fulfilled. All Muslim scholars require that the confessor must be of age; this implies a capacity to understand what is being admitted to and its legal consequences. The confessor must be sane, capable of self-expression, and acting on his own free will.").

[60] *Id*., at 226. ("Any torture, pressure, or deception by the judge nullifies the confession. Moreover, the confession must be clear, explicit, and unequivocal as to the crime. The confessor must describe in detail the acts he committed in a way that leaves no doubt ("*Shubha*") as the *Sunnah* bars doubtful confessions. A confession will be invalid if made outside the court. Thus, it must take place during a legal hearing. A confession proves guilt and incurs penalties only when the judge is persuaded of it and the confession meets the [. . .] legal criteria with corroboration of the facts confessed. *Hanafis* stress that the accused must repeat the confession the same number of times as that of the required number of witnesses. In this context, Muslim scholars are in favor of confessions that implicate only the accused and not his accomplices or co-conspirators. This emerges from the principle of individual criminal responsibility set forth above. The accused may withdraw his confession at any time before or after sentencing, or during its execution. In the latter case, the judgment will be nullified if based solely on the confession.").

[61] *Id*. So, excluded from evidence are confessions obtained by force or fraud, as Mohammad warned: "God shall torture on the Day of Judgment those who inflict torture on people in life." Also, the confession of the adulterer must also be repeated four times. In the famous story of *Maa'iz*, who came to the Prophet to confess adultery, the Prophet turned him away three times and then after the third time, he was punished for his crime. Further, he is also reported to have discouraged confessions and scrutinized them carefully, when he said to an adulterer: "Perhaps you kissed her, perhaps you only touched her, perhaps you only looked."

[62] It is reported that when *Maa'iz* felt the first stone, he tried to run away but was pursued and killed. When the Prophet learned later of this, he said "Why did you not leave him. Perhaps he would have repented, and God forgiven him." For a better understanding of the taxonomy of crimes and their punishments under the principle of legality in Islamic criminal law, *see* 'Arafa, *supra* note 47 at, 189-195 ("*Ta'azir* offenses are not subject to the legality principle in the same manner as *Hudud* and *Quesas* crimes. All acts which infringe private or community interests of the public social order are falls into the *Ta'azir* category. Therefore, the public authorities have a duty to lay down rules penalizing all conduct detrimental to the society's interests, values, or public order.") ("The legality principle is strictly realized in this type of offense. *Hudud* [. . .] are offenses sanctioned by fixed legal penalties. *Hudud* crimes are those that bring injury and harm to the essential interests of an Islamic community. There are seven such crimes: theft, fornication, slander and defamation, brigandage, drinking wine, apostasy, and rebellion against the legitimate authority [. . .] Under the principle of legality, the judge has at least minimal discretion in the imposition of the fixed penalties.").

[63] God says, "If you doubt their testimony, then detain them after the prayer and let them swear by God (saying): we will not take for it a price though there be a relative nor will we hide the testimony [...]." *Qur'an* 5:106.

crime of adultery or fornication.[64] Also, Islamic law provides guidance for the judiciary regarding the evidentiary values.[65]

In a human right's landmark case in Morocco decided by the Moroccan Appellate Court, it was argued that the marriage contract that was performed between two Moroccans in France was *batil* (invalid) because one of the witnesses to the contract was a woman, which is in violation of the Islamic law.[66] The Court disagreed, holding that:

> "…testimony in Islam is not restricted to men. In fact, in Islamic [*fiqh*] jurisprudence there are matters that may not be witnessed except by women [...] as in female defects and suckling [...] and that Islam allows in a case of 'necessity' the testimony of anyone who may not meet the strict requirement of a witness so that the rights are preserved . . . what is required is that a witness should be just regardless of his or her gender . . . these principles aim at achieving justice which is now a universal concept that is based on equality and liberty and rejection of discrimination on basis of sex or race or colour [and that] "these basic tenants are established in Islamic *Shari'a*" [. . .] the presence of a woman as a witness to the marriage contract does not violate the public order in Morocco which is derived from the principles of the Islamic *Shari'a*, the internal values of Moroccan society, and the universal principles of human rights."[67]

Prescription (statute of limitations) period sets forth the maximum time period within which legal proceedings may be initiated in respect of certain events.[68] There is no statute of limitations according to Prophet Mohammad classical traditions, as he reported: "a right of a Muslim does not extinguish by lapse of time."[69]

3. So, what's wrong? The Cairo Declaration of Human Rights of 1990 and the Islamic Human Rights Catalogue

[64] The right of an individual (or their representative), to present evidence is supported by Mohammad's traditions, who advised 'Ali when he granted him the governorship of Yemen: "If two adversaries come for arbitration do not rule for the one before you have similarly heard from the other." *Id*., at *Sahih Muslim* & *Bukhari*.

[65] In adjudicating conflicts and disputes, the Prophet said "I am a human being. When you bring a dispute to me, some of you may be more eloquent in stating their case than others. I may consequently adjudicate based on what I hear. If I adjudicate in favor of some over something that belongs to his brother, let him not take it, for it would be like taking a piece of fire." *See* Abou Dawoud. Also, the *Qur'an* refers to issues when the witness is a woman, there is a debate on the interpretation of that verse reads "Oh! Ye who believe! When ye deal with each other, in transactions involving future obligation in a fixed period reduce them to writing and get two witnesses out of your own men and if there are not two men, then a man and two women, such as ye choose, for witnesses so that if one of them errs the other can remind her." *Qur'an* 2:282. *See* Mohammad Fadel, *Two Women*, *One Man*: *Knowledge*, *Power and Gender in Medieval Sunni Legal Thought*, 29 INT'L. J. OF MIDDLE EAST STUDIES (1985), at 185; K. Bauer, *Debates on Women's Status as Judges and Witnesses in Post-Formative Islamic Law*, 1 J. OF AMER. ORIENTAL SOCIETY (2010), at 130.

[66] Court of Appeal, Dec. No. 1041, *file on Appeal Ro* 494, April 18, 2007.

[67] *Id*. *See generally* Nathan J. Brown, *Shari'a and State in the Modern Middle East*, 29 INT'L. J. OF MIDDLE EAST STUDIES (1997). The Court stated that ("arts. 56, 57, and 61 of the *moudawana* have specified when a marriage contract becomes void and when it may be rescinded and that these cases did not include any reference to absence of witnesses to a marriage contract properly executed in accordance with the law of the country of residence.") For a discussion of the Moudawana, *see* M. Deiana, *Improving Women's Rights in Morocco*: *Lights and Shadows of the New Family Code* (*Moudawana*), 3 INT'L. J. OF INTERDISCIPLINARY SOCIAL SCIENCE (2009), at 11.

[68] For further details on this rule in cases of human trafficking, *see* M. Y. Mattar, *Combating Trafficking in Persons in Accordance with the Principles of Islamic Law*, UN OFFICE ON DRUGS AND CRIME, (New York 2009), at 104. This notion is rooted also in the Rome Statute of the International Criminal Court ("ICC"), which states that the crimes under the jurisdiction of the Court "shall not be subject to any statute of limitations" (Art. 29). On the other hand, The Convention against Transnational Organized Crime Convention requires that "Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence covered by this Convention and a longer period where the alleged offender has evaded the administration of justice." *See UN General Assembly*, UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME: resolution/*adopted by the General Assembly*, January 8, 2001, A/RES/55/25, at art. 11(para. 5), http://www.refworld.org/docid/3b00f55b0.html (last visited Sep.1, 2021).

[69] *Sahih Muslim* & *Bukhari*. Thus, there is always a duty to fulfil one's obligation and perform irrespective of the time a claim is made. *See* 'Arafa, *supra* note 47, at 223-227 & 233 ("The majority of Muslim jurists' state that prescription may apply to the penalty itself or the public action. The competent authority carries out this procedure in the light of public needs taking into account individual rights.").

On the right to life, it is generally well-known that life is a God-given *hiba*(*h*) (gift) and it is guaranteed to every human being, as it is the responsibility of individuals, societies, and the state to protect this right from any transgression, and it is proscribed to take away life except for a *Shari'a* prescribed reason according to the Cairo Declaration of Human Rights.[70] In the same vein, the *Qur'an* said, "And whoever kills a believer intentionally, his punishment is hell; he shall abide in it, and *Allah* will send His wrath on him and curse him and prepare tor him a painful chastisement."[71] Additionally, Prophet Mohammad said that "the first thing that will be decided among people on the Day of Judgment will pertain to bloodshed."[72]

Also, the Cairo Declaration stipulated that "it is not permitted without a legitimate reason to arrest an individual, or restrict their freedom, to exile or to punish them. It is not permitted to subject them to physical or psychological torture or to any form of humiliation, cruelty, or indignity. Nor is it permitted to subject an individual to medical or scientific experimentation without their consent or at the risk of their health or of their life. Nor is it permitted to promulgate emergency laws that would provide executive authority for such actions."[73] In this domain, Mohammad said, "Visit the ill, feed the hungry, and release the slaves" and the *Qur'an* confirmed that rule by reciting "Fight in the way of God with those who fight with you, and do not exceed the limits, surely God does not love those who exceed the limits."[74] Likewise, the Arab Charter on the Human Rights stipulates "No one shall be subjected to physical or psychological torture or to cruel, degrading, humiliating or inhuman treatment. Each State party shall protect every individual subject to its jurisdiction from such practices and shall take effective measures to prevent them. The commission of, or participation in, such acts shall be regarded as crimes that are punishable by law and not subject to any statute of limitations. Each State party shall guarantee in its legal system redress for any victim of torture and the right to rehabilitation and compensation."[75] In terms of right to personal liberty and security, the Cairo Declaration confirmed that human beings are born free, and no one has the right to enslave, humiliate, oppress or exploit them, and there can be no subjugation but to God the Most-High.[76] Then, the Arab Charter confirmed that by saying that all forms of slavery and trafficking in human beings are banned and are punishable by law and no one shall be held in slavery and servitude under any circumstances.[77]

Moreover, every man shall have the right, within the framework of *Shari'a*, to free movement and to select their place of residence whether inside or outside their country and if persecuted, is entitled to seek asylum in another country. The country of refuge shall ensure their protection until they reach safety, unless asylum is motivated by an act which *Shari'a* treats as a crime.[78] The *Qur'an* said: "It is He who made the Earth

[70] *See* CAIRO DECLARATION ON HUMAN RIGHTS IN ISLAM, August 5, 1990, *UN GAOR*, *World Conference on Human Rights*, 4th *Session*, *Agenda Item* 5, UN Doc. A/CONF.157/PC/62/Add.18 (1993), at art. 19(b)(c)(d)(e), http://hrlibrary.umn.edu/instree/cairodeclaration.html (last retrieved Sep. 1, 2021). Arts. 24 and 25 states "All the rights and freedoms stipulated in this Declaration are subject to the Islamic *Sharia* and "The Islamic *Sharia* is the only source of reference for the explanation or clarification of any of the articles of this Declaration."

[71] *Qur'an* 4:93. Also, God says, "Whoever slays a soul, unless it be for manslaughter or for mischief in the land, it is as though he slew all men; and whoever keeps it alive, it is as though he kept alive all men" and "And do not kill yourselves (nor kill one another). Surely, God is Most Merciful to you." *Qur'an* 4:29 & 5:32. These rules confirmed by the Universal Declaration of Human Rights ("UDHR") of 1948 by saying in its third article, "Everyone has the right to life, liberty, and security of person" and the Arab Charter on Human Rights by saying "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

[72] Also, Mohmmad says, "and Every sin could be forgiven by *Allah* except the deliberate killing of a believer or when a man dies in the state of being a *kafir* (unbeliever)." *Sahih Muslim* & *Bukhari*. *See UN General Assembly*, UNIVERSAL DECLARATION OF HUMAN RIGHTS, [December 10, 1948], 217 A (III), at http://www.refworld.org/docid/3ae6b3712c.html.

[73] Further, the Arab Charter reads: "No one shall be subjected to medical or scientific experimentation or to the use of his organs without his free consent and full awareness of the consequences and provided that ethical, humanitarian, and professional rules are followed, and medical procedures are observed to ensure his personal safety pursuant to the relevant domestic laws in force in each State party. Trafficking in human organs is prohibited in all circumstances." *See the League of Arab States*, *Arab Charter on Human Rights*, [September 15, 1994], at art. 5, http://www.refworld.org/docid/3ae6b38540.html (last visited Sep. 1, 2021).

[74] *Qur'an* 2:190.

[75] *Id*., at the *Arab Charter*, *supra* note 6, at art. 8(1)(2). Also, Mohammad said "Treat the prisoners in good way."

[76] *Id*., at *Cairo Declaration*.

[77] *Id*., at the *Arab Charter*, at arts. 10(1) & 14(1). "Everyone shall have the right to live in security for himself, his religion, his dependents, his honor and his property and "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest, search or detention without a legal warrant." Also, Mohammad said "There are three categories of people against whom I shall myself be a plaintiff on the Day of Judgment. Of these three, one is he who enslaves a free man, then sells him and eats this money."

[78] *Id*., at *Cairo Declaration*.

submit to you, so traverse its surface and eat of its sustenance and to Him is your return."[79] Regarding highway safety (which allows for the freedom of movement), Prophet Mohammad reported that the rights of the road are "lowering the gaze, abstaining from abuse, returning the greeting of peace, enjoining what is right, and forbidding what is wrong."[80]

All human beings form one family whose members are united by submission to God and descent from Adam. All men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the grounds of race, colour, language, sex, religious belief, political affiliation, social status, or other considerations. True faith is the guarantee for enhancing such dignity along the path to human perfection. Woman is equal to man in human dignity, and has rights to enjoy as well as duties to perform; she has her own civil entity and financial independence, and the right to retain her name and lineage.[81] All individuals are equal before the law, without distinction between the ruler and the ruled (and are entitled without any discrimination).[82] Based on the Cairo universal document, it is not permitted to arouse nationalistic or doctrinal hatred or to do anything that may be an incitement to any form of racial discrimination.[83] The *Qur'an* condemns that the Pharaoh "had divided his people into different classes...and he suppressed one group of them (at the cost of others)."[84]

In terms of criminal procedural searches, private residence is inviolable in all cases according to the Cairo Declaration values, as it will not be entered without permission (search warrant and probable cause in Western legal terms) from its residents or in any illegitimate manner, nor shall it be demolished or confiscated and its dwellers expelled.[85] In other words, it is not permitted to spy on anybody, to place them under surveillance or to besmirch their good name and the State shall protect them from arbitrary interference.[86] The *Qur'an* affirmed that by saying "It is not piety/righteousness that you enter the houses from the back but piety/righteousness (is the quality of the one) who fears God. So, enter houses through their proper doors, and fear God that you may be successful."[87]

On the right to access '*adaelah* (justice), the right to resort to justice is guaranteed to everyone according to the principles of Cairo Declaration and that all folks are equal before the courts and tribunals, as states shall assure the judicial independence and protect judges, prosecutors, magistrates (district attorneys) against any interference, pressure or threats.[88] Additionally, they shall guarantee every person subject to their jurisdiction the right to seek a legal remedy before courts of all levels.[89] Further, the Cairo Charter emphasized that the defendant is innocent until their guilt is proven in a fair and impartial trial in which they shall be given all the guarantees of defence.[90] By the same token, trials, particularly criminal shall be public, except in extraordinary cases that may be warranted by the interests of justice in a society that respects human

[79] The Arab Charter said that: "Everyone lawfully within the territory of a State party shall, within that territory, have the right to freedom of movement and to freely choose his residence in any part of that territory in conformity with the laws in force." *Id*., at the *Arab Charter*, at art. 26(1). In the same vein, God says, "One who abandons his home for the cause of God will find many places of refuge in the vast land and one who dies, after having abandoned his home to get near to God and His Messenger, will receive his reward from God. God is All-forgiving and All-merciful." *Qur'an* 67:15 & 4:100.

[80] *Sahih Muslim* & *Bukhari*. *See UDHR*, at art. 7.

[81] *Id*., at *Cairo Declaration*. In this sense, the Arab Charter said that: "Men and women are equal in respect of human dignity, rights, and obligations within the framework of the positive discrimination established in favor of women by the Islamic Shariah, other divine laws and by applicable laws and legal instruments. Accordingly, each State party pledges to take all the requisite measures to guarantee equal opportunities and effective equality between men and women in the enjoyment of all the rights set out in this Charter." *Id*., at the *Arab Charter*, at art. 3(3).

[82] *Id*., at arts. 24(4), 3(1)(2). "The States parties to the present Charter shall take the requisite measures to guarantee effective equality in the enjoyment of all the rights and freedoms enshrined in the present Charter in order to ensure protection against all forms of discrimination based on any of the grounds mentioned in the preceding paragraph."

[83] *Id*. *See* also Fadel, *supra* note 65.

[84] *Qur'an* 28:4.

[85] Leonardo Bernard, *A New Look at Human Rights through the Eyes of Islam*, 25 SINGAPORE L. REV. (2007), at 81.

[86] Mohammad said, "A Muslim's wealth is forbidden for others to use without his permission." *Sahih* Muslim.

[87] *Qur'an* 2:189, 49:12, & 24:27. God says also, "Do not spy on one another" and "Do not enter any houses except your own homes unless you are sure of their occupants 'consent." "No one shall be subjected to arbitrary or unlawful interference regarding their privacy, family, home or correspondence, nor to unlawful attacks on their honor or their reputation." *Id*., at the *Arab Charter*, at art. 21.

[88] *Id*., at art. 12(1).

[89] *Id*.

[90] In this respect, the Arab Charter "Everyone has the right to a fair trial that affords adequate guarantees before a competent, independent and impartial court that has been constituted by law to hear any criminal charge against him or to decide on his rights or his obligations. Each State party shall guarantee to those without the requisite financial resources legal aid to enable them to defend their rights." *Id*., at art. 13(1).

freedoms, rights, and civil liberties and everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to the law in a public trial at which they have had all the guarantees necessary for their defence.[91]

Islamic law principles confirmed these values, in which the *Qur'an* reported that "O you who believe! Be upright for *Allah*, bearers of witness with justice, and let not hatred of a people incite you not to act equitably; act equitably, that is nearer to piety, and be careful of (your duty to) *Allah*; surely *Allah* is Aware of what you do."[92] Also, the Prophet Mohammad said "God, the Exalted, and Glorious, said; 'O My slaves, I have prohibited injustice for Myself; and have made it unlawful for you, so do not be unjust to one another or oppress one another [...]."'"[93] 'Omar ibn el-khattab said that "In Islam, no one can be imprisoned except in pursuance of justice."

Last but not least, on the due process guarantees within the Arab and Islamic principles, the Arab Charter on Human Rights echoed that anyone who is arrested shall be informed, at the time of arrest, in a language that they understand, of the reasons for their arrest and shall be promptly informed of any charges or criminal offenses against them, and they shall be entitled to contact their family members and consulting with their lawyers.[94] Moreover, anyone arrested or detained on a crime shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release and their release may be subject to guarantees to appear for trial.[95] Pretrial detention shall in no case be the general rule.[96] Also, anyone who has been the victim of arbitrary or unlawful arrest or detention shall be entitled to a fair and just – civil – compensation or fees and no one shall be deprived of their liberty except on such grounds and in such circumstances as are determined by law and in accordance with such procedure as is established thereby.[97] In addition, according to the Islamic values, any person who is deprived of their freedom by arrest or detention shall have the right to request a medical examination and must be informed of that right.[98] Likewise, everyone charged with a criminal offence shall be presumed innocent until proven guilty by a final verdict (irrevocable ruling) rendered according to the law and, within the course of the investigation, interrogation, and trial, he/she shall enjoy the minimum due process guarantees.[99]

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[91] *Id*., at art. 13(2). "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed." *Id*., at *UDHR*, at art. 11(1)(2).

[92] *Qur'an* 5:8. Also, God says: "Do not let your hatred of a people incite you to aggression", "*Allah* commands you to make over trusts to their owners and that when you judge between people you judge with justice; surely *Allah* admonishes you with what is excellent; surely *Allah* is Seeing, Hearing", and "O you who believe! Stand out firmly for justice, as witnesses to God, even though it be against yourselves or your parents, or your kin, be the rich or poor, God is a Better Protector to both (than you). So, follow not the lusts (of your hearts), lest you may avoid justice, and if you distort your witness or refuse to give it, verily, God is Ever Well-Acquainted with what you do." *Qur'an* 5:2, 4:58, & 4:135.

[93] *Sahi Muslim* & *Bukhari*. God says, "If two parties among the believers start to fight against each other, restore peace among them. If one party rebels against the other, fight against the rebellious one until he surrenders to the command of God. When he does so, restore peace among them with justice and equality; God loves those who maintain justice" and "God does not forbid you to deal justly and kindly with those who fought not against you on account of religion and did not drive you out of your homes. Verily, God loves those who deal with equity." *Qur'an* 49:9 & 60:8.

[94] *Id*., at the *Arab Charter*, at art. 14(3).

[95] *Id*.

[96] *Id*., at 14(5)(6). "Anyone who is deprived of his liberty by arrest or detention shall be entitled to petition a competent court in order that it may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful."

[97] *Id*., at 14(7)(2). "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination", "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law", and "No one shall be subjected to arbitrary arrest, detention or exile." *Id*., at *UDHR*, at arts. 7, 8, & 9.

[98] *Id*., at the *Arab Charter* at arts. 14(4) & 15.

[99] The Arab Charter highlighted these legal standards as follows:

(a) the right to be informed promptly, in detail and in a language which he understands, of the charges against him/her;
(b) the right to have adequate time and facilities for the preparation of their defense and to be allowed to communicate with their family;
(c) the right to be tried in their presence before an ordinary court and to defend himself/herself in person or through a lawyer of their own choosing with whom he/she can communicate freely and confidentially;
(d) the right to the free assistance of a lawyer who will defend him/her if he cannot defend himself/herself or if the interests of justice so require, and the right to the free assistance of an interpreter if he/she cannot understand or does not speak the language used in court;

Reconsidering the future: Conclusion and policy recommendations

Shari'a (Islamic) law norms provides for general principles of procedural criminal justice system, specifically the principle of non-retroactivity, uniform liability norm, the legality principle, and the presumption of innocence as cornerstone norm within the penal context. Islamic criminal law also maintains on strict evidentiary guidelines that are based on direct evidence and witness testimony or confession. The Cairo Declaration of Human Rights of 1990 along with the Arab Charter of 2004 refers to some of these aspects of procedural justice, as for instance "the right to resort to justice is guaranteed to everyone", "liability is in essence personal", "there shall be no crime or punishment except as provided for in the *Shari'a*", and "a defendant is innocent until their guilt is proven in a fast [fair and unbiased trial] in which he/she shall be given all the guarantees of defence."

The Cairo Declaration makes it clear that these and other rules of procedural justice are to be interpreted in accordance with Islamic law and its general rules of Islamic *fiqh* (jurisprudence). This interpretation, especially on debatable issues, should be made in the light of the general *maqasid* (objectives) of Islamic law that are based on justice, equality, and freedom. All in all, relieving the tension between any clashing worldviews, included, Islamic law and the international human rights, means, as the same in the evolving history of Judaism and Christianity, the depuration of the law trough the human dignity lenses, which sees the free man as a free man, created to live in peace with their idiosyncrasies, loves, and talents. Free to finally be socially responsible for their own freedom, in a timeline which recognises, better and better, the ultimate meaning of what a beneficent and merciful God really is. As the precedent Abrahamic religions of Judaism and Christianity already did – and still do every day – Islam – as a victim – is called to face the challenges of freedom.

The contemporary liberal Islamic perspective to human rights gets bogged down in a theological debate about the "correct" Islamic stance on human rights. Because Islamic revelation occurred centuries before the expansion of the modern philosophies of human rights, there is no way to truly know the detailed Islamic perspective on human rights, though the general norms support it, just as we will never know if there are pineapples in paradise. Instead of dwelling on an unwinnable debate, moderate Muslim scholars should put their effort into proving the positive aspect that Islam does support human rights via flexible interpretation of the law. It is also far better to move the conversation back down to the temporal level of whether modern human rights make sense for Middle Eastern and Muslim cultures. Contemporary Muslims must determine the answer to that inquiry, whether human rights make sense for their societies. Islam will definitely play a role in this debate, and only when Islamic discourse moves in this direction can Muslims better understand the relationship between human rights and Islam.

Al-Imam Al-Ghazali – one of the most well-recognised Islamic scholars – assures the right of personal security in the Islamic criminal justice system and consequently, established the *alMaqased elKhams* (Five Essentials), which have become the core principle for Muslim jurists for determining whether the public interest is endorsed by a notion or a solution. Under this theory, these five significant notions guaranteed to all individuals and should not be violated by the State. It involves protecting property, lineage, intellect and posterity, religion, and lives. Additionally, Islamic criminal law reveals the structural framework for a community to preserve the legal relationships among individuals and protect not only the public interest but also the personal ones (from being attacked by another). This theory also guarantees peace and security and assure the relation between the government (State) and its citizens, and hence, the principle of legality, non-retroactivity of criminal laws, punishment personality are the most vital principles laid down in *Shari'a*. Based on *Cilafah* (viceregency) notion, and the duty paradigm in Islam, the Muslim *ummah* (community) is entrusted with the authority to implement the *Shari'a*, administer justice, and to take all necessary measures

(e) the right to examine or have their lawyer examine the prosecution witnesses and to defense, according to the conditions applied to the prosecution witnesses;
(f) the right not to be compelled to testify against himself /herself or to confess guilt;
(g) the right, if convicted of the crime, to file an appeal in accordance with the law before a higher tribunal, and
(h) the right to respect for their security of person and their privacy in all circumstances.

Id., at art. 6. In sum, Islam recognized human rights long time ago and no real conflict exits between human rights and Islam, as it stresses the concept of duties in the field of human rights. Thus, the international human rights movement can transpose many human rights methodologies from Islamic law. The Reverse Moderate Relativism (RMR) perspective calls on the move of human rights standard towards Islamic standards.

for the betterment of society, and for future generations. God has placed *amanah* (trust) in everyone and by accepting this trust, humans have accepted individual accountability towards each other and the society. Islam believes in the sacred nature of rights, accordingly, Islam considers them 'necessities,' and made them part of the 'obligations'

Since the foundation of Islamic *Shari'a*, there is an individual and collective concepts of rights and duties, that are interpreted by the third generation (solidarity rights) as a shared common responsibility of both the individuals and society. These rights can be realised only through the concerted efforts of all actors on the social scene, as law – including Islamic law – can serve as a "*tool*" for social change. Islamic criminal justice system is deeply rooted in the scared provisions of the *Qur'an* and Prophet Mohammad's teachings for securing human freedom and dignity. Over many decades, Islamic law has developed into a complicated, highly established, and a delicate reality and such a complexity does not make it mysterious. The diversity among the Islamic schools of jurisprudential thought demonstrates numerous manifestations of the same heavenly will and are developed as diversity throughout unity. "Oriented" Islamic law has its own sources (primary and secondary) like any other legal system, which has its controlling aspects that interpret the nature of its legal texts and rulings. It uses several fundamental objectives and consistently implements the use of legal *maxims* for sustaining the structure of its legal theory. It should be noted that the moderate *Islamic* cultural relativist discourse accepts cultural differences while striving to find a group of universal norms via the interpretation of Islamic texts in the light of human rights norms.

As times goes by, the undeniable pulse of mankind's brotherhood tends to prevail and mix the infinite colours in the ocean of life into the final and desired peaceful white. In this path, the newest branch in Abraham's family tree will blossom, more and more, its own soft, perfumed, and white freedom flowers.

Enhancing the NILEX Growth in Egypt: A Study of the Relevant Laws and Regulations

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Abstract

Access to finance for Egyptian companies through the stock market is hampered by the inadequate institutional, regulatory and legal frameworks. The paper discusses how the NILEX can serve as an alternative to bank lending which can be more attractive to issuers, and how the Egyptian institutions involved in the implementation of policies relating to SMEs can cooperate, not only to encourage firms to be listed on the SMEs exchange, but also to develop simple project ideas into success stories. It studies the capital markets laws and legislation and presents the pitfalls in the regulations and supervision processes that have resulted in a limited number of IPOs, a narrow investors' base, unmatured equity culture, poor quality of companies, weak supervision and illiquidity. Finally, the paper explains how the NILEX can be rescued by tailoring the appropriate regulations and legislations and illustrates how the careful design of such regulations can be intended to meet only its very particular needs.

Keywords

Small and medium enterprises; SME; capital markets; listing requirements; legal reform

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Introduction

In 2004, Egypt recognized the importance of SMEs, and accordingly, Egypt Law No. 141/2004 on the Small Enterprises Development Law was promulgated. On the 15 July 2020, Egypt enacted the new MSMEs Development Law under Egypt Law No. 152/2020. Egypt Law No. 152/2020 deals with Micro, Small, and Midsize Enterprises (MSMEs), as well as Entrepreneurships. It discusses crucial matters related to Informal Economy Projects (IEPs).

Egypt Law No. 152/2020 defines medium-sized enterprises with an annual business volume of EGP 50 million and not exceeding EGP 200 million, or every newly established industrial project which has paid-up capital or invested capital of EGP 5 million and does not exceed EGP 15 million, or every newly non-industrial project incorporation paid-up capital or the invested capital of which, according to the circumstances, is EGP 3 million and does not exceed EGP 5 million. Egypt Law No. 152/2020 also defines small enterprises with annual business volume of EGP 1 million and less than EGP 50 million, or every newly established industrial project with paid-up capital or invested capital between EGP 50,000 and less than EGP 5 million, or every newly established non-industrial project with paid-up capital or invested capital, between EGP 50,000 and less than EGP 3 million. A micro-project is any project with an annual business volume of less than EGP 1 million or every newly established project whose paid-up capital or invested capital is less than EGP 50,000.

SMEs are considered a priority for the development and growth plan for emerging economies. Ayadi and Gadi noted the difficulty SMEs encounter in obtaining credit compared to larger firms due to the lack of quality collateral and credit worthiness.[1] On the other hand, the credit provided to microfinance institutions is inadequate and unable to meet the capital requirements of SMEs.[2] Consequently, SME Exchanges have emerged to serve as an alternative to banks' lending. Exchanges will provide equity financing for small enterprises that cannot fulfil the exchange requirements listed in the main stock exchanges.

Despite Egypt's efforts to enhance the doing business, SMEs in Egypt still struggle to access finance. Given the numerous studies that show the significant contributions of small local firms as a field of strategic interest to the economy, Egypt must give more attention to encourage small and medium-sized enterprises.

Peter Drucker said in respect of SMEs that 'small businesses represent the main catalyst of economic growth' and that they constitute the backbone of social, economic development.[3] The importance of SMEs is based on the critical role they have in the growth of the economies.[4] According to Dalberg Global Development Advisors, small businesses represent a fundamental part of the economic fabric in developing countries.[5] They play a critical role in furthering growth, innovation, and prosperity in any economy.[6]

In Egypt, SMEs constitute a big part of large national plans. They would help solve the overpopulation problem and the relative scarcity of resources by increasing the inhabited space, consequently reshaping the nature of the economic and social formation in Egypt.

SMEs still face several challenges. Constraints include for example, transportation, conditions of electrical and water connections, internet access, and others,[7] insufficient supply of some essential services like transport, and utilities, [8] high importation tariffs on raw materials, and competition. However, the biggest challenge is access to finance. For instance, Ayyagari, Demirgüç-Kunt, and Maksimovic's work showed that

[1] Peter F. Drucker (2009), '*Innovation and Entrepreneurship: Practice and Principles'*, New York HarperCollins Publishers Inc.
[2] *Ibid.*
[3] *Ibid.*
[4] Feeney, L. and Riding, A. (1997), *'Business Owners' Fundamental Tradeoff: Finance and the Vicious Circle of Growth and Control. Canadian Business Owner'*.
[5] Barbara Johnson, Reichard Angelous Kotey (2009), *'The Influence of Small and Medium Enterprises (SMEs) Listing on the Ghana Alternative Market (GAX): Prevailing Factors'.*
[6] Dalberg Global Development Advisors (2011), *'Report on Support to SMEs in Developing Countries Through Financial Intermediaries'*, Geneva.
[7] ChandraiahM, and Vani R. (2014)*, 'The prospect and problems of MSMEs sector in India an analytical study'*, International journal of Business and Management Invention, vol.3 Issue 8, p.27 -403.
[8] Nicolescu, O., *' Managementul Intreprinderilor mici si mijlocii, Editura Economică'*, Bucharest (2001).

finance represents the most constraining obstacle to firm growth.[9] Shinozaki further identifies a gap between the demand for SME finance and its supply.[10]

Nevertheless, other constraints include gaps in the financial system, such as high administrative costs, lack of experience within financial intermediaries, and high collateral requirements.[11]

In Egypt, the burden of obtaining finance, primarily through bank loans, has been reduced due to the Central Bank initiative that aimed at facilitating access to bank financing for MSMEs.[12] However, SMEs in Egypt continue to be plagued by the long, complex, and very bureaucratic administrative aspect of the lending process. Some SMEs have reported that the amount of forms required is very excessive and hard to fulfil.

This research addresses how the NILEX can serve as an attractive alternative method to access to finance instead of bank lending for issuers. The paper also explains how Egyptian institutions involved in the implementation of SME policies can cooperate not only to encourage firms to be listed on the SME exchange but also to boost the firm's growth to become a significant global competing corporation listed on the mainboard.

1. Overview of NILEX

1.1 Importance, legal structure, and performance in the market

An SME Exchange is a market created to trade securities of SMEs that are too small to be listed on the main board. SME Exchanges help small enterprises to get credit to facilitate their investments and growth to contribute towards job creation and economic development by being listed as a public company.

Companies may list on an exchange for several financial and non-financial reasons. A report from the Milken Institute Centre for Financial Markets showed that Bombay Stock Exchange (BSE) firms get listed to improve their access to finance, directly and indirectly. In contrast, SMEs in South Africa and Jamaica are most strongly motivated to get listed to position themselves for higher growth and visibility. South African firms were especially encouraged to be listed for reasons other than raising new capital; they mostly wanted to provide exit opportunities for early investors.[13]

While most SMEs list to obtain financing, many others list to increase their visibility, advertise their products, and gain credibility. Some SME exchanges have a particular focus, such as technology or high growth companies, so SMEs win customer recognition by being listed. The 'JSE AltX'[14] and 'WSE NewConnect'[15] highlight these as drivers for listings by SMEs on their exchanges.[16]

Moreover, listed companies understand that they will be able to get funds from other sources more easily compared to their similar unlisted firms upon listing, because the listing process demands firms meet strict financial reporting and corporate governance requirements. By applying those standards, firms improve their accounting practices and financial management, increasing their transparency, credit rating, and creditworthiness. Moreover, by decreasing their leverage ratios consequently, firms can obtain credit on more favourable terms. As a result, the listing will encourage firms to grow, develop and create jobs, thereby

[9] Ayyagari, Meghana, Asli Demirgüç-Kunt & Vojislav Maksimovic (2008), *' How important are Financing Constraints? The role of finance in the business environment'*, World Bank Economic Review 22(3), 483-516.
[10] Shinozaki (2014), *'Capital market financing for SMEs : A growing need in emerging Asia'*, Working paper series on Regional Economic Integration, Asian Development Bank, Issue 121.
[11] Dalberg (2011), op. cit.
[12] Central Bank of Egypt (2016), *Economic Review*., Vol. 57 No. 2.
[13] Jacqueline Irving, John Schellhase, & Jim Woodsome (2017), *'Can Stock Exchanges Support the Growth of Small and Medium-Sized Enterprises? Lessons from India, South Africa, and Jamaica'*, Milken Institute Center for Financial Markets.
[14] AltX, the alternative exchange, is a division of the JSE Limited in South Africa. AltX is a parallel market focused on small and medium sized companies.
[15] NewConnect is an organized market; it is operated by the Warsaw Stock Exchange outside the regulated market as an alternative trading system for financing the growth of young companies
[16] Alison Harwood & Tanya Konidaris (2015) op. cit.

emphasising the relationship between stock market development and economic growth, especially in developing economies, within which economies consider SMEs to be the most significant contributor to employment and economic fundamentals. Peterhoff et al. estimated that increasing SME access to capital markets financing could increase SMEs' contributions to the GDP by 0.1 to 0.2% and generate hundreds of thousands of new jobs.[17]

Throughout the world, exchanges only dedicated to SMEs have become a common phenomenon. They are known as 'Alternate Investment Markets (AIM),' 'Growth Enterprises Market (GEM),' or 'Alternative stock markets.' Nevertheless, emerging market economies observed a difficult challenge in the development of SME exchanges given the small sizes of SMEs. However, some have been very successful. Some of the most successful include GreTai Securities Market' in Taipei and 'Warsaw Stock Exchange (WSE), Hong Kong's Growth Enterprises Market (GEMS), and Japan's Market High-growth and Emerging Stocks. Believing in the vital role of the SME exchange in providing funds, increasing the corporate governance and creditworthiness of the listed SMEs promotes the idea that equity financing must be an attractive potential source for SMEs' existence and growth.[18]

SME exchanges can be a separate board or market housed under the primary market. Examples include the 'Korea Exchange (KRX)', which has a very successful and dedicated SME market (KOSDAQ), the 'Bombay Stock Exchange (BSE)' which established its SME platform in 2012, and the 'Euronext' which established SME market, 'Alternext,' in 2005.

SME exchanges can also be a part of the mainboard. An example is the 'Australian Securities Exchange (ASX),' which doesn't have a separate SME board. The rules only change according to the company's size.

Finally, SME exchanges can be stand-alone markets, such as the 'GreTai Securities Market,' one of the very few SME exchanges that is not linked to the Taiwan Stock Exchange. However, such structure will not motivate SMEs to graduate to the main market, given that it will leave this exchange and become listed on a completely different one.

In Egypt, on 3 June 2010, trading started to be executed in a new sub-market established for companies from any country or industrial sector with issued capital of less than EGP 50 million. That is the NILEX – the Egyptian SME exchange, the first market in the Middle East and North Africa region for the listing and trading of small and medium-sized companies. This market is subject to the same trading rules as the main market. However, only the listing requirements differ.[19] In 2010, NILEX market recorded a trading value of EGP 199 million and reached a market capitalization of more than EGP 1 billion at the end of the year.[20]

In early 2014, the EGX has introduced the Nile Index to increase the investors' interest in this sub-market. The number of listed companies reached 33 companies at the end of 2014, with nine new companies getting listed in 2014, which is one of the highest records attained since the launching of NILEX.[21]

In 2015, the number of listed companies decreased to 31 companies. However, the total market capitalisation reached EGP 1 billion by the end of the year 2015 similar to 2010 five years previously. Consequently, Egypt took steps to promote the NILEX, such as the signing of an MOU with the General Authority for Investment (GAFI) to promote the role of NILEX and raise awareness, especially in Upper Egypt. Furthermore, the Egyptian Stock Exchange signed an agreement with the American University in Cairo to help develop the SMEs' capabilities and access to finance.[22]

In 2016, three new companies got listed, so that the total number of listed companies reached 32 companies. Additionally, EGX continued its efforts in promoting the NILEX through establishing meetings with promising companies and conducting workshops with related working organizations, such as the Rotary Club

[17] Daniela Peterhoff, et. al. (2014), *'Towards better capital markets solutions for SME financing'*, Oliver Wyma.
[18] Alison Harwood & Tanya Konidaris (2015) op. cit.
[19] Oxford Business Group, *'The Report Egypt 2014'*, Oxford Business Group.
[20] Research & Markets Development Dept. (2010) Annual Report. The Egyptian Exchange (EGX).
[21] Research & Markets Development Dept. (2014) Annual Report. The Egyptian Exchange (EGX).
[22] Research & Markets Development Dept. (2015) Annual Report. The Egyptian Exchange (EGX).

and Egyptian Women Association, to raise their awareness and to encourage women to have access to finance through NILEX.[23]

In 2017, the value traded reached EGP 677 million compared to EGP 894 million in 2016 and the total market capitalisation reached EGP 1.2 billion.[24]

In 2018, in cooperation with the European Bank for Reconstruction and Development (EBRD), workshops were held to develop the capacity of NILEX listed companies.[25] In the third quarter of 2019, the value traded reached EGP 230 million with a market capitalization of EGP 1.2 billion with around 31 listed companies.[26] In the fourth quarter of 2019, the value traded decreased to EGP 151.5 million.[27]

EGX was keen to develop its SME platform in 2020 in cooperation with the European Bank for Reconstruction and Development (EBRD) and assigned experts from Madrid Stock Exchange (BME). Based on this, the Egyptian Exchange (EGX) launched its program for the restructuring of the SME market. Restructuring steps are as follows: filtering nominated advisors, raising listed companies' capabilities, marketing and promotional activities and communicating with investment banks to boost liquidity. The total value of trading during 2020 reached EGP1.3 billion.[28]

In the second quarter of 2021, the NILEX trade value decreased by 27% compared to the first quarter of 2021.[29] The above figures and data show that development of NILEX is very slow. Consequently, investors do not make profits from their investment, and some can no longer even exist the market. Therefore, the NILEX reputation has been badly affected, making investors very reluctant to put their money in this market. This warning alarm cannot be ignored; actions must be taken, reforms must be made, and amendments must be drafted to develop and promote this market. This market is essential not only for SMEs but also for the entire economy.

1.2 The relationship between NILEX and other relevant regulatory entities

1.2.1 The Financial Regulatory Authority

The issuance of Egypt Law No. 10/2009 introduced the Egyptian Financial Supervisory Authority, which replaces the Egyptian Insurance Supervisory Authority, the Capital Market Authority, and the Mortgage Finance Authority in enforcing Egypt Law No. 10/1981, Egypt Law No. 95/1992, and Egypt Law No. 148/2001, respectively as well as any other related laws and decrees that are part of the mandates of the above authorities.[30]

The authority mainly aims at regulating and supervising the non-banking financial market activities by establishing systems and issuing policies to promote the efficiency of the market and to guarantee transparency to protect the investors and the entire network of participants in this market. Furthermore, the authority ensures the continuous development of the non-banking financial industry, improves its soundness and promotes an enabling environment for a fair, competitive, and attractive financial system that allows firms, especially SMEs, to operate on a more significant scale.

The Financial Regulatory Authority shall encourage firms to transfer their start up project ideas to employment opportunities that will no doubt serve the developmental objectives in Egypt.[31]

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[23] Research & Markets Development Dept. (2016) Annual Report. The Egyptian Exchange (EGX).
[24] Research & Markets Development Dept. (2017) Annual Report. The Egyptian Exchange (EGX).
[25] Research & Markets Development Dept. (2018) Annual Report. The Egyptian Exchange (EGX).
[26] Research & Markets Development Dept. (2019) EGX Quarterly Report 1/7/2019 – 30/9/2019. The Egyptian Exchange (EGX).
[27] Research & Markets Development Dept. (2019) EGX Quarterly Report 1/10/2019 – 31/12/2019. The Egyptian Exchange (EGX).
[28] Research & Markets Development Dept. (2020) Annual Report. The Egyptian Exchange (EGX).
[29] Research & Markets Development Dept. (2021) EGX Quarterly Report 1/4/2021 – 30/6/2021. The Egyptian Exchange (EGX).
[30] About the Financial Regulatory Authority – FRA retrieved from http://www.fra.gov.eg/content/efsa_en/efsa_pages_en/main_efsa_page_en.htm.
[31] Sahar Naser (2007), *'Access to Finance and Economic Growth in Egypt'*, Middle East and North African Region World Bank 41305.

In November 2017, the Egyptian Financial Supervisory Authority announced that it had changed its English-language name to Financial Regulatory Authority (FRA). Only the name has been modified, but still it has future ambitions to achieve its aims .

1.2.2 The Micro, Small and Medium Enterprise Development Agency (MSMEDA)

The MSMEDA was established by Egypt Prime Minister Decree No. 947/2017 and amended by Egypt Decree No. 2370/2018 to be directly affiliated to the Prime Minister. The MSMEDA has replaced the Social Fund for Development established in 1991[32], and subsequently Egypt issued Egypt Law 152/2020.

MSMEDA mainly aims to set general policies and strategies to develop projects in all sectors of the economy. Therefore, the MSMEDA must cooperate and coordinate with all relevant Ministries, related agencies, and independent regulatory bodies, notably the Central Bank and the Financial Regulatory Authority, to ensure effective implementation of public policies and action plans of the MSMEs. Moreover, the agency has the right to express its opinion on drafted laws and regulations in the areas that relate to its work fields.[33]

The MSMEDA is concerned with the development of medium, small and micro enterprises and entrepreneurship, either directly or through coordinating the efforts of all agencies, NGOs, and initiatives working in the field of those projects or through the companies that establish or contribute to it. The role of the agency is not limited to funding only. Still, it also helps in marketing the products of the MSMEs, developing the capabilities and skills of human resources working in these projects, along with developing MSMEs' capabilities in the field of research, innovation, development, and in preparing feasibility studies. MSMEDA works on encouraging small and medium enterprises to export their products abroad by providing incentives and financing opportunities to participate in exhibitions abroad.[34]

Accordingly, the agency works through several axes. The first axis is a house of expertise and a knowledge centre for projects to develop policies, strategies, enhance coordination, and impact assessment. The second axis is the business environment; it works to provide a supportive work environment that facilitates the implementation of legal, legislative and regulatory reforms for project growth and contributes to improving the standards of living. The third axis is project development, aiming to enhance competitiveness and connections between projects, whether directly or indirectly.

To further emphasise the MSMEDA's role in developing the human resources who are responsible for the MSMEs' success in the first place, some entities were integrated into the agency, such as the Industrial Training Council, which is related to the Ministry of Commerce and Industry. That council has been fully integrated into the agency, mainly providing technical and crafts training, entrepreneurship, and training for operation. Nevertheless, all the initiations announced by the MSMEDA were targeting training for project establishments. Still, none of them influenced pre-existing listed SMEs that suffered from a lack of efficient management that could cause losses and, accordingly, bankruptcy. In reference to the agency's announced role in helping projects through developing polices and strategies to facilitate its growth and improve its competitiveness and therefore promote its quality and survival, this emphasises the significance of the MSMEDA's impact on listed SMEs.

Consequently, the role of the MSMEDA is not only providing finance to the SMEs but also providing a supportive working environment and a project development strategy to help the project succeed and gradually move from being small to medium to a listed corporation in the main market. On the other hand, the FRA establishes regulations to supervise the listed SMEs to facilitate their access to finance through the stock exchange after fulfilling the listing requirements.

[32] About the Agency MSMEDA retrieved from http://www.msmeda.org.eg/AboutUs.html
[33] Egypt Law No.152/2020.
[34] Moha Mohamed Al Shal, '*The Establishment of the Small and Medium Enterprises Agency'*, Institute of National Planning issue 18, 11/3/2017.

Therefore, cooperation between the FRA and the MSMEA is a must; such integration plays a vital, significant, and monumental role in the growth of not only NILEX's credibility and liquidity but also the entire SME industry.

2. The NILEX rules, regulations and working mechanisms

2.1 Listing requirements

Egypt has issued several requirements to facilitate the listing of SMEs in the exchange. The listing requirements in accordance with the latest amendments issued on 21 March 2021 are classified into two types of requirements. The general provisions that apply to both EGX and NILEX and specific rules that are applicable only to NILEX in terms of SMEs. A detailed distinction between these two types of rules is provided hereinafter.[35]

2.1.1 General provisions

For a primary listing to take place, the company must comply with the following.

The shares of the company must be deposited with the Ministry for Central Clearing, Depository and Registry (MCDR).

The company's authorised capital shall not exceed five times the issued capital and the articles of association shall not include any conditions or restrictions on the trading of securities without violating the regulations governing certain activities or specific geographic areas.[36]

Articles of incorporation of the issuing entity must stipulate the obligation to use the cumulative voting method in the appointment of the board members, which allows for proportional representation in the board of the issuing entity (if applicable).[37]

The company must develop a website to include financial statements and footnotes prior to the trading. The company must publish its financial statements, footnotes and the auditor's report annually on the website. It is forbidden to combine the position of the Chairman of the Board of Directors and the Managing Director or CEO of the company.[38]

In July 2021, the Egyptian Financial Regulatory Authority has issued Egypt Decree No. 17/2021, which states that female representation in the boards of directors of companies listed on the EGX and non-banking financial services companies should not go under 25%, or the board must be composed of at least two women.[39]

2.1.2 Listing requirements for SMEs

The company should present financial statements for the two fiscal years before the listing request. In case only one financial statement is issued for a full fiscal year, it shall submit a three year future business plan that includes the expected profits approved by the nominated advisor or a financial consultant accredited by FRA.[40]

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[35] Listing and Delisting Requirements in the Egyptian Stock Exchange, Capital Market Egypt Law No. 95/1992 on Capital Markets, in accordance with the amendments issued on 21 March 2021.
[36] *Ibid.*
[37] *Ibid.*
[38] *Ibid.*
[39] Egypt Decree No. 17/2021, FRA.
[40] Listing and Delisting Requirements in the Egyptian Stock Exchange, Capital Market Egypt Law No. 95/1992 on Capital Markets, in accordance with the amendments issued on 21 March 2021.

The shareholders' equity for the last annual financial statements or the periodical one before the listing request date should not be less than paid-in capital.

The listed shares should not be less than 25% of the total company's shares or a quarter of a thousand free floating capital and not less than 10% of the company's share. The number of shareholders should not be less than 100 shareholders.[41]

The number of issued shares should not be less than 100 thousand shares. taking into consideration that allotment of shares should be made as per the regulations to be set by the Exchange, to ensure that the offering is not fictitious.[42]

The percentage of free-floating shares shall not be less than 10% of the total company's shares, or 1/8 per thousand of the free market capital above 5% of the company's shares.[43]

The issued capital should be fully paid. The issued capital should not be less than 1 million EGP and not more than 100 million EGP, and less than 100 million EGP, as reported in the last annual or periodic financial statements. These statements must be accompanied by a comprehensive audit report drawn up by the company's auditor and approved by its general assembly.[44]

The percentage of retention of the founders and board members should not be less than 51% of their shares in the company's capital with a minimum of 25% of the shares issued and for not less than two fiscal years from the listing date.[45]

In accordance with the Executive Regulations of Egypt Law No. 95/1992 on Capital Markets, the authorised capital may be increased by decision of the extraordinary general assembly and upon the proposition of the board of directors or the partner or the managing partners in partnerships limited by shares. The board of directors or the managing partner(s), as the case may be, should include in their proposition regarding the increase of authorized capital, all the information related to the reasons for such an increase, and attach to it a report on the work progress of the company during the year in which such a proposition is presented, as well as the approved balance sheet of the preceding year. Attached to the board of directors' report shall be another report from the auditor affirming the accuracy of financial information included in the board of directors' report.[46]

Any company intending to issue securities should notify the FRA of such intention. If the FRA does not object within three weeks from the date of receiving such a notification, the company may proceed with issuing arrangements for such securities. The notification should include the share's value for the capital increase and the auditor's report thereon in accordance with the provisions of Article 17 of these Executive Regulations, if these shares are offered to someone other than company shareholders. It must also include the types of shares to be issued and the terms of their offering to the public, the distribution of shareholdings and whether the company is listed on the stock exchange as well as the type of schedule it is listed on, and the issue charges in case it is specified and the basis of their calculation. Finally, a certificate from the concerned administrative area notifying the payment of the legally required percentage of capital increase and a receipt of fees paid to the authority is required.[47]

Minimum shares to be held by the founders and board of directors and the company's major shareholders is 51% of the company's capital for a period of two fiscal years with a minimum of 25% of the required listed shares. In all conditions, the 25% is to be held for the next fiscal year, provided that the same retention conditions apply to any subsequent increase in the company's capital, except for the free shares' distributions.

[41] *Ibid.*
[42] *Ibid.*
[43] *Ibid.*
[44] *Ibid.*
[45] *Ibid.*
[46] Executive Regulations of Egypt Law No. 95/1992 on Capital Markets.
[47] *Ibid.*

After the approval of the FRA and the general assembly, these shares can be transferred if the buyer was a bank, insurance company, direct investment fund or any specialised person or entity with previous experience in the company's activities, provided that they pledge to keep the shares until the end of the term.[48]

From the above requirements, when comparing the listing requirements of SMEs with the main market, distinct key parameters are capital, the number of shareholders, and the number of listed shares, which are the parameters that differentiate the two markets by definition.

Meanwhile, there was no reference as to whether SMEs with high growth forecasts but made net losses in their first year or two could be listed in the exchange or not. However, Egypt Law No. 95/1992 showed that companies presenting one-year financial statements must provide a three year future business plan that includes the expected profits. Consequently, firms operating in innovative sectors, mainly with intangible assets incurring high costs in their first years of operation, will not have their chance to be listed on the NILEX. SMEs that can be listed accordingly are the sufficiently institutionalised companies that can handle the adequate requirements demanded by the legislation. This is a minimal subset of SMEs.

As a result, tailoring the listing requirements is important to include a larger sector of SMEs in a way that motivates firms to be listed and at the same time preserves the market stability and investor protection considerations. The unfortunate consequence of the imprecise listing requirements that are not carefully studied is that companies will choose to switch the home market, opting to be listed in a global foreign market. The foreign market will help firms enjoy a faster admission procedure, more straightforward listing requirements, government subsidies, and a reduced administrative and procedural burden. As a result, NILEX now struggles with low listing, small market capitalisation, and illiquidity.

2.2 Disclosure and governance requirements

The main listing documents include legal documents proving the company's legal entity, documents associated with the listing request, and documents related to the financial status of the company. The prospectus must also include general data about the company, company's contact details, central depository and stock exchange listing details, board members and their participation data, the number of shareholders and the percentage of their equity participation, founders and shareholders who hold 1% or more and associated groups, the percentage of the free float, IPO data, shareholders who are offering their shares, equity positions in terms of data freezing, the name of the financial auditor and their data, a summary of the company's financial statements if any, and a summary of the last financial auditor's report if any. Additional disclosures can be included, if particularly the company had not published financial statements for at least one fiscal year. The legal representative, auditor, legal advisor and financial consultant should approve each page of the disclosure report.[49] The legal representative of the company shall submit the disclosure report before the commencement of trading after the approval of the authority to the listing department in the Egyptian exchange. An attachment must also be provided that proves its publication in newspapers (for companies other than SMEs) along with a copy of the fair value study, the auditor's report and the minutes of the competent authority. Lastly, a clearing company letter that includes the percentage of shares retained and any additional disclosures that need to be published is required.

For the shares of Egyptian companies (established through public or private subscription or subsequently offered by the company through a public or private offering which has been listed before issuance of financial statements for one financial year before the commencement of trading), they must submit the study conducted by an approved financial advisor registered in the FRA and publish it on the FRA website, as well as two official newspapers widely circulated within a week at most. SMEs shall publish this on the trading screens and the Egyptian exchange websites. For SMEs, dividends are announced (cash coupon, free stock, or dividend distribution) on the stock exchange trading screens and its website. In contrast, the main market companies publish their dividends distributions in two daily newspapers after being handed over to the Department of Disclosure in the exchange.

[48] Listing and Delisting Requirements in the Egyptian Stock Exchange, Capital Market Egypt Law No. 95/1992 on Capital Markets, in accordance with the amendments issued on 21 March 2021.
[49] *Ibid.*

All companies list on the Egyptian stock exchange face the same filing requirements for the quarter periodic disclosure report, the annual corporate disclosure report, the disclosure of decisions and minutes of the general assembly, the disclosure of board decisions, and material information. However, the existing literature supports the recommendations that SME boards should reduce the disclosure frequency rather than content.[50] Reducing the frequency would save costs to SMEs, and preserving the same content will make firms meet the corporate governance standards that increase their transparency and improve their management.

The unfortunate consequence of strict reporting requirements is that issuers may choose to delist themselves as the cost of listing exceeds its benefits. The data shows that the number of listed companies reached 33 companies at the end of 2014, and five years later, in 2019, there were only around 31 company listed in the NILEX.

Consequently, the NILEX is now suffering from illiquidity, and new IPOs are rare. As a result, only a few companies acquire the most significant percentage share of the total trading value with a weak daily turnover. To flourish the market initially, the benefits from SME listing must overweigh the costs. Then, the balance between adequate investor protection and affordable SME costs to access exchange markets must be attained. Furthermore, liquidity of the market must be the top priority for legislators and regulators.

2.3 The nominated advisor role

A contract should be signed with a certified nominated advisor who shall guide the company through the listing process, do the necessary research, and help the company follow the disclosure requirements for a period not less than two years from the listing date.

The EGX Chairman issued Resolution No. 918/2020 governing nominated advisors performance. The resolution commits nominated advisors management to have investor relations for the companies they consult, as well as their commitment to provide research coverage to boost the growth of listed companies as well as attract more investments to the market to enhance liquidity and stimulate trading. The European Bank for Reconstruction and Development (EBRD) register nominated advisors on its records, as well as develop a program for the capacity building of nominated advisors in matters related to rules of registration and disclosure and investor relations, accounting and financial issues.

2.4 Annual listing fees

Listing fees include annual listing fees paid according to Egypt Prime Minister Decree No. 2125/2018 and administrative fees to be paid according to EGX Board of Directors' decrees. Every listed issuing company should pay for publishing its financial statements on the EGX website according to the brackets of the company's listed capital, as follows:

- from EGP 5 million up to EGP 20 million = EGP 3,000;
- more than EGP 20 million and up to EGP 40 million = EGP 5,000;
- more than EGP 40 million and up to EGP 60 million = EGP 7,000; and
- more than EGP 60 million = EGP 10,000.

In case of capital increase, the company will be subject to the higher bracket of fees and hence should pay an additional fee representing the difference between the two brackets of fees for the remainder of the current year.[51]

[50] Jacqueline Irving, John Schellhase, & Jim Woodsom. op. cit. 7
[51] EGX Listing Fees, https://www.egx.com.eg/en/Listing_fees.aspx.

2.5 Listing requirements for foreign companies

In order to list foreign shares in the Egyptian stock exchange, the foreign company's shares should be listed in one of the international stock exchanges, subject to the jurisdiction of an authority that exercises the competencies executed by the FRA. If the foreign company has no shares listed abroad, it can list its shares in the Egyptian stock exchange only if 50% of its equity, assets and revenues were derived from a subsidiary Egyptian company. It also must present the consolidated financial statements for the two fiscal years before the listing request. After the listing, the company must present its financial statements according the Egyptian accounting standards.[52]

Foreign SME's capital shall not be less than USD 10 million. In addition, foreign companies must have a legal representative in Egypt.[53]

3. Recommended policies towards promoting the NILEX growth

Egyptian companies' access to finance through the stock market is hampered by the inadequate institutional, regulatory, and legal frameworks. To reform the overall financial sector, attention must be paid not only to issuers and investors but to the entirety of market participants who constitute the tiny puzzle pieces of the larger picture, without which the accurate capital market reform picture cannot be seen. Such reform is essential to the NILEX and the growth and development of all micro, small and medium enterprises.

Accordingly, to flourish the market, issuers must understand the motives for listing and its benefits.[54] The disconnect and the absence of two-way and ongoing communications between policymakers and SMEs is the main reason that firms do not correctly perceive the different benefits they should expect from listing. Benefits include, among others, diversifying the investor base, easier access to other sources of finance compared to the unlisted firms, and higher growth and visibility.

Addressing the theoretical benefits of listing to the issuers by providing education and awareness campaigns must be done alongside implementing an overall SMEs capital market development strategy. Policymakers must develop such a strategy by studying the market conditions and communicating with the listed and unlisted SMEs to enhance the regulatory capacity and legal framework starting with the primary market.

In regards to the listing and delisting requirements in Egypt and its executive regulations, for a company to be listed in the Egyptian stock exchange, it must submit legal documents proving the company's legal entity, documents associated with the listing request, documents concerning the nomad, documents related to the financial status of the company and its prospectus, a financial advisor study of the fair value of the company, and the IPO prospectus.[55] Consequently, micro firms and start-ups are not suitable for being listed in this market because the costs are too high, and they will face difficulties coping with the ongoing listing requirements. By all means, allowing the listing of start-ups to in an emerging market is not an easy decision as the market must be deep enough to be able to face the failures that could result.

On the other hand, regulations that make all companies fulfil the exact listing requirements are not effective. One size fits all regulations are not fair for either market. Given that SMEs are small in size compared to the main market companies, a proportionate approach could better serve the SMEs,[56] taking into consideration the money and time that those companies cannot afford. Without forgetting the necessity of protecting the investor, a regulatory balance must be attained to decrease the issuance, legal, transaction, administrative and intermediary charges without reducing the prudent elements such as transparency, corporate governance, and disclosure. As a result, the NILEX listing requirements should be different from the main market to encourage issuers but not necessarily lower the protection offered to investors.

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[52] Listing and Delisting Requirements in the Egyptian Stock Exchange, Capital Market Egypt Law No. 95/1992 on Capital Markets, in accordance with the amendments issued on 21 March 2021.
[53] *Ibid.*
[54] Jacqueline Irving, John Schellhase, & Jim Woodsom. op. cit. 7
[55] Listing Guide in NILEX Stock Exchange, The Egyptian Exchange retrieved from www.NILEX.com.eg
[56] OECD Report to G20 Finance Ministers and Central Bank Governors, *'Opportunities and Constraints of Market-Based Financing For SMES'*, Submitted to the G20 IIWG meeting in Berlin on 20-21 August 2015.

In this context, regulations should streamline the legal and listing procedures[57] to reduce the issuance costs while asking the issuer to provide more specific information to improve transparency. Legislation in Egypt concerning the details included in the legal documents associated with the listing request, the prospects, and the financial advisor study of the company's fair value must be revised. In addition, the requested documentation regarding the estimated financial statements (five years) must be amended to do away with the five-year timeframe. Instead, legislation should define a list of types of information an issuer might need to disclose.

Moreover, policymakers should streamline any increased disclosure requirements by revising the regulations to develop a proportionate approach between the small and large listed firms regarding the disclosure frequency. Decreasing the reporting frequency will reduce some of the costs that companies find to be higher than they had estimated before going public. Regarding the financial reporting requirements mentioned in the listing and delisting executive legislations (Article 64 and 65), the exchange should publish a comprehensive summary for the annual and the periodic (quarterly) financial statements of the SMEs in addition to the footnotes, the auditor's report, the FRA remarks and the entire list of documentation required by the legislation on the Egyptian exchange's website. Consequently, making all these submissions quarterly decreases the issuers' incentives in the listing. Furthermore, this diminishes transparency in the market, as issuers lose interest in the quality of information submitted.

In this respect, the legislation needs to be more flexible to tailor the listing standards according to the quality of the firms being listed. Consequently, and to balance the costs for the issuer and the investor protection standards, legislation should allow that SMEs be audited on an annual basis and include the auditor's report in a publicly available yearly report. Concerning the periodical disclosures, SMEs should provide at least semi-annual updates on their performance, financial conditions, and a list of types of information clearly defined by the legislation to ensure that investors understand the quality, risk, and performance of the listed companies. Besides, any material information must be disclosed immediately. Getting the right regulatory balance is rather an art. Accordingly, the Egyptian legislation should revise the disclosure frequency, differentiate between the annual and quarter disclosures, and ask companies to submit a list of updates to ensure transparency and efficiency.

To enhance the public equity offering and encourage firms to be listed on the NILEX, the FRA should communicate with the market participants to find a way to reduce the transaction costs, the amount of time firms devote to consider listing and work on amending the listing procedures and disclosure frequency to decrease the unnecessary regulations. On the other hand, policy makers such as the FRA and the Ministry for Central Clearing, Depository, and Registry (MCDR) can review the fee structures of the exchange. Encouraging competition between underwriters and intermediary market participants could provide a healthier competitive environment with lower costs, improved efficiency, and more innovations.[58]

Following the public equity offering and to sustain the capacity to take SMEs public and through the secondary market, such operation needs to be supported by a healthy ecosystem. Such a system consists of investment banks, specialized banks, auditors, financial advisors, research analysts, sales, brokers, market makers, legal advisors, and others who support SMEs by enhancing market transparency and confidence.[59]

Moving forward to the secondary market and increasing the transparency and investor confidence to operate in a healthy ecosystem, policy makers should reform the financial reporting environment to improve the quality of the accounting and auditing regulatory framework and its enforcement. Investors in Egypt generally make their investment decision according to the company's reputation, its major stakeholders and qualitative factors due to the lack of confidence in the reporting quality.

Therefore, Egypt needs legal and institutional reforms integrated under legislation that comprehensively supervise and regulate the accounting and auditing practices. In this regard, there should be a supervisory

[57] Sahar Naser. op. cit. 11
[58] Sahar Naser. op.cit. 11
[59] OECD Report to G20 Finance Ministers and Central Bank Governors. op. cit. 18.

body that monitors auditors' working practices and enforce disciplinary actions. Moreover, the Egyptian Accounting and Auditing Standards should be continuously updated to restore confidence. Finally, litigations must ensure auditors empowerment, independence, and professionalism, in addition to, setting the rules of confidentiality.

For SMEs to be listed on the NILEX according to Article 9 of the listing and delisting rules, firms must appoint a nominated advisor to guide the company for a period not less than two years through the listing process. In addition, the advisor is responsible for following up with the company's commitment to the listing and disclosure requirements and submitting the company's research coverage.[60]

Given the importance of the nominated advisor role in guiding the company to be listed, in addition to the critical role the advisor plays in helping SMEs to comply with the ongoing listing and disclosure requirements. The FRA must license the advisors in Egypt and yet they lack the needed the education and professionalism to complete their tasks thoroughly. Instead, advisors in Egypt bring too many poor-quality companies to market.

One of the main elements that stunt the development of the NILEX is the lack of high-quality data regarding the financial performance and track record of the listed companies. However, the availability of quality information can positively influence the behaviour of the issuer and investor on the market's overall condition. Therefore, it will facilitate listing for companies in the primary market and enormously enhance the secondary market's liquidity. Besides, Egypt suffers from a declining provision of equity research, which is the advisor's responsibility according to the legislation. Equity research assists investors in making informed investment choices, providing an evaluation of the attractiveness of an individual stock, industry, or market, and expected future performance.

According to the law, nominated advisors should assist firms in the listing and the ongoing listing requirements after the listing. They should appropriately assist SMEs to meet listing requirements, disclosure requirements, and governance requirements. Their role is to approve and prepare the information documents and provide a stamp of approval for an SME's suitability to access the market. Advisors should support successful companies to maintain their livelihood and reputation.[61] As a result, if the nominated advisor did the quality of work alluded to in the provisions of law, this would be reflected in improving the quality of listed firms, enhancing public awareness, increasing confidence, and promoting the market to institutional and foreign investors.

Advisors are essential to the Egyptian market, as the market is not mature enough. Consequently, policymakers should develop a capital market strategy that creates regulation against conflicts of interest between advisors and the SMEs they bring to the market. The company pays the advisor, and at the same time, the advisor is responsible for assessing their readiness for market and ongoing disclosure.[62] Regulations should vigorously supervise and regulate the nominated advisor and enforce disciplinary actions against any violation in which they can lose their licenses if they support too many unsuccessful companies.

The regulatory capacity in terms of regulating and supervising the advisors in Egypt is fragile. Consequently, the NILEX lacks the quality of well-regulated authorised advisors, which is the most important factor in any capital market without which the market will suffer from reluctant issuers and investors as well.

Another important factor that stimulates liquidity in the secondary market is the market maker. Unfortunately, the market maker legislation is not yet activated in Egypt. The inadequate regulations and legislations concerning market makers undermine the ecosystem. Market makers are the catalysts to the provision of liquidity, and driving them away will deprive the marketplace of liquidity, particularly for SMEs, given that those stocks are not easy to match and impede their price discovery.[63]

[60] Listing and Delisting Requirements in the Egyptian Stock Exchange, Capital Market Egypt Law No. 95/1992 on Capital Markets, in accordance with the amendments issued on 21 March 2021.

[61] Alison Harwood & Tanya Konidaris, op. cit. 5
[62] Ibid.
[63] OECD Report to G20 Finance Ministers and Central Bank Governors. op. cit. 18

In their studies, Grose and Friedman pointed out that a weak secondary market is a key constraint on primary market activity.[64] Illiquid markets are not attractive to issuers or investors, as issuers will not find such markets an efficient source of capital. Issuers will therefore continue to search for bank financing.[65]

To protect the NILEX, regulations should strongly stipulate the prerequisites for an SME market, addressing the roles of the mandatory partners such as the auditors, advisors, and market makers. The supervision of their commitment to the laws and regulations is as necessary as defining their role appropriately in the legislation. An ICSA study on the financing of SMEs through the capital market confirms that a market-making system is instrumental for improving liquidity and that dedicated equity markets that have market advisors developed faster after introducing the market advisor system.[66]

Despite substantial efforts that Egypt exerts to develop the capital market in Egypt, unfortunately, the market still suffers from inadequate legal frameworks, weak regulatory and supervisory frameworks, and staff who do not have the proper skills to regulate and supervise the industry. As a result, SMEs have difficulties accessing the market and even more challenges in surviving in the market. These results are reflected in the investor base of the NILEX.

The Egyptian stock market lacks active domestic financial institutional investors. According to the EGX report summary of the 2018 market performance, domestic institutional investors accounted for 14% of the total transactions executed on the market. Egyptian retail accounted for 50%, foreign institutions for 30%, and foreign persons for 6%.[67]

Such data rings a loud alarm to policy makers in Egypt - why are domestic financial institutional investors investing in the market with such poor figures?

In this essence, policymakers should revise the investment constraints defined in legislation and investment policy statements of the domestic financial institutional investors, analyse the retail investors' investment behaviour and develop programs to promote the long-term holding of securities. Additionally, competition should be announced among brokerage firms while improving the supervisory framework.

Even if public markets are not suitable for all types of SMEs or investors, the promotion of a public SME market will help foster innovations and job creations, affecting not only the capital market but also the entire economy, welfare, employment rates, and standards of livings. Accordingly, governments and policymakers are required to promote public awareness.

SMEs face an educational gap due to their lack of awareness about the means of finance. Their limited information discourages seekers of finance and drives down the demand for capital market products. Moreover, they cannot market their projects effectively to garner adequate supply. Consequently, MSMEDA, EGX, and FRA must induce further participation of SMEs by bridging the educational gap, raising awareness of public financing options, and building the needed skills for SMEs to overcome this academic gap.

The Egyptian exchange along with the Financial Regulatory Authority within the overall capital market development strategy that the government must develop should enhance the equity culture of the public. Campaigns must be held to raise awareness regarding financial consumer protection explaining the risk of such instruments and the benefits of diversified saving portfolios.[68]

Considering the limited number of IPOs, the narrow investors' base, the lacking equity culture, the poor quality of companies, the weak supervision and illiquidity, the NILEX should be rescued by tailoring the

[64] Grose, C., Friedman, F.B. (2006), *'Promoting Access To Primary Equity Markets: A Legal And Regulatory Approach'*, Policy Research, Dostupno na: http:// dx.doi.org/10.1596/1813-9450-3892.
[65] Aljoša Šestanović (2016), *'SME Stock Exchanges - Should They Have a Greater Role?'*, University College EFFECTUS - College for Finance and Law, Vol. 4.
[66] ICSA Emerging Markets Committee (2013), *'Financing of SMEs through Capital Markets in Emerging Market Countries'*.
[67] Research & Markets Development Dept., 2018 Annual Report, The Egyptian Exchange (EGX)
[68] OECD Report to G20 Finance Ministers and Central Bank Governors. op. cit. 18

appropriate regulations and legislations designed carefully to meet only its very particular needs. One size fits all regulations and disclosure requirements can never be fair. Designing regulations is rather an art that needs focus and contemplation to be carefully designed as issuer friendly, while still comprehensive and strict to protect investors.

Conclusion

The regulatory and supervisory system in Egypt should be aware of its critical role in delivering efficient financial services to the public. However, from the data analysis of the market performance, it was clear that the regulations and supervision in Egypt are facing difficulties in promoting a deep, efficient, liquid, and attractive market to the most critical industry in Egypt - the SMEs. Accordingly, a financial sector development strategy must be initiated to rescue the SMEs capital market by strengthening the capacity of the supervisory bodies, supporting the market infrastructure, encouraging research and easily accessible information. In addition to bridging the educational gap, we must also raise awareness of the capital market financing benefits and options. Moreover, the development strategy shall provide SMEs with the needed training and skills and promote the underdeveloped investor base. Furthermore, this will strive towards catalysing long term institutional and retail investor participation, streamlining the unnecessary regulations and legislation, and developing new regulations tailored specially to meet the SMEs' specific needs and conditions.

To provide such a broad and deep SMEs capital market, the efforts of all the interconnected parties involved in the SMEs financing environment must be coordinated to create financial stability in a healthy financial ecosystem, which is both a target and, at the same time, a reason for the market's growth and efficiency.

Although the Financial Regulatory Authority is making progress in developing several legislations and decrees to introduce new financial products and services to the market, further streamlining and more market-based measures targeting the NILEX are necessary to be considered in cooperation with the MSMDA.

Eventually, financial restructuring and institutional reform will enhance the benefits from the opportunities that could be achieved from the SMEs capital market. Such reform will ultimately be reflected not only in a well-functioning financial system but also in Egypt's economic growth and development.

SCA vs. Evergreen
ADSERO Writing Competition 2021 Winner

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Abstract

In this paper, we examine various legal aspects regarding the SCA vs. Evergreen matter, as if no settlement has been reached. Preliminarily, despite that Ever Given's owner and charterer are foreign entities, the Ismailia Economic Court is internationally and locally competent to examine the dispute. Since the ship is faced with a number of maritime claims, the Court duly ordered its conservatory seizure.

The parties may proceed to international commercial arbitration instead of litigation, as the subject-matter is arbitrable, and the SCA does not need to obtain the Prime Minister's prior-approval. In either proceeding, the Egyptian Cabinet cannot be forced to join this case, as it is regarded as a third-party. Moreover, Egyptian law shall govern the dispute, notably as the passage contract is governed by the Navigation Rules, an Egyptian law document. In accordance with these rules, Ever Given's owner and charterer waived their right to benefit of any limitation of liabilities. Therefore, the SCA is entitled to obtain full compensation for all damage, including its financial losses due to the Canal's obstruction.

Finally, the SCA cannot benefit of the insurance coverage made by the UK P&I Club, due to the "Pay to be paid" standard clause.

Keywords

Litigation; dispute resolution; maritime law; international law; damages

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Editorial note

This Case Note is the winning submission of the ADSERO[1] 2021 Writing Competition, which was open to students and young professionals. The ADSERO 2021 Writing Competition and its subsequent judgement of submissions was conducted independently, and therefore did not adhere to the Peer Review Policy of the Journal of Law in the Middle East by LexisNexis. The submissions were judged by three firm members, including Senior Associate Dalia Nagati, of Counsel Dr. Radwa Magdy and Junior Associate Abdullah Hosny.

In partnership with ADSERO, the Journal of Law in the Middle East by LexisNexis has chosen to republish the winning submission.

Introduction

In this paper, we examine various legal aspects regarding the SCA vs. Evergreen matter, as if no settlement has been reached.

Preliminarily, despite that Ever Given's owner and charterer are foreign entities, the Ismailia Economic Court is internationally and locally competent to examine the dispute. And since the ship is faced with a number of maritime claims, the Court dully ordered its conservatory seizure.

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Table of abbreviations

CCPL	Egypt Law No. 13/1968 on Civil and Commercial Procedures, as amended.
Civil Code	Egypt Law No. 131/1948 on the Civil Law, as amended.
Club	United Kingdom Mutual Steam Ship Assurance Association Ltd., also known as UK Protection & Indemnity (P&I) Club.
Club's Rules	Club's Rules of 2021, accessed 18 July, https://www.ukpandi.com/-/media/files/uk-p-and-i-club/rules/2021/rulebook-2021---final.pdf
Cass.	Court of Cassation.
Dispute	SCA vs. Principals, regarding the Suez Canal obstruction.
EAL	Egypt Law No. 27/1994 on Arbitration, as amended.

[1] Adsero - Ragy Soliman & Partners is an Egyptian law firm. Full details may be found at their website, https://www.adsero.me/.

ECL	Egypt Law No. 120/2008 on the Economic Courts, as-amended.
ETL	Egypt Law No. 17/1999 on the Trade Law, as-amended.
Ever Given	MV Ever Given, a ULCS registered in Panama, with IMO No. 9709257.
Evergreen/Charterer	Evergreen Marine Corporation Limited., charterer of Ever Given.
JY	Judicial year.
LLMC	Convention on Limitation of Liability for Maritime Claims of 1976, accessed by Egypt through President Decree No. 150/1986.
Maritime Claim(s)	As defined by article 1.1 of-the Seizure Convention and article 60 of-the MTL.
MTL	Egypt Law No. 8/1990 on Maritime Trade, as-amended.
Navigation-Rules	Rules of Navigation of 2020, issued by the SCA's Circular No. 8/2020, https://www.suezcanal.gov.eg/English/Navigation/NavigationCirculars/Documents/Cir.8-2020/SC-Rules-of-Navigation(Circ.%208.2020).pdf.
Owner	Shoei Kisen Kaisha Limited., ultimate owner of Ever Given.
Principals	Charterer and Owner of Ever Given.
SCA	Suez Canal Authority, organized by the SCA Law.
SCA Law	Organisation of-the SCA Law No. 30/1975, as-amended.
Seizure Convention	International Convention Relating to the Arrest of Sea-Going Ships of 1952, accessed by Egypt through Egypt Law No. 135/1955.
TEU	Twenty-foot Equivalent Unit.
ULCS	Ultra-large containership.

Analysis

On 23 March 2021, the Egyptian Meteorological Authority warned of a heavy sandstorm hitting the country, with a rough impact over the maritime traffic. The SCA increased its precautionary measures across its six ports in Suez, South Sinai and Red Sea governorates.[2] However, transiting through the Suez Canal kept flowing without interruption.[3]

At 7:40 AM (GMT+2), on the said day, Ever Given, a ULCS of 400 metres long (as tall as the Empire State Building), with a width of 59 meters[4] (nearly as wide as the International Cairo Stadium),[5] and a capacity of 20,124 TEU,[6] was going through the Suez Canal, heading to Rotterdam, Netherlands. It grounded in the

[2] Amal Abbas, "After Nuweiba: Closing Suez ports due to bad weather," *Al-Masry Al-Youm*, 23 March 2021, https://www.almasryalyoum.com/news/details/2294706
[3] "Sandstorm hits Egypt, and strong warnings to citizens," *Al-Ain*, 23 March 2021, https://al-ain.com/article/severe-dust-storm-egypt
[4] "Ever Given," *Vessel Finder*, accessed 18 July 2021, https://www.vesselfinder.com/vessels/EVER GIVEN-IMO-9811000-MMSI-353136000
[5] "Main Football Stadium," *International Cairo Stadium*, accessed 18 July 2021, http://www.cairo-stadium.org.eg/Location.aspx?id=16
[6] "Vessel Particulars of Ever Given," *Shipment Link*, accessed 3 July 2021, https://www.shipmentlink.com/tvi1/jsp/TVI1_VesselParticulars.jsp

south end of-the Suez Canal,[7] halting all traffic in the Canal for more than 185 vessels, mostly bulk carriers, container ships, and oil and chemical tankers.[8]

Early media statements by the SCA officials and Evergreen, were estimating that the cause of-the incident was due to weather conditions causing a blackout.[9] The SCA deployed two of its biggest dredgers and nine tugboats to float Ever Given, in an attempt to remove sand and water from beneath it and tug it to the course again.[10]

On 24 March 2021, the SCA declared that navigation through the Canal will continue without interruption. However, on the next day, it had to suspend the navigation until floating Ever Given, which obstructed the Canal due its size and location.[11]

During this period, world-wide news reports were speculating the disastrous outcomes of-the Ever Given incident, and its impact over international trade, with daily loses estimated around USD 15 million incurred by the SCA.[12] The SCA kept monitoring the situation, and even cooperated with the leading Dutch company, SMIT Salvage. Thanks to SCA's plans and careful calculations, Ever Given had been finally floated on 29 March 2021, and navigation resumed in the Canal. [13]

On 1 April 2021, Admiral Rabie, the SCA's Chairman, declared that SCA will demand more than USD 1 billion as compensation for the losses and floating costs.[14] Disagreements escalated between the parties due to the magnitude of-the amount, leading the President of-the First Instance Circuit of the Ismailia Economic Court, on 13 April 2021, upon the SCA's request, to issue order No. 26/2021 to seize Ever Given as a security, followed by another claim regarding the proof of debt.[15] On 23 May 2021, the Court rejected all counter-attempts to annul the order, and proceeded with examining the Dispute.[16]

On 25 May 2021, after initially claiming approximately USD 916 million, [17] the SCA slashed them to USD 550 million and showed its will to settle through requesting the delay of judicial procedures. At the same time, the SCA started to disclose some of its investigation results, conveying that Ever Given's grounding was due to a human error, and not just the weather conditions.[18]

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[7] Mike Schuler, "Grounded 'Mega Ship' Blocking Suez Canal in Both Directions," *gCaptain*, 23 March 2021, https://gcaptain.com/grounded-mega-ship-blocking-suez-canal-in-both-directions/

[8] Salma El Wardany, Mirette Magdy and Jack Wittels (Bloomberg), "Grounded Mega Ship in Suez Canal Paralyzes Trade for Second Day," 24 March 2021, https://gcaptain.com/grounded-mega-ship-in-suez-canal-paralyzes-trade-for-second-day/

[9] Ashraf Gehad, Ahmed El-Sheikh, "Ever Given's Grounding and Disruption of Navigation," *Masrawy*, 24 March 2021, https://www.masrawy.com/news/news_egypt/details/2021/3/24/1992790/%D8%AC%D9%86%D9%88%D8%AD-%D8%A5%D9%8A%D9%81%D8%B1-%D8%AC%D9%8A%D9%81%D9%86-%D9%88%D8%AA%D8%B9%D8%B7%D9%84-%D8%A7%D9%84%D9%85%D9%84%D8%A7%D8%AD%D8%A9-%D9%85%D8%A7%D8%B0%D8%A7-%D9%8A%D8%AD%D8%AF%D8%AB-%D9%81%D9%8A-%D9%82%D9%86%D8%A7%D8%A9-%D8%A7%D9%84%D8%B3%D9%88%D9%8A%D8%B3-%D8%B5%D9%88%D8%B1-%D9%88%D8%AA%D8%AA%D8%A8%D8%B9-%D9%84%D8%AD%D8%B8%D9%8A

[10] Amr El-Warwari, "Full Detail about the Stranded Ship in the Suez Canal," *Al-Watan*, 24 March 2021, https://www.elwatannews.com/news/details/5394461

[11] Amr El-Warwari, "SCA Declares Navigation Suspension," *Al-Watan*, 25 March 2021, https://www.elwatannews.com/news/details/5395079

[12] "Suez Canal Blockage | What happened? What are the losses? And when and how will it end?" *Daqaeq*, 28 March 2021, https://daqaeq.net/suez-canal-blockage/

[13] "Egypt or Smit Salvage: Who's the main responsible of floating the ship and unblocking the canal?" *Daqaeq*, 30 March 2021, https://daqaeq.net/free-ever-givin/

[14] "Suez Canal: Egypt seizes Ever Given and demands more than US$ one billion as compensation," *BBC News Arabic*, 1 April 2021, https://www.bbc.com/arabic/middleeast-56603122

[15] Al-Sayed Fouad, "Al-Mal publishes the details of the claims regarding the proof of debt and the validity of the conservatory seizure over Ever Given," *Al-Mal*, 23 May 2021, https://almalnews.com/%D8%A7%D9%84%D9%85%D8%A7%D9%84-%D8%AA%D9%86%D8%B4%D8%B1-%D8%AA%D9%81%D8%A7%D8%B5%D9%8A%D9%84-%D8%AF%D8%B9%D9%88%D9%89-%D8%AB%D8%A8%D9%88%D8%AA-%D8%A7%D9%84%D8%AF%D9%8A%D9%86-%D9%88%D8%B5/

[16] Ismailia Economic Court of Appeals' judgment regarding case No. 23 of JY 14, 23 May 2021, accessed 20 July 2021, https://manshurat.org/node/72199

[17] "SCA's memorial regarding the owner of Ever Given's objection from its arrest order," *Manshurat*, accessed 20 July 2021, https://manshurat.org/node/72265

[18] "Egypt determines the cause of the "Ever Given" ship stranding in the Suez Canal," *Al-Arabiya*, 25 May 2021, https://ara.tv/65tdk

Negotiations carried on between the parties, and finally, after 107 days, a confidential compensation settlement has been concluded, freeing Ever Given from the Court's order, as it departed on 8 July 2021.[19]

In this paper, we will examine various legal aspects in relation with the Dispute, as if no progress has been reached since the conservatory seizure of Ever Given, regardless of its potential perspectives towards third parties.

1. Procedural issues

1.1 The international jurisdiction of the Egyptian judiciary

Determining the competent jurisdiction to examine the Maritime Claims is generally in accordance with the Seizure Convention, which gives jurisdiction to the State where the ship, flying the flag of a signatory State, is located.[20] But since Ever Given is a Panamanian ULCS,[21] and Panama is a non-contracting State,[22] the Egyptian judiciary will need to examine its international jurisdiction in accordance with its law,[23] through reviewing the foreign element to the case, (i.e., the nationality of-the parties), which is not an issue in regards to the SCA, the Egyptian public authority.

Regarding the Principals, Egyptian law only establishes how to determine a corporate's *lex societatis*,[24] regardless of its nationality; as the power to accord a nationality is an act of national sovereignty that should not be infringed by a foreign authority.[25] However, some of-the Egyptian doctrine suggests taking into consideration certain criteria to deduce the nationality of a juristic person, notably the nationality of-the shareholders, the management and/or employees, its incorporation papers, and the location of its facilities.[26]

Except for Evergreen's[27] and Ever Given's[28] respective agents, the aforementioned criteria are mostly non-Egyptian in respect of-the Principals. Therefore, the foreign element in this case is established.

Consequently, we assert that the Egyptian judiciary is internationally competent to hear the Dispute, in accordance with both article 7 of the Seizure Convention and article 30 of-the CCPL, the international jurisdiction is established if any of-the following was located in Egypt:

(i) a property (i.e., the arrested Ever Given);[29]

(ii) an obligation which has been created, performed or should have been performed (i.e., the Suez Canal passage contract);

(iii) an elected residence of a foreign defendant who does not have a domicile or residence in Egypt. In accordance with article 144 of-the MTL, the ship's agent is considered as the operator's representative regarding filed claims against or by the latter in Egypt, and the

[19] "After 107 days: Ever Given leaves the Suez Canal in a big ceremony," *Al-Ahram*, 7 July 2021, https://gate.ahram.org.eg/News/2858747.aspx
[20] Article 2 of the Seizure Convention.
[21] Since Ever Given is registered at Panama, it cannot have more than one nationality, in accordance with articles 91 and 92 of the UN Convention on the Law of the Sea (UNCLOS)
[22] Signatories of the Seizure Convention, *UN Treaty Collection*, accessed 17 July 2021, https://treaties.un.org/pages/showDetails.aspx?objid=08000002801338ba
[23] Articles 7, paragraph 1, and 8, paragraph 2, of the Seizure Convention.
[24] Article 11 of the Civil Code.
[25] Dr. Fouad Riad and Dr. Samia Rashed, *International Private Law*, vol. 1, (Cairo, *Dar Al-Nahda*, 1971), p. 320.
[26] Dr. Ibrahim Ahmed, *International Private Law: Nationality & Law on Foreigners*, (Cairo, *Dar Al-Nahda*, 2006), pp. 45-52.
[27] "Egypt – Arabian Guld Marine Trading Company," *Evergreen Line*, accessed 11 July 2021, https://www.evergreen-line.com/tbo1/jsp/TBO1_GlobalInfo.jsp?en=n&Type=%27%27&Country=EG&CountryName=Egypt ; *Maritime Transport Sector*, accessed 11 July 2021, https://www.emdb.gov.eg/ar/directory/default/view/65?v=desc&agency=1
[28] "Konouz for International Maritime Commerce and Navigation," *Maritime Transport Sector*, accessed 11 July 2021, https://www.mts.gov.eg/ar/directory/default/view/236?v=desc&agency=1
[29] Cass., case No. 145 of JY 62, 15 May 2000.

agent's domicile is considered to be the operator's. This representation remains limited to procedural aspects of-the claim, as the liability in respect of the subject-matter remains on the operator.[30]

1.2 The governing law of the Dispute

As the Egyptian judiciary is internationally competent, it shall proceed to determine the applicable law in accordance with the *lex fori*.[31] Respectively, we conclude that Egyptian law shall be applicable over the seizure's validity[32] and the merits of the Dispute.

To elaborate, the SCA-Evergreen relationship is based on a contract, and not just a material fact or another type of legal acts; as a contract is concluded when reciprocal considerations and obligations are agreed upon by-the parties, without having them originally derived from either a statute or a tort.

Even if there was an imbalance between the parties leaving one of-them in a "take it or leave it" type of deal (i.e., adhesion contracts), it does not deprive their relationship from being characterized as a contract, as this imbalance is the result of an economic reality (e.g., indispensable monopolised utilities) that does not defect the beneficiary's consent.[33] And in case of-the Suez Canal, economic operators willingly take this route instead of other options (e.g., navigating around Cape Agulhas) for financial reasons.

Therefore, SCA-Evergreen's connection is based on a passage contract, with its terms and conditions detailed in the Navigation-Rules,[34] which state in its first article that vessels have to comply with all laws, orders, and regulations issued by the Egyptian Government.

Subsequently, the main branch of Egyptian law governing this contract is the MTL. Thus, economic courts have an exclusive jurisdiction over all disputes in relation with the MTL, including the validity of-the conservatory seizure.[35]

1.3 The arbitrability of the Dispute

Concerning the arbitrability of-the Dispute, it is generally admitted under the EAL that parties to an international[36] commercial dispute have the possibility of electing any law as their *lex arbitri*.[37]

However, even if the EAL would not be chosen as the *lex arbitri*, some of its public policy rules remain applicable, especially if it eventually became the *lex executionis*. Two sets of requirements must be respected: (1) the arbitrability of-the subject matter of-the dispute, and (2) the capacity of-the parties to enter into an arbitration agreement.

[30] Cass., case No. 2429 of JY 69, 26 February 2002.
[31] Article 10 of the Civil Code.
[32] Article 6 of the Seizure Convention.
[33] Dr. Abd El-Razzak El-Sanhuri, *Al-Wasit in the New Civil Code,* vol. 1, *Sources of Obligation*, (Lebanon, *Dar Ehya' El-Turath*, 1952) p. 229-230.
[34] Article 1, paragraph 1, of the Navigation Rules (p. 4).
[35] Article 6, point 13, of the ECL.
[36] The internationality of a dispute is determined when it falls under several cases, including: (i) when the principal places of business of the two parties to the arbitration are situated in two different States at the time of the conclusion of the arbitration agreement, and (ii) when the parties to the arbitration have agreed to resort to a permanent arbitral organization or to an arbitration centre having its headquarters in Egypt or abroad (article 3 of the EAL).
[37] Cass., case No. 450 of JY 40, 5 May 1975.

A dispute is arbitrable under the EAL when in consideration of conciliable disposable rights, [38] without contradicting public policy nor morals.[39] Most importantly, the subject matter should be related to a legal economic connection[40] (i.e., the passage contract).[41]

Regarding the capacity requirement, the Principals' capacity is generally determined in accordance with their respective *lex societatis*; therefore, for the sake of our analysis, we will assume that the Principals do have the required capacity. As for the SCA, we confirm that it does have the capacity to conclude a submission agreement regarding the Dispute, without the need to obtain the competent minister's prior approval (i.e., the Prime Minister).

For instance, article 1, paragraph 2, of-the ELA explicitly draws a distinction between private law contracts and administrative contracts, as resorting to arbitration in respect of-the latter requires the approval of-the competent minister or the official assuming his powers in regards to public juristic persons, and delegation of powers in this respect is prohibited. Accordingly, the key point to determine the SCA's capacity is through determining the nature of its contract with Evergreen.

When speaking of-the nature of contracts concluded by the economic public authorities, it is incontestable that contracts in relation with the administration and management of-the economic public utilities, when containing exorbitant clauses, are of an administrative nature (e.g., concession agreements).[42] The State Council, in its advisory opinion of 1997,[43] further justified the rationale behind rejecting the arbitrability of administrative contracts without the approval of a competent official, as their subject matter is related to a public interest, and not just a private interest (e.g., all acts in relation with maritime navigation are commercial acts).[44]

Additionally, SCA's property is not public, but it is a private property governed by private law, and therefore disposable.[45] And the SCA's goal is to make profits in first place, that it is why its gains are not perceived as mere tolls (i.e., reduced fees in exchange for public services), but rather as a commercial consideration in exchange for transiting through the Suez Canal (i.e., passage contract),[46] similar to other authorities managing economic utilities.[47]

1.4 The joinder of the Egyptian Cabinet to the Dispute

A question may arise over the joinder of the Egyptian Cabinet, which cannot be forced to join to this case whatsoever was the resolution mechanism.

In the context of litigation, article 117 of-the CCPL granted to the parties the possibility to bring a third-party to the case if the latter was a person whom was possible to be involved in the first place.[48] However, the link between the Cabinet and the Dispute cannot be established, since the SCA is a public authority with an independent legal personality.[49] And even if the SCA is affiliated to the Cabinet, this affiliation is generally

[38] Article 11 of the EAL; article 551 of the Civil Code, stating that financial interests are conciliable.
[39] Article 135 of the Civil Code.
[40] Article 2 of the EAL; Dr. Fathi Waly, *Arbitration Law in Theory & Practice*, 1st ed. (Alexandria: *Dar Al-Maarif*, 2007), pp. 121-129.
[41] Dr. Atef Mohamed, *Arbitration in Maritime Disputes,* (Cairo, *Dar Al-Nahda*, 2004), pp. 77-82.
[42] Cass., cases No. 1964 and 1968 of JY 91, 8 July 2021, the recent judgment which annulled an ICC award rendered against Damietta Port; Dr. Soliam Al-Tamawi, *General Principals of Administrative Contracts,* 5th ed. (Cairo, Ain-Shams University Press, 1991), pp. 53-106.
[43] State Council, advisory opinion No. 60 issued on 22 February 1997, case No. 54/1/339. This opinion echoed in subsequent case laws; by way of illustration, kindly refer to: State Council, cases No. 30952 and 31314 of JY 56, 14 September 2010; Cairo Court of Appeal, case No. 8 of JY 127, 15 April 2014.
[44] Article 6 of the ETL.
[45] Article 10 of the SCA Law.
[46] Dr. Zeinab Hussein, *Principles of Public Finance*, (Alexandria, *Dar Al-Gami'a Al-Gadeeda*, 2006), pp. 109-116.
[47] Dr. Mohamed Sherif, *Adhesion Contracts*, (Cairo, *Dar Al-Nahda*, 2006), pp. 56, 60-63.
[48] Dr. Ahmed Meliguy, *A Comprehensive Commentary on the Procedural Law*, 8th ed., vol. 3, (Cairo, Egyptian Judges' Club, 2010), p. 11.
[49] Article 2 of the SCA Law.

limited to administrative supervision, without being under its control.[50] Thus, a counter-evidence should be submitted to prove that the Cabinet was materially involved in the Dispute.[51]

As in the context of arbitration, if we drew an analogy with mother companies and their affiliates, it is required in such a context that the affiliate would have been playing a part in executing the obligations of-the former in order to be forced to join the arbitration proceedings.[52] Either that, or to obtain the consent of-the parties, and of the relevant third-party too, to bring the latter to the case;[53] as submission agreement is a consensual contract,[54] and forced arbitration is unconstitutional.[55] Hence, bringing the Cabinet to arbitration requires its consent.

1.5 The legal grounds of the conservatory seizure

There are two types of seizure over ships: the executory seizure, subsequent to rendering an executory verdict (e.g., courts' judgments and orders),[56] and the conservatory seizure, ordered by a court with the sole goal to guarantee the creditor's claimed rights until reaching either a final verdict[57] or a settlement agreement.[58]

The conservatory seizure is applicable even if the ship was ready to sail.[59] Readiness of a ULCS to sail is prior to or after being loaded with containers, which, in our interpretation, may allow for the inclusion of the cargo itself, especially if there was a risk upon the creditor to lose a significant guarantee of his rights.[60] As Ever Given's capacity equals 20,124 TEU, requiring the SCA to unload this massive amount of cargo in order to seize only the ship would result in a significant loss of time and money, not only for the SCA, but also for the Principals and the whole chain of supply depending on Ever Given.

As examined earlier, the Egyptian judiciary is internationally competent to order the seizure of Ever Given in respect of Maritime Claims; the pertinent Maritime Claims in our case are: (1) loss of life; (2) salvage, (3) towage, and (4) damage caused by the ship.

A seizure order must be obtained from the appropriate judicial authority;[61] in this case, the president of-the competent first instance court or his equivalent,[62] who happens to be a class (A) judge of an equivalent ranking, selected by the General Assembly of-the Ismailia Economic Court,[63] the locally competent jurisdiction since the ship falls in its circuit.[64] This condition has been duly fulfilled.

This order must be followed with a claim filed by the creditor before the First Instance Circuit of the Ismailia Economic Court during the following eight days since delivering the seizure, otherwise the seizure shall be considered as null and void.[65] The SCA filed its claim in due time.

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[50] Dr. Soliam Al-Tamawi, *General Principals of Administrative Law,* vol. 2, *The Theory of Public Utilities & Public Administration's Workers*, (Cairo, *Dar Al-Fikr Al-Arabi*, 2014), p. 60.
[51] Judge Ahmed Mahmoud, *Maritime Case Laws*, 4th ed., (Alexandria, *Dar Al-Maarif*, 2007), pp. 379-385; State Council, case No. 1719 of JY 34, 23 March 1991: "The administrative liability is established upon three elements; an error, a damage and causation."
[52] Cass., cases No. 4729 and 4730 of JY 72, 22 June 2004.
[53] State Council, case No. 7595 of JY 81, 13 February 2014.
[54] Cass., cases No. 6529 and 6530 of JY 62, 12 January 2000.
[55] Constitutional Court, case No. 380 of JY 23, 11 May 2003.
[56] Articles 67-77 of the MTL.
[57] Article 59 and 61 of the MTL; Cass., case No. 8810 of JY 64, 26 November 2001.
[58] Article 8 of the ECL.
[59] Article 3 of the Seizure Convention and article 59 of the MTL.
[60] Article 316 of the CCPL; kindly note that the provisions of the CCPL are applicable over the economic courts' procedures, unless it contradicts the special provisions of the ECL, as stated by the latter's fourth article of issuance.
[61] Article 4 of the Seizure Convention.
[62] Article 59 of the MTL.
[63] Article 7 bis of the ECL.
[64] Articles 55 and 59 of the CCPL; Minister of Justice's decree No. 8603/2008, as amended.
[65] Article 65 of the MTL.

Finally, the seizure can be elevated if a sufficient warranty or guarantee was offered,[66] but Evergreen refused to, as it considered that the amount requested by the SCA (USD 200 million) was grossly estimated.[67]

2. Legal liabilities of the SCA and the Principals

2.1 The non-limitation of the Principals' liabilities

Preliminarily, when addressing the merits of-the Dispute, it should be reminded that the terms and conditions of-the passage contract are the Navigation-Rules, considered as the law of the Canal.[68] The Navigation Rules are binding upon the Principals and Ever Given's master by the sole fact of using the Canal,[69] prevailing over non-public policy norms.[70]

Furthermore, Egypt is a signatory of-the LLMC, with its rules incorporated in the MTL, and both instruments state that the limitation of liability is an option for the Principals in regards to enumerated claims.[71] Consequently, such an option can be waived,[72] which happened in the SCA-Evergreen passage contract, as article 4, paragraph 3, of-the Navigation-Rules states that the Principals "are responsible without option to release themselves from responsibility by 'Limited Liability'."

Accordingly, the Principals shall not benefit of any limitation of liability in respect of the damage to the Canal itself, physical injuries (i.e., the death of an SCA's personnel),[73] and material damage (i.e., the drowning of an SCA's boat),[74] and the claimed compensation shall be evaluated in proportion with the damage.[75]

Furthermore, we need to examine the compensation claims regarding the financial losses incurred by the SCA, caused by the obstruction of-the Canal for six consecutive days. In addition to the non-limitation of the Principals' liability in this regard, it has been estimated that daily losses due to obstruction accounted for USD 15 million, accruing to USD 90 million in six days. This figure can be close to the truth, as the average weekly revenues during the last five years ranged between USD 94 million (at the lowest) and USD 111 million (at the highest), according to the Central Bank of Egypt's data.[76]

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[66] Article 5 of the Seizure Convention, and article 63 of the MTL.
[67] Mohamed Muhammadin and Moaaz Abd Al-Aziz, "An Egyptian court orders the continued detention of the ship Ever Given in the Suez Canal," *Reuters*, 23 May 2021, https://www.reuters.com/article/egypt-suez-as3-idARAKCN2D40A9
[68] Minister for Foreign Affairs of Egypt, "Declaration on Suez Canal and the arrangements for its operation – Letter addressed to the President of the Security Council," *UN Digital Library*, 24 April 1957, p. 3 https://digitallibrary.un.org/record/574836?ln=en ; Al-Sayed Falah, "Suez Canal: The Navigation Rules constitute the legal references to the SCA's rights and obligations," *Al-Youm 7*, 5 June 2021, https://www.youm7.com/story/2021/6/5/%D9%82%D9%86%D8%A7%D8%A9-%D8%A7%D9%84%D8%B3%D9%88%D9%8A%D8%B3-%D9%84%D8%A7%D8%A6%D8%AD%D8%A9-%D8%A7%D9%84%D9%85%D9%84%D8%A7%D8%AD%D8%A9-%D9%87%D9%8A-%D8%A7%D9%84%D9%85%D8%B1%D8%AC%D8%B9%D9%8A%D8%A9-%D8%A7%D9%84%D9%82%D8%A7%D9%86%D9%88%D9%86%D9%8A%D8%A9-%D9%84%D8%AD%D9%82%D9%88%D9%82-%D8%A7%D9%84%D9%82%D9%86%D8%A7%D8%A9-%D9%88%D8%A7%D9%84%D8%AA%D8%B2%D8%A7%D9%85%D8%A7%D8%AA%D9%87%D8%A7/5343838
[69] Article 1, paragraph 3, of the Navigation Rules (p. 4).
[70] Article 147 of the Civil Code.
[71] Article 1.1 of the LLMC; article 81 of the MTL.
[72] Dr. Mohamed Bahgat, *Al-Wasit in Maritime Trade Law*, 7th ed., vol. 1, (Cairo, *Dar Al-Nahda*, 2014), pp. 308-311.
[73] Even though the MTL did not explicitly mention death, "physical injury" can be understood to be inclusive of this damage, as it is explicitly mentioned in article 2, paragraphs 1.a, of the LLMC, kindly refer to: Ibid., pp. 294-295.
[74] "SCA unveils latest updates over Ever Given," *Sky News Arabic*, 25 May 2021, https://www.skynewsarabia.com/business/1439858-%D9%82%D9%86%D8%A7%D8%A9-%D8%A7%D9%84%D8%B3%D9%88%D9%8A%D8%B3-%D8%AA%D9%83%D8%B4%D9%81-%D8%A7%D9%93%D8%AE%D8%B1-%D8%AA%D8%B7%D9%88%D8%B1%D8%A7%D8%AA-%D8%A7%D9%95%D9%8A%D9%81%D8%B1-%D8%BA%D9%8A%D9%81%D9%86-%D9%88%D8%AC%D8%AF%D9%84-%D8%A7%D9%84%D8%AA%D8%B9%D9%88%D9%8A%D8%B6%D8%A7%D8%AA
[75] Cass., case No. 5 of JY 16, 17 April 1947.
[76] Moustafa Eid, "How much is the Suez Canal's weekly revenue during the last five years? (infographic)," *Masrawy*, 28 Mars 2021, https://www.masrawy.com/news/news_economy/details/2021/3/28/1995053/%D9%83%D9%85-

Moreover, arguing that the SCA does not deserve this amount since its revenues hit a record in the fiscal year 2020-2021 despite the obstruction[77] is not a solid claim, as this increase can be due to other factors (e.g., causation link between COVID-19's precautionary measures and e-commerce, leading to an increase in international shipping).[78]

2.2 Categorisation of the parties' responsibilities

The Navigation-Rules detail the responsibilities of both sides, in specific and basket clauses (e.g., article 4). We can identify a clear emphasis over the strict liability of the master and the Principals; as article 4, paragraph 2, states that the Principals are responsible of any "damage" (defined as physical and environmental damage) and "consequential loss" (defined as "any losses caused to the vessel or floating unit herself, SCA properties or personnel or the obstruction of navigation in the Canal water").

In respect of-the SCA's responsibilities, although all vessels have the right to transit the Suez Canal,[79] the SCA retains a prerogative to delay the transit through the Canal for all vessels in a number of situations (e.g., investigations, complaints, security reasons), without having its liability engaged.[80]

As for the Principals' and master's responsibilities, they are numerous. Beginning with transiting the Canal in a bad weather (applicable to our case; *supra*, paragraph 1), the Navigation-Rules advise against such a conduct. However, if the master opted to transit, he will be notified that his transit will be at his own responsibility.[81] Surely, taking the decision to postpone is difficult, as the master finds himself compelled to transit, regardless of the weather, in order to avoid significant financial losses for the operator.[82]

Additionally, even if some experts convey the responsibility of-the SCA's pilots of-the obstruction[83] (noting that pilotage is compulsory in the Suez Canal),[84] pilots are exempted from any liability, as it totally falls on the master and the Principals, since the pilots' role is purely advisory, whether they were giving orders directly,[85] or the mistake resulted from their advice.[86]

2.3 The SCA's efforts between towage and salvage regimes

%D8%AA%D8%A8%D9%84%D8%BA-%D8%A5%D9%8A%D8%B1%D8%A7%D8%AF%D8%A7%D8%AA-%D9%82%D9%86%D8%A7%D8%A9-%D8%A7%D9%84%D8%B3%D9%88%D9%8A%D8%B3-%D8%A7%D9%84%D8%A3%D8%B3%D8%A8%D9%88%D8%B9%D9%8A%D8%A9-%D8%AE%D9%84%D8%A7%D9%84-%D8%A2%D8%AE%D8%B1-5-%D8%B3%D9%86%D9%88%D8%A7%D8%AA-%D8%AC%D8%B1%D8%A7%D9%81-%D8%AA%D9%81%D8%A7%D8%B9%D9%84%D9%8A-

[77] "Record revenues at the Suez Canal," *Enterprise*, 12 July 2021, https://enterprise.press/stories/2021/07/12/record-revenues-at-the-suez-canal-47194/

[78] By way of illustration, kindly watch this audio-visual report: "How Maersk Dominates the Global Shipping Industry," *CNBC*, YouTube, 13 July 2021, https://youtu.be/9-IEcZOa4rg

[79] Article 1 of the Constantinople Convention of 1888; Minister for Foreign Affairs of Egypt, "Declaration on Suez Canal and the arrangements for its operation – Letter addressed to the President of the Security Council," *UN Digital Library*, 24 April 1957, p. 2, https://digitallibrary.un.org/record/574836?ln=en ; article 1, paragraph 1, of the Navigation Rules.

[80] Article 5, paragraphs 1 and 3, of the Navigation Rules (p. 5-6).

[81] Article 9, H, 1, e, 1, of the Navigation Rules (p. 21).

[82] Kit Chellel, Matthew Campbell and K Oanh Ha, "BIG READ: Six days in Suez: The inside story of the ship that broke global trade," *Business Live*, 29 June 2021, https://www.businesslive.co.za/bd/life/2021-06-29-six-days-in-suez-the-inside-story-of-the-ship-that-broke-global-trade/

[83] Gunter Schütze, "'Ever Given' - A Precedent? (Part 1)," *LinkedIn*, 25 April 2021, https://www.linkedin.com/pulse/Ever Given-precedent-part-1-gunter-sch%C3%BCtze/?trk=public_profile_article_view

[84] Article 6, paragraph 1, of the Navigation Rules (p. 6); article 282 of the MTL.

[85] Article 11, A and D, of the Navigation Rules (p. 26), articles 286-290 of the MTL.

[86] Article 4, paragraph 7 of the Navigation Rules (p. 5); Constitutional Court, case No. 25 of JY 28, 7 November 2010, affirming that such provisions do not violate Sharia principles of justice and fairness.

Finally, it is argued that the SCA does not deserve a remuneration in exchange of its services in floating Ever Given,[87] as these efforts do not qualify as a "salvage" entitling the SCA to a generous reward,[88] but rather as a "towage."

This argument is based on the obligatory nature of conducting the floating operation in respect of the SCA, as the latter's efforts were not deliberate, but were only for the sake of honouring an already existing agreement between the SCA and Evergreen.[89] Especially when taking into consideration that the participation of any third-party in the floating operation without the SCA's approval is prohibited.[90]

Also, the Navigation-Rules state that when a vessel stops in the Canal itself in consequence of an accident other than collision, engine troubles, auxiliary and steering gear troubles, its towing shall be free of charges [91] until the ships is afloat.[92]

Lastly, and most importantly, the advocates of this argument assert that Ever Given was never in a perilous situation endangering the survival of its crew or itself, a condition precedent to be entitled to a salvage reward. [93]

In our assessment, we do agree that, under normal circumstances, the SCA's efforts would have been characterized merely as towage conducted in execution of its contract with Evergreen. However, as testified by the global media, this incident was one of a kind. [94]

Furthermore, article 308 of-the MTL[95] endorses that towage operations transform into salvage, once these operations are of an exceptional scope that does not normally fall under a standard towage contract.[96] Egyptian case laws did not specify what qualifies as an "exceptional scope" to transform towage into salvage, but we can have some insights from the recent developments in French law.

Firstly, a towage contract is normally a commutative contract, but once the existence and limits of an obligation and its effects for one party or for both become unknown, the contract turns into an aleatory contract, transforming towage into salvage.[97] [98] Accordingly, we realized that the SCA allowed for the flow of navigation to continue in parallel with the floating operation, in accordance with its early expectations; but due to how difficult and unforeseen the situation was, it had to halt the transit until further notice, with many predicted that the obstruction would extend for weeks.

[87] "Memorial of Ever Given's owners," *Manshurat*, accessed 20 July 2021, pp. 12-17, https://manshurat.org/node/72266
[88] Article 13 of the International Convention on Salvage of 1989 states several criteria to determine the reward's value, including the salved value of the vessel, the skill and efforts of the salvors in preventing or minimizing damage to the environment, the time used and expenses and losses incurred by the salvors, and the risk of liability and other risks run by the salvors or their equipment; this convention applies in case of judicial proceedings regarding salvation matters in a State party's jurisdiction, according to its second article; this convention is signed by Egypt, *Un Treaty Collection*, accessed 20 July 2021, https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800a58b3&clang=_en
[89] It is worth noting that this assistance is imposed by the SCA upon "*vessels whose machinery is/or becomes disabled, or having bad steering, or which is liable to becoming unmanageable for any reason*," according to article 57, paragraph 2, of the Navigation Rules (p. 59); Dr. Iman Al-Gameel, *Maritime Assistance*, (Alexandria, *Dar Al-Gami'a Al-Gadeeda*, 2011), pp. 53-54.
[90] Article 59, paragraphs 3 and 4 of the Navigation Rules (p. 62).
[91] Article 103, C, 2, d of the Navigation Rules (p. 193).
[92] Article 59, paragraph 5, of the Navigation Rules (p. 62).
[93] Dr. Iman Al-Gameel, *Maritime Assistance*, (Alexandria, *Dar Al-Gami'a Al-Gadeeda*, 2011), pp. 22-25.
[94] Mostafa Salem et al., "Dislodging the huge ship blocking the Suez Canal could take 'days to weeks,' as the traffic jam builds," *CNN*, 26 March 2021, https://edition.cnn.com/2021/03/25/middleeast/suez-canal-ship-blockage-intl-hnk/index.html
[95] Please note that the MTL (articles 302-316) incorporated all the provisions of Convention for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea of 1910, as amended by the 1967 Protocol, without any alteration, kindly refer to: Dr. Iman Al-Gameel, *Maritime Assistance*, p. 15.
[96] Dr. Iman Al-Gameel, *Maritime Assistance*, pp. 89-92.
[97] Prof. Gaël Piette, "Remorquage," *Répertoire de droit commercial* (January 2017), Dalloz étudiants, paragraphs 21-24 accessed 20 July 2021 (restricted access; reference available upon request).
[98] Kindly note that the Egyptian judiciary has the power to characterize the contract in accordance with its true nature, regardless of its given designation by the parties (Cass., case No. 15487 of JY 77, 26 October 2008).

Secondly, in a similar case before the Paris Court of Appeal,[99] where a ship was grounded, the Court judged that the conducted efforts in the case were characterized as a salvage and not as a towage, stating that even if the ship existed in a harbour zone, the ship is considered in a risk as long as it was no longer afloat, or lost its manoeuvrability and was unable to adjust its situation by its own means, which was indisputable in the grounding of Ever Given.

3. Insurance law perspectives of the Dispute

In the limits of what is publicly disclosed, Ever Given is insured by the Club for "certain third-party liabilities that might arise from an incident such as this - including, for example, damage caused to infrastructure or claims for obstruction. The vessel itself and its cargo will have been insured separately."[100]

We cannot be certain of any further information; however, we can take as guidance the Club's Rules for the insurance policies the Club offers, noting that it explicitly states that they can be altered in the final agreement.[101] Therefore, the following analysis is based on the presumption that the Club's Rules constitute the terms and conditions of-the Club's agreement with the Owner, in the limits of our knowledge of foreign laws.

On these terms, is it possible for the SCA to benefit of-the Club's insurance? Aside of-the discernible economic benefits of providing further solvency, what we are concerned of are the legal implications of this coverage.

As a reminder, insurance contracts, as any contract, only create effects between its parties, without creating any obligations nor rights to a third-party, unless the applicable law (i.e., English law)[102] otherwise provides (i.e., the direct-action suits).

Even if the Club had an effective role negotiating damages with the SCA, it does not mean that it would be directly liable to pay the compensation. In order to avoid direct-action suits, it is common between P&I clubs to stipulate the "pay to be paid" principle, which means that in order for the insured party to recover his indemnity, it is a condition precedent that he would pay all of his dues, not only to the P&I club he is affiliated to, but also in respect of third-party liabilities;[103] and the Club is no exception.[104]

This principal of antiquity, as much as it is beneficial for the marine insurance industry, is contested by many of-the international literature, as it creates a hardship upon injured parties, who will not be able to directly file a claim against the insurer unless the insured party pays its dues.

According to the Club's Rules, there is a possibility for a third-party to proceed with arbitration against the Club, but only upon its directors' approval.[105] The likelihood of success is subject to an experienced local counsel's assessment.

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[99] Paris Court of Appeal, second chamber, 15/07715, 3 November 2016, https://www.legifrance.gouv.fr/juri/id/JURITEXT000033354298?init=true&page=1&query=15%2F07715&searchField=ALL&tab_selection=all

[100] "Ever Given" Media Statement," *UK P&I Club*, accessed 18 July 2021, https://www.ukpandi.com/news-and-resources/press-release-articles/2021/Ever Given---media-statement/

[101] Rule 1.3 of the Club's Rules (p. 8).

[102] Rule 42 of the Club's Rules (p. 97).

[103] By way of illustration: Prof. Philippe Delebecque, *Droit maritime*, 14th ed, Précis, (Paris, Dalloz, 2020), pp. 1006-1008; Pat Saraceni, "PI Clubs Pay to be paid versus direct action," *Clifford Chance*, published 30 August 2017, https://www.cliffordchance.com/briefings/2017/08/pi_clubs_pay_to_bepaidversusdirectaction.html

[104] Rule 5.a of the Club's Rules (p. 34).

[105] Rule 40 of the Club's Rules (pp. 93-94).

The Application of the CISG by the Egyptian Courts: Egypt's Court of Cassation Case No. 2490 of Judicial Year 81, Rendered on 23 June 2020

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Abstract

This Case Note discusses the approaches adopted by the Egyptian courts on the application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) which could be threatened by the inappropriate application of the domestic laws.

This Case Note clarifies whether the Egyptian courts' approach is deemed a support, or a threat to the CISG.

Keywords

CISG; UNCITRAL; commercial law; sale of goods; private international law

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Introduction

The United Nations Commission on International Trade Law (UNCITRAL)[1] plays a significant role in harmonizing the laws of international trade through formulating legislative and non-legislative instruments in many areas of commercial law, including, inter alia, the sale of goods.[2] In this context, the United Nations Convention on Contracts for the International Sale of Goods (CISG) has been recognized as one of the most successful attempts of the UNCITRAL to unify the rules that govern the international sale of goods.[3] To reach this latter end, the uniform application and interpretation of the provisions of the CISG by national courts is essential. This Case Note sheds light on Egypt's Court of Cassation's approaches concerning the application and the interpretation of the CISG to the international sale of goods. The role of Egypt's Court of Cassation is to unify the interpretation of the laws and the application of such interpretation by all the other lower courts in Egypt. Therefore, the judicial principles that are rendered analysed in this Case Note represent the approach that should be followed by all the Egyptian courts with respect to the interpretation and application of the CISG.

Initially, to understand the key facts of the case presented below, it is essential to have a broad understanding of Egypt's Civil Courts system structure. Briefly, Egypt's Civil Courts have a three-tiered structure, as follows:

i. Courts of First Instance, which represent the first level of litigation;
ii. Courts of Appeal, which represent the second level of litigation that review the rulings of the Courts of First Instance, covering questions of fact as well as questions of law;[4] and
iii. Court of Cassation, which is the highest court in Egypt that reviews the rulings of the Courts of Appeal to provide uniform interpretation and application of the law. However, appealing to the Court of Cassation is limited to the issues of law, but not facts.

1. Facts

1.1 Pre-dispute facts

On 19 April 1994, an Egyptian company (the "Egyptian Company") entered into a sale of goods contract with the Australian Wheat Board ("AWB") for supplying Australian wheat to the Egyptian Company on several shipments.[5]

On 18 April 2000, the Egyptian authorities rejected one of the shipments for non-compliance with the Egyptian standard specifications.[6]

On 10 December 2001, the Egyptian Company, on the one hand, served a notice to AWB, by virtue of which it rejected the shipment for the lack of conformity. On the other hand, to release the shipment, the Egyptian Company took all the needed corrective actions to make the shipment compatible with the Egyptian standard specifications, which cost the Egyptian Company an amount of EGP 264,600 (the "Remedy Cost")[7].

[1] UNICITRAL is established by the United Nations General Assembly by resolution No. 2205 (XXI) of 17 December 1966.
[2] United Nation Commission on International Trade Law, A Guide to UNICITRAL, Basic facts about the United Nation Commission on International Trade Law, Vienna (2013), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/12-57491-guide-to-uncitral-e.pdf.
[3] Harry M. Flechtner, Introductory Note, United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980, February (2009), https://legal.un.org/avl/ha/ccisg/ccisg.html.
[4] Dr. Mohamed S. E. Abdel Wahab, Article, An Overview of the Egyptian Legal System and Legal Research (2019), https://www.nyulawglobal.org/globalex/Egypt1.html#_ednref1.
[5] Judgement issued from the Egyptian Court of Cassation on Case No. 2490 of Judicial Year 81 on June 23, 2020, p. 5.
[6] *Ibid*, p. 5 and 6.
[7] *Ibid*, p. 2.

1.2 Dispute facts

1.2.1 The Dispute before the Court of First Instance

In 2003, the Egyptian Company filed a case against AWB before an Egyptian Court of First Instance to claim the Remedy Cost in addition to its legal interests.[8]

AWB argued that: (i) the Egyptian Company did not serve any notice with respect to the lack of conformity as per Articles 38 and 39 of the CISG; and (ii) that AWB was not notified of the notice dated 10 December 2001.[9]

The Court of First Instance declined the case.

1.2.2 The dispute before the Court of Appeal

The Egyptian Company appealed the ruling of the Court of First Instance.

AWB presented the same arguments that were submitted before the Court of First Instance with respect to the non-compliance with the notice of any lack of conformity in accordance with the provisions of the CISG**.**

The Court of Appeal did not respond nor review AWB argument of the non-compliance with the notice of the lack of conformity as per the CISG, breaching AWB right of defence and issued its ruling in favour of the Egyptian Company based on the fact that the Remedy Cost was essential to make the wheat valid for human use.

1.2.3 The Dispute before the Court of Cassation

AWB challenged the ruling of the Court of Appeal before the Court of Cassation. The Court of Cassation revoked the challenged ruling for the deficiency in reasoning, breaching defence right, and the misapplication of the laws, as detailed and analysed below.

2. Legal analysis of the Cassation Judgement

The Court of Cassation conducts its legal analysis by reviewing the laws governing the dispute, then apply the correct interpretation of the said governing laws on the facts of the case to reach its decision. I will present the legal analysis of the Court of Cassation in this section, as follows:

i. the laws governing the dispute and the legal reasoning of judgement;
ii. the application of the governing laws to the dispute; and
iii. the Court's decision.

2.1 The laws governing the Dispute and the legal reasoning of the Judgement

2.1.1 The law governing the Dispute

Given that Egypt is a contracting state to the CISG and that the CISG was approved by the Egyptian Presidential Decree No. 471/1982 and entered into in force in Egypt as of 1 August 1988, the Court of Cassation concluded that the dispute shall be governed by the provisions of the CISG.[10]

[8] *Ibid*, p. 2.
[9] *Ibid*, p. 3.
[10] *Ibid*.

2.1.2 The legal reasoning of the Judgement

The Court of Cassation provided the following interpretation of the CISG provisions that should be applicable to the dispute:

The buyer's right to examine the goods: The buyer shall have the right to examine the goods when they arrive at their destination in case the sale contract of goods included a carriage of goods in accordance with Article 38 of the CISG[11].

Notice of lack of conformity: According to Articles 6 and 39 of the CISG, the buyer shall notify the seller of any lack of conformity that has been discovered or ought to be discovered in the goods within the following time limits (the "Notice Obligation"):

a. a reasonable time as of the date on which the lack of conformity has been discovered or ought to have been discovered.

   The reasonable time during which the notice shall be served should be determined on a case-by-case basis taking into consideration the following:

   i. the contractual circumstances;
   ii. the nature of the goods;
   iii. the nature of the lack of conformity (apparent or latent);
   iv. the professional and experience of the buyer; and
   v. the business practices.

b. a maximum period of two years as of the date on which the buyer has actually received the goods unless the parties agreed on longer/shorter period (the "Maximum Period").

It is worth noting that the Maximum Period shall not be applied unless the reasonable time limit criteria would be longer than the said Maximum Period.[12]

Failure to comply with the Notice Obligation: Failing to notify the seller with the lack of conformity deprives the buyer of its right to rely on the lack of conformity for any future claims against the seller unless the lack of conformity is related to matters that the seller is aware of or ought to be aware of as per Article 40 of the CISG.[13]

2.2 The application of the governing laws to the dispute

The Court of Cassation applied the above rules on the facts of the Case and concluded the following:

- CISG shall be applied to the dispute. Therefore, the Egyptian Company shall have the right to examine the goods and shall notify AWB of any lack of conformity within a reasonable time as of discovering the lack of conformity.

- The date on which the lack of conformity was discovered is deemed the date on which the shipment was rejected by the Egyptian authorities (i.e., 18 April 2000). That said, the Egyptian Company should have served the lack of conformity notice by no later than 17 April 2002.[14]

[11] *Ibid.*
[12] *Ibid*, p. 4 and 5.
[13] *Ibid*, p. 3 and 4.
[14] *Ibid*, p. 6.

- AWB argued before the Court of First Instance and the Court of Appeal that the Egyptian Company did not serve any lack of conformity notices and that AWB was not served the notice dated 10 December 2001.[15]

- The Court of Appeal did not respond to AWB argument of not receiving any notice with respect to the lack of conformity leading to breaching of defence and did not investigate whether or not the Egyptian Company has fulfilled the Notice Obligations as per Articles 38 and 39 of the CISG leading to a deficiency in reasoning and a misapplication of laws.[16]

2.3 Decision of the Court of Cassation

The Court decided to (i) revoke the ruling of the Court of Appeal for the deficiency in reasoning, breaching defence right and the misapplication of the laws for not reviewing the fulfilment of the Notice Obligations as per the provisions of the CISG; and (ii) to refer the case to the Court of Appeal to be re-reviewed with a new panel.

3. Critical analysis

3.1 Application of the CISG by the Egyptian Courts

The binding power of the international treaties, under Public International Law, causes the automatic application thereof when the requirements of its application are met.[17] In this context, the CISG has satisfied the entry into force requirements under the Egyptian laws since 1988. That being said that Egyptian courts are obliged to, automatically, apply the CISG on any dispute that arise from contracts of sale of goods between parties whose place of business are in different contracting States to the CISG.[18]

In addition, the Court of Cassation adopts an approach to apply the CISG, whenever applicable, even if the parties to that dispute do not invoke the application thereof. This approach was confirmed in another case between an Italian seller and Egyptian buyer entered into a contract for the sale of marble where the Court of First Instance and the Court of Appeal were erred in applying the domestic laws to the dispute without paying any attention to the CISG.[19]

In view of the above, the efforts of the Court of Cassation to redirect the attention of the lower courts towards the correct application of the CISG, whenever applicable, instead of domestic laws is notable and well recognised.

3.2 Uniform interpretation of the CISG by the Egyptian Courts

The interpretation of the Court of Cassation with respect to the provisions of the CISG, as detailed in point 2.1 [the legal reasoning of the Judgement], was made in light of the explanatory notes of the CISG and the 1978 Secretariat Commentary thereon.[20]

In view of the above, Egyptian courts are adopting an efficient approach towards the uniform application of the CISG considering its international character and the need to promote uniformity in its application.

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[15] *Ibid*.
[16] *Ibid*.
[17] Ani Nadareishvili, LLM short thesis, Application of the CISG by Courts and Arbitral Tribunals: Comparative Analysis, the Central European University (2015), http://www.etd.ceu.hu/2015/nadareishvili_ani.pdf.
[18] Article 1 of the CISG. Note that if any court did not apply the CISG automatically (whenever applicable), the Court of Cassation would revoke this judgement. However, in this Case Note, the Court of Appeal's fault was disregarding the argument of AWB of not receiving lack of conformity notice and not investigating whether the notice obligations was fulfilled or not.
[19] Egyptian Court of Cassation No. 979 of Judicial Year 73 on 11 April 2006.
[20] Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat/ UN DOC. A/CONF. 97/5, http://www.cisg-online.ch/index.cfm?pageID=644.