

ARBITRAL AWARDS OF THE CAIRO REGIONAL CENTRE FOR
INTERNATIONAL COMMERCIAL ARBITRATION II

1997–2000

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Volume 24

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Dr. Mark S.W. Hoyle

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Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration II

1997–2000

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Preface

I am glad to present the Second Volume of the *Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration* to the readers and practitioners of arbitration all over the world.

The period covered in this volume featured new scopes of CRCICA-administered arbitration, between which the most important are:

- Hotel management.
- Software contracts.
- Oil contracts.
- Distributorship contracts.
- Insurance contracts.
- Credit risk management contracts, etc.

It is notable that domestic arbitral cases relatively increase more than international cases. This appears as reflective of the CRCICA's persistent role in the few past decades to develop an arbitration culture in a legal environment in which arbitration was – until recent times – a relatively unpopular phenomenon. Speaking of international cases, foreign parties to CRCICA arbitrations represent different countries of the world within and from outside the Afro-Asian Region. All the parties to some cases are even from outside the Region. Another salient feature is that disputed amounts obviously increase, a matter that mirrors the increasing confidence in arbitration in Egypt.

It is worth mentioning that a significant development took place in the arbitral procedures before the Centre. It is always expected that if the arbitrators, the parties, and the lawyers are all from Common Law, Civil Law countries, or from where Sharia is applied, there would be no doubt that the procedural patterns of their systems would be applied. However, this volume includes different examples where the arbitrators, or any one of them, the lawyers or some of them, or one of the parties are from a system different from the systems of the others. This brings about what is known as hybrid procedural patterns, which reflect the harmonisation of legal cultures in the proceedings of the cases that are arbitrated under the auspices of the Centre.

The domination of the party autonomy principle in applicable laws of arbitration permitted the parties and the Arbitral Tribunals to harmonise the different proceedings in order to realise procedural flexibility so long as they are bound by the arbitration agreements, the applicable laws, and if each party would be given a fair opportunity to introduce his case and if the parties were treated on an equal footing.

In conclusion, it may be said that in some cases arbitrated under the auspices of the Centre, adversarial procedures, which are used primarily in England, the United States,

Scandinavia, and the Commonwealth countries comprising the former British colonies, are exercised. These procedures result in alternative versions of the facts and interpretations of the law presented by the parties to the Arbitral Tribunals. Each party may test and respond to the materials submitted by the other, and the Arbitral Tribunal must ultimately choose between the views of the parties. In some other cases of the Centre, the inquisitorial and Shari'a procedures are practised. In such cases the Arbitral Tribunal conducts its own inquiries into the facts and legal issues, with the assistance of the parties and their lawyers.

Parties to an arbitration may choose either approach or a blend of the two approaches, irrespective of the procedures followed by the courts according to the legal systems of the parties so long as the agreements of the parties, the applicable laws and the guarantees of defence are respected.

I am glad to point out that this volume of CRCICA Awards sums up some important legal principles that reflect much of the arbitral aspects in Egypt and other countries of the Region.

Readers and practitioners will find herein the 2002 CRCICA Rules along with the most recent amendments thereof.

Dr. M.I.M. Aboul-Enein

Director, Cairo Regional Centre for
International Commercial Arbitration and
former Senior Vice President of the
Supreme Constitutional Court of Egypt

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Introduction

In this volume attention may be drawn to some characteristics of arbitration, which were not contained in the former volume.

1. The various and multifaceted aspects of internal and external trade has brought new approaches to arbitration, which are reflected in this volume.
2. The sophisticated nature of modern life expressed itself in the cases before CRCICA and directed all concerned to find the best solutions.
3. The number of cases brought before CRCICA has multiplied and reached more than 300 international cases, a matter which expresses the confidence and credibility of the Centre.
4. The parties to an arbitration are moving towards demanding conservatory measures, but none of these demands have been honoured.
5. In case the parties to an arbitration are not satisfied with the arbitration award, the attack for nullity is open to them before the courts of appeal. The decisions of the Court of Appeal as well as the commentaries on them amassed a wealth of legal knowledge and jurisprudence, and many of them were included in commentaries.
6. While cases of significant amounts were introduced in the first volume, the second volume (as well as showing that pattern) also contained cases of minor amounts but with magnificent legal issues.
7. Decisions of the Supreme Constitutional Court appear in this second volume which were not yet issued at the time of the first volume and which will enrich the reader with constitutional jurisprudence based on the decisions of this highest Court.
8. The second volume tries to introduce the reader to the new trends and principles of arbitration, such as the alter ego doctrine, and *contra proferentem*, which are reflected in Cases No. 6 and 37.

Deep and cordial gratitude is hereby expressed to Prof. Dr. Mohamed Hossam Loutfi of Cairo University, and Dr. Mohamed Abdel Raouf Counsel for CRCICA, for their valuable assistance.

Dr. Mohie Eldin I. Alam-Eldin

Supply Cases

CASE NO. 1

Final award of 30 April 1998, case no. 102/1997

Arbitrators: Three Egyptian Arbitrators
Parties: Claimant: A European oil company (buyer)
Respondent: An African oil authority (seller)
Place of Arbitration: CRCICA, Cairo, Egypt
Subject Matter: • specifications of oil argued non-complying
Applicable Law: Egyptian law
Language of Arbitration: English and Arabic

Held

Where the parties agree upon evidence by chemical analysis at a named laboratory, the report of the laboratory shall be final and binding. No further objections may be raised.

Facts

In 1995 the parties entered into a contract of supply of petroleum from Respondent to Claimant, and agreed upon an arbitration clause:

Any dispute, controversy or claim arising out of or relating to this contract or breach, termination or invalidity thereof between the two parties shall be settled by arbitration in accordance with the arbitration rules of the Regional Centre for Commercial Arbitration – Cairo (the Centre) in effect on the date of this contract. The award of the arbitrators shall be final and binding on the parties.

The number of arbitrators shall be three.

Each party shall appoint one arbitrator. If within thirty days after receipt of the Claimant notification of the appointment of an arbitrator the Respondent has not notified the Claimant in writing of the name of the arbitrator he appoints, the Claimant requests the Centre to appoint the second arbitrator.

The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the tribunal. If within thirty days after the appointment of the second arbitrator, the two arbitrators have not agreed upon the choice of the presiding arbitrator, then either party may request the Secretary General of the Permanent court of arbitration at the Hague to designate the appointing authority. Such appointing authority shall appoint the presiding arbitrator in the same way a sole arbitrator would be appointed under Article 63 [sic!] of the

UNCITRAL Arbitration Rules. Such presiding arbitrator shall be a person of a nationality other than the nationalities of the parties.

Unless otherwise agreed by the parties to the arbitration, the arbitration including the making of the award shall take place in Cairo, A.R.E.

If for whatever reason arbitration in accordance with the above procedure would likely fail, then the parties agree that all disputes, controversies or claims arising out of or relating to the agreement or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with UNCITRAL Rules.

The addendum to the contract stated the agreement upon applying provisions of Egyptian Laws.

The parties fell in dispute upon the specifications of oil and the Claimant filed this arbitration case requesting damages, in addition to full arbitration fees including attorney's fees.

Explaining its demands, the Claimant stated that they contracted with the Respondent to purchase six shipments of "Straight Run Naphtha", a shipment every two months over the period extending from January to December 1996. The contract referred to determining the specification quality of sold "Naphtha" as specifications in the attached authority general provisions, besides the method of sample taking from shore tanks for the purpose of measuring quality prior to shipping. Sample taking shall be in the presence of an independent inspector representing the buyer with the representative of the seller. Samples are mixed and poured in three containers, two of which shall be firmly wax-sealed and stamped by both representatives of the buyer and the seller and labelled with the date of sample taking, name of the tank and name of substance; one shall be handed to the Captain of the carrier and the other shall be kept with the seller for two months while the third shall be sent to the laboratory for analysis and issuance of certificate of quality.

The Claimant went on stating that the last shipment (the sixth), upon arrival at destination and on analysis, revealed that the shipment was contaminated with MTBE. As the consignee refused to receive the shipment the company was forced to sell it at a loss and incurred additional shipping expenses. As the contract provides that, in case of dispute regarding the quality of sold naphtha based on another analysis certificate obtained by the buyer from another laboratory within the above-mentioned month term, on conducting analysis of the sealed sample by an independent laboratory acceptable to both parties, results of this analysis shall be final and binding on both parties. Costs of such analysis shall be borne by the defeated party. The company immediately contacted their independent representative, who informed them that the officials of the shipping port had assured him that there was not the slightest probability of the existence of MTBE in the shore tanks. The Office also stated that they had kept samples taken from shore tanks to meet any future claim by the Company.

The buyer notified the seller, and deemed him responsible for contamination and compensation, since, as stated by the contract, it shall be the entitlement of either party for harm caused by the other. The buyer notified the other party to preserve the sample for the purpose of analysis as per the contract and followed that notification by a warning officially delivered by a bailiff and asked the said office to preserve the sample they had. The buyer received a report from an internationally celebrated and

experienced company, S.G.S., on MTBE as contaminant in naphtha depending upon the final intended use. A widely used industry specification for naphtha includes a maximum limit of 50 PPM for MTBE. Any naphtha cargo having an MTBE content in excess of 50 PPM would be considered unsuitable. Seeing that the analysis reports at the port of destination showed MTBE in excess of 50 PPM in all ship tanks, and based on the Arbitration Clause agreed upon, the company requested settlement of this dispute through arbitration and nominated its arbitrator.

The Respondent replicated to the above arbitration demand requesting rejection of the demands of the Claimant, based on the fact that the specified quality of sold naphtha, as per the contract executed by both parties, had been fully verified by analysis reports signed by the Claimant representative, a matter that testified compliance with the said specifications but which do not include MTBE testing.

After the Tribunal listened to the requests lodged by both parties, it decided that “Arabic shall be the language for pleading while English, the language of the contract, shall be for documents and statements. Minutes shall be recorded in both languages, draft decision shall be only in Arabic, and the final award shall be in both languages in one sheet.”

The Claimant submitted a docket including a certificate from international S.G.S. on Straight Run Naphtha and MTBE, and a printed manual on MTBE. Another docket was also submitted including copies of the documents calculating the price of naphtha and development thereof during the purchase period, invoice of additional expenses incurred by the carrier due to refusal of receiving the shipment, together with five invoices.

The defence of the Respondent submitted a docket involving specification quality of sold naphtha in accordance with the contract concluded by both parties and the analysis report indicating conformity of the sample with the specifications signed by representatives of both arbitration parties.

In compliance with the decision of the Tribunal mandating the Respondent to produce the sample of sold naphtha kept thereby for the purpose of re-analysis, the defence submitted it to the Tribunal.

The Tribunal deemed it necessary to listen to the testimony of the representative of the Claimant and the Office that signed the letters sent to the company. Therefore, it was decided to demand attendance of the witness before the Tribunal to listen to his testimony regarding the certificates drawn up thereby and to confirm that the seals of samples submitted by the Respondent are the same seals placed upon sample taking. The Tribunal also demanded that both parties of arbitration agree upon a chemical laboratory to have the sample analysed thereby.

At the witness hearing session, the director and owner of — Inspector Office, showed up. He stated that naphtha is pumped through pipes to shore tanks within the refinery around one kilometre away from the port then re-pumped directly via pipes to the ship tanks. He added that the Office is not responsible for cleaning the tanks but the captain of the ship, according to a maritime protocol of established practice, does it. When the captain declares readiness of the ship for loading, a representative of the said Office reviews with him the adopted procedures of cleaning according to the protocol and then the ship’s tanks are filled. The guarantee that cleaning procedures have been adopted as indicated in the ship documents depends on the signature

of the captain, on a report submitted thereby indicating that the cleaning process has been performed in the manner indicated in the papers. The witness also added that a representative of his Office takes a look at the tanks using powerful spots to be assured of compliance thereof with the requirements. The witness also added that he obtained a sample from the shore tanks and another sample from the ship's tanks and the sample that was analysed was only the first one (from shore tanks). The Tribunal, while showing the sample submitted by the Respondent to the witness, asked him whether the sample bears the genuine stamp of the Office. The witness indicated that the sample had only one stamp that belongs to an African Petroleum Company and that he was not used to fixing the stamp of his Office to the sample. Asking him if the sold commodity being "Straight Run Naphtha" means that it should be completely free from any trace of MTBE, he answered that the acceptable content of MTBE is not to exceed 50 PPM, a matter that does not prejudice the naphtha being "Straight Run Naphtha", and went on to say that certain international markets consider that the content does not affect the naphtha.

The witness submitted to the Tribunal samples taken thereby from the shore tanks and the ship's tanks. The Claimant objected to the sample produced by the Respondent and did not take it as valid, and the Respondent objected to the two samples submitted by the witness and did not take them as valid. The objection of both parties was grounded on the absence of their stamps on the sample submitted by the other party.

The Arbitration Tribunal has assured itself of the validity of the objections raised by both parties as the sample submitted by the Respondent did not show the stamp of the Claimant and both samples submitted by the witness did not show any stamp of the Respondent.

The Tribunal returned the sample to the respective parties and mandated the Claimant to pay the expenses of analysing the three samples at S.G.S. laboratory in order to indicate the presence of MTBE and its percentage.

Both parties submitted a copy of the S.G.S. report of the analysis of the three samples indicating that MTBE was traced in the three samples as follows: the sample of the Respondent showed 115 PPM, the sample taken by the representative of the Claimant from the shore tanks showed 47 PPM and the one taken from ship tanks 96 PPM.

The Claimant cast suspicions on the results of analysis by S.G.S of the samples submitted by both parties on the grounds that determining the content of MTBE was conducted via the IP process, which is not an internationally recognised method and only accepted in case of very slight contamination. It strictly maintained that since the contract is for Straight Run Naphtha, it should show no trace of MTBE, the existence of which is deemed to breach the conditions of sale.

Award

The contract concluded by both parties states that:

due to any fault of one of the parties, the other party suffers substantial loss or damage, then the party at fault will be liable to compensate the other party to fulfil its material or main obligations under this contract.

The Claimant identified the fault of the defendant as being the contamination of the sold naphtha with MTBE, as analyses showed that the MTBE content was largely in excess of 50 PPM in all tanks of the cargo.

The Claimant identified the damages incurred thereby as the refusal on the part of the consignee to accept naphtha contaminated with MTBE, saying that, “as a result of this contamination our buyer refused to take delivery and rejected the cargo”. The Claimant was forced, due to this, to sell the cargo at a loss in addition to the incurred expenses pertinent to resale, delay of the ship and, changing its route towards the new harbour at which the cargo was unloaded.

It has been established for the Arbitration Tribunal through the contract and reports of the representative of the Claimant, and from the testimony of the witness that he has breached the provisions of the contract, which stipulate closing firmly and sealing the sample that is handed over to the Captain of the ship and the other that is kept by the seller, and fixing the stamps of the representatives of the buyer and seller. The witness admitted before the Tribunal that he had not fixed his stamp to the sample, a matter which is deemed to be extreme negligence in the performance of job duties, since the presence of stamps of the representative of the buyer and the seller together is the only confirming guarantee that the sample contains the same naphtha as sold, despite the fact that the Office representing the Claimant had stamps bearing its name. The analysis report issued by S.G.S. revealed, firstly, that the ship tank sample handed over thereto by the representative of the Claimant bore its stamp, and secondly, the inaccuracy of information reported thereby to the Claimant of the impossibility of conducting analysis of MTBE in the African country, despite the fact that such an analysis can be conducted in more than one laboratory in this country. In addition to all that is mentioned above the witness was not keen to have the two samples submitted thereby stamped by the Respondent, although the existence of such stamps is in the interest of the Company that the witness represents. He also stated in his testimony that he took one sample from the ship’s tanks and another one from the shore tanks. However, he analysed the second one only, although the analysis of both samples after he had been informed of the contamination of naphtha with MTBE would have proved that such contamination exceeded double the content as soon as naphtha was pumped into the ship’s tanks, since it was stated by S.G.S. analysis report that the content of MTBE in shore tanks was 47 PPM while the content in the ship’s tanks was 96 PPM – a matter which proves that contamination originated from the ship’s tanks. This was further proved by the very high content measured at the destination after the naphtha had mixed for a long time with tank sediments due to vibrations during the long journey. According to analysis reports issued by another laboratory enclosed to the docket of the Claimant, the content of MTBE in ship tank no. “1P”, which represented about 28% of the cargo, was 766 PPM, in accordance with the data on the cargo content of each tank and MTBE content in each. Such a high rate, which exceeds 16 times the content in shore tanks of 47 PPM, according to the sample of the representative of the Claimant, convinced the Tribunal completely that all tanks of the ship were completely contaminated with MTBE but to different degrees, least of which is tank no. “7s” which showed 325 PPM. Such vast differences between the percentage of MTBE content in the ship’s tanks indicates that the contamination originated from the ship’s tanks, as it is not

understood how the shore tanks showed 47 PPM while the content soared in the ship's tanks giving the following figures: 766, 688, 682, 661, 645, 584, 577, 523, 520, 510, 493, 465, 458, 399, 389, 381 and 325 PPM. Such a variety with no similarity between any two tanks of the 17 tanks of the ship is evidence that the source of contamination is the ship's tanks themselves.

Since the Claimant is the sole party to be charged with faults of his representative, its representative Office, and since the rate of contamination the Respondent argues is 15 PPM, the question then is: Was that rate the reason behind the refusal to receive the cargo at Houston harbour? And does such a rate constitute a fault on the part of the defendant that mandates award of compensation? The following facts assured the Arbitration Tribunal that the answer to those questions was in the negative. The facts are as follows:

First: the declaration made by the Claimant in the arbitration notice reveals that, "Analysis carried out on arrival at destination shows that the MTBE content was largely in excess of 50 PPM in all tanks of the cargo. As a result of this contamination, our buyer refused to take delivery and rejected the cargo."

The MTBE present at discharge must have had pre-shipment origin.

Second: In the last session the Claimant submitted a docket containing a document from the American broker company that mediated in the sale of the contaminated cargo, subject of this dispute, indicating the following, "This cargo was contaminated with MTBE in concentration far exceeding standards for Straight Run Naphtha (320 PPM vs less than 50 PPM). The cargo had to be resold at US\$ — on US\$ — tm less than its commercial value of — tm had it not been contaminated".

Third: Expertise report by S.G.S. dated — submitted by the Claimant and referred to in the arbitration request states that, "MTBE is contaminated in naphtha depending upon final intended use. A widely used industry specification for naphtha includes a maximum limit of 50 PPM for MTBE; any naphtha cargo having an MTBE content in excess of 50 PPM would be considered unsuitable to be used as a feedstock for processing".

Fourth: Also expertise report by S.G.S. dated — submitted by the Claimant included "Refinery and petrochemical purchases have introduced specifications to limit the amount of MTBE in naphtha (as a result of contamination in different sources of naphtha); the accepted limits vary from 10 to 50 PPM".

Fifth: The representative of the Claimant stated in his testimony before the Arbitration Tribunal that the tolerated rate of MTBE-contaminated naphtha is 50 PPM and the presence of such a rate of contamination does not jeopardise naphtha being Straight Run Naphtha.

Based on the above facts the Arbitration Tribunal concluded non-existence of any fault that could be attributed to the Respondent being the cause of damage to the Claimant, for which compensation would be awarded in consideration that the contamination rate of MTBE of the sold naphtha is 15 PPM and it was not the reason behind the rejection of the cargo at the port of arrival or devaluation thereof, and the presence of such rate does not alter the specifications or the sold substance as being Straight Run Naphtha, and it is an acceptable rate in dealing. This rendered groundless the allegation of the Claimant that the sold material, in order to be called Straight Run Naphtha, should be completely free from any trace of contamination,

no matter how slight, which constitutes breach of contract, forming grounds for compensation according to the modified request by the Claimant. This is because the Claimant did not raise that new cause, which is different from the one on which the claim for compensation was based, until the results of the analysis of samples submitted by both parties conducted by S.G.S. had been declared, and collapse of the legal grounds on which claim for compensation was based. In addition the sale contract did not mention the final intended use of naphtha, which is only known by the buyer, and the Claimant did not submit to the Arbitration Tribunal the contract concluded by the Claimant and the consignee in order to substantiate that defence. Therefore, the Arbitration Tribunal considered the rate of contamination as reported by S.G.S. regarding the widely used industry specifications for naphtha as indicated above.

Suspicious were raised by the Claimant of the results of the analysis performed by S.G.S., in adopting the IP method to measure MTBE contamination while the analysis conducted in the States adopted the GC.MS method, and as the first method is not internationally recognised and only used in cases of very slight contamination, and since the Claimant did not provide the Tribunal with the difference in results of the two methods of analysis, and since the Claimant did not indicate requesting the agreed upon S.G.S. laboratory to conduct analysis in accordance with GC.MS method in which the first analysis were made – added to that, the Claimant stated that the IP method not being used except in cases of very slight contamination may prove to the contrary that it is a very accurate method, capable of measuring slight rates of contamination. Finally, raising suspicions regarding the results of analysis conducted by the laboratory agreed upon by both parties violates this agreement and the finality and binding character of the report of the laboratory.

Based on the above, the Arbitration Tribunal decided to reject the request of the Claimant to mandate the Respondent to pay compensation.

As regards arbitration's expenses and attorney fees, the Arbitration Tribunal decided that both parties should equally share the arbitration expenses, and each shall be charged with the fees of its attorney.

CASE NO. 2

Final award of 14 December 1998, case no. 105/1997

Arbitrators: Three Egyptian Arbitrators
Parties: Claimant: An African company and an Asian individual
Respondent: A European individual
Place of Arbitration: CRCICA
Subject Matter: • facultative arbitration and mandatory arbitration, which should prevail? If mandatory arbitration, what would be the fate of the arbitration agreement providing for *ad hoc* arbitration?
Applicable Law: Egyptian law
Language of Arbitration: Arabic

Held

Mandatory arbitration provided for in regard to stock exchange transactions in 1992, has been cancelled by the Arbitration Act of 1994 which provided for the cancellation of any provision contrary to it. The Supreme Constitutional Court held that the mandatory arbitration is unconstitutional because it bans the citizen from his natural judge.

Facts

The dispute arose among three shareholders in a closed joint stock company owning all its shares: first Claimant 80,000 shares, the second Claimant 60,000 shares, and the Respondent 20,000. The board of directors of the company issued a decision to its members to pay the rest of the capital. The Respondent was unable to pay the rest which amounted to a quarter of the 20,000 shares, and the other two members (the Claimants) agreed to pay for themselves. The Respondent fraudulently made a certificate of shares with 5000 shares, kept it for himself, and brought a lawsuit before the court of first instance to order the company to deliver him the shares against the certificate of shares he had. The court gave a judgment in his favour, but this was appealed and cancelled.

The Respondent asked his two colleagues to buy all his shares as he wanted to get out of the company. They agreed to buy them at the same price of subscription, and paid him the price of the 15,000 shares, but soon after he alleged that there were 20,000 shares including the forged certificate of 5000 shares.

The agreement of sale of shares contained an arbitration clause:

Disputes which may arise among parties with regard to the execution or interpretation of this agreement shall be settled amicably or through ad hoc arbitration in the premises of CRCICA, retaining its executive rules. The decision given shall be final and binding.

The agreement contained a penal clause in case the Respondent breached this agreement by complaining to administrative or judicial authorities.

Claimants' demands were:

1. To order the Respondent to deliver to them the certificate of 5000 shares which he retained without lawful cause;
2. To apply the penal clause and award Claimants the whole of its value;
3. To order the Respondent to pay all the costs of arbitration.

The Respondent replied in his statement of defence that:

1. The Arbitral Tribunal is not competent to consider the case because there is a special sort of arbitration provided for in the Capital Market Law (CML). This law provides for a sole way of settlement of disputes among those dealing in securities, that is arbitration within the CMA (the Capital Market Authority), where the Arbitral Tribunal is constituted by a decision from the Minister of Justice appointing one of the vice presidents of the courts of appeal as chairman and an arbitrator is appointed by each of the two parties, and if one of the parties contains more than one person (as in this case) they will be represented by one arbitrator. This competence is related to public policy and no other jurisdiction can consider this case.
2. The Respondent said that the agreement with Claimants stated the total price, but did not state the number of sold shares. Accordingly, the certificate of 5000 shares is not included in this agreement.

Award

The Arbitral Tribunal discussed the plea of competence and found that the CML was issued in 1992. The arbitration law was issued in 1994, and provided for the cancellation of any provisions in any other law contrary to its provisions. Accordingly, the obligatory arbitration provided for in the CML is partially cancelled by the arbitration law, and is not applicable except in cases where no arbitration is agreed upon in the issues of securities. The Tribunal considered the arbitration clause stated before as a valid clause, which gave it the competence to consider the case.

This interpretation of the two laws complies with the judgments of the Supreme Constitutional Court which said: "the source of arbitration is the agreement, and arbitration can never be obligatorily adhered to by one party in execution of an imperative rule which cannot be agreed contrary thereto, whether in an existing or prospective arbitration".

[Judgment of 17.12.1994 in case no. 13 of the judicial constitutional year 15.]

Accordingly, the arbitration law is the general “Shari’a” (system) in civil and commercial matters; it is based on facultative arbitration and should be widely construed. On the other hand, the obligatory arbitration should be restrictively interpreted.

As to the plea of the Respondent saying that the certificate of 5000 shares was not included in the sale agreement and that he still possessed these shares, the Tribunal said that this agreement provided for the sale of all the shares of the Respondent in line with his wish to quit the company. This meant that the common intention of all parties was to dispose of all the shares and that nothing would remain for the Respondent after the sale.

As to the plea of nullity of the sale agreement because of the CML provision prohibiting transactions made outside the stock exchange, the Tribunal said that the matter in this provision related to securities listed in such a stock exchange, and the disputed shares were not listed and could be freely transacted, therefore, the plea of nullity was dismissed.

The penal clause was considered applicable upon the Respondent and the Claimant does not have to prove the existence of damage.

The penal clause was considered exaggerated and the Tribunal reduced 15% of its amount.

The Tribunal awarded the dismissal of the plea of non-competence, and ordered the Respondent to deliver the certificate of 5000 shares to the purchasers (Claimants), to pay the 15% of the penal clause and to pay all the costs of arbitration.

CASE NO. 3

Award of 7 March 1999, case no. 115/1998

Arbitrators: Three Egyptian Arbitrators
Parties: Claimant: A maritime African Company
Respondent: An African Authority of Industrial
Metallic Projects
Place of Arbitration: CRCICA
Subject Matter: • sale of cranes, one destroyed by *force majeure*
• damages
• sales tax
Applicable Law: Egyptian law
Language of Arbitration: Arabic

Held

There is a difference between the breach of contract and restraining the scope of the contract by deleting some items from it, as in the latter case no damages may be claimed.

Facts

The Claimant entered a contract with the Respondent for the supply and installation of four cranes movable on rails each having a capacity of 8 tons for the commissioning of one of the ports against an agreed upon price. The contract contained an arbitration clause:

Any dispute between parties shall be finally settled by arbitration by Cairo Regional Centre for International Commercial Arbitration and the UNCITRAL Rules shall be applicable.

At a later date the Respondent issued an “annex of works” ordering the Claimant to provide and install the rails of cranes of containers each having a capacity of 40 tons, as additional works at a certain price. The Claimant paid the custom dues and recovered them from the Respondent. The Claimant paid the banking commissions of the documentary credit and wished to recover it from the Respondent.

The Claimant made the total amount of its claims in local and foreign currencies and deducted some amount for expenses of training the employees, the price of the fourth crane (which was not supplied), the value of civil works not executed, the custom dues on the fourth crane, the price of spare parts not supplied and sums paid.

The Respondent requested the Arbitral Tribunal to dismiss the claim and to order the Claimant to pay some amount, saying that the period of implementation of the contract was 14 months as from the date of imbursement of the down payment. But the Claimant requested to be exempted from the civil works and the Respondent charged a public sector company to undertake it. Three cranes were received and installed and the fourth was refused because it was completely destroyed as a result of a collision with a foreign war ship lying at anchor in the said port.

According to the Respondent, the Claimant delayed for three years and eight months and for this delay a fine was inflicted upon it. Custom duties were required for the release of the spare parts and the Respondent paid for them and added its price to its requests.

As to the commissions of the documentary credit, they were to be borne by the Claimant because this is the provision of the law of procurement and also the general conditions of the contract provided that the local banking commissions were to be borne by the Respondent, and this meant that external commissions are borne by the other party, that is, the Claimant.

The Respondent also requested the recovery from the Claimant of the amount of sales tax paid by the Respondent. The Respondent also requested to order the Claimant to pay the costs and fees of arbitration and the fees of the lawyers of the Respondent and to be awarded interest over all these amounts. The Claimant requested the dismissal of these counterclaims and to order the Respondent to pay the costs and fees of arbitrators and lawyers of the Claimant.

Award

The Arbitral Tribunal said that there were points of dispute:

1. Is the Claimant bound to pay to the Respondent the costs of execution of the civil works?
2. Is the Claimant bound to pay to the Respondent a fine of delay?
3. Is the Claimant bound to return the sales tax paid by the Respondent?
4. Is the Claimant bound to pay the custom duties over the spare parts?
5. Is the Claimant bound to return to the Respondent the expenses of the documentary credit?

The Tribunal discussed the first point saying that the Claimant requested the Respondent to agree with another contractor to undertake the civil works because the situation was the same as the other side of the dock, established before by another contractor. The Respondent answered through a letter saying that it gave a “direct order” to another contractor for the civil works. The Respondent did not consider that this was a failure on his side or that this execution should be with expenses on the side of the Claimant. These circumstances revealed that there was no breach of the contract, but the parties agreed to cancel the item of civil works from the contract and as a result its price in the contract was no longer due to the Claimant.

As to the fine of delay and the sales tax, these two items are linked together, as the Respondent said that the period of delay was three years and eight months; execution

should have been in 1990, but was not completed until 1993. During this delay the law of the sales tax was issued in 1991 and the Respondent was forced to pay this tax.

As the Claimant is responsible for the delay, it must bear the amount of sales tax. The Arbitral Tribunal said that the period of delay is the responsibility of the two parties and for this reason ordered them to bear the sales tax on equal footing and thus, ordered the Claimant to pay the Respondent half of it.

The expenses of the documentary credit was charged, by the Tribunal, upon the Claimant because the item in the general conditions upheld by the Claimant for this purpose provided that:

The customer (respondent) shall pay all custom and import duty which may become payable upon the delivery of the cranes equipment, the temporary works and contractor's equipment in (the country) which will be reimbursed by (respondent) to the contractor, on submission of supporting documents.

The Tribunal said that the phrase “all custom and import duty” does not include the expenses of documentary credits.

As to the custom duties on spare parts paid by the Respondent and counter-claimed from the Claimant, the Tribunal said that the Claimant is not responsible for the increase of the amount of duties because these parts were imported in 1990, but remained in the warehouses of the Claimant until 1993, and at this time the Claimant requested the Customs Administration to give permission to transfer them to the premises of the Respondent, and the Administration reconsidered the evaluation of duties on this occasion and found the difference paid by the Respondent. The Tribunal said that this difference may not be recovered by the Respondent because it is always the debtor for custom duties.

The Tribunal reviewed the amount of the demands of the Claimant and awarded them (after the deductions made in the claim) to the Claimant, except the expenses of the documentary credits, and ordered each party to pay half of the costs and fees of arbitrators and to bear the fees of its lawyers.

CASE NO. 4

Final award of 6 August 1998, case no. 116/1998

Arbitrators: Three Egyptian Arbitrators
Parties: Claimant: An African rice company
Respondent: An Australian export guarantee company
Place of Arbitration: CRCICA
Subject Matter: • Does export guarantee cover fraudulent acts?
Applicable Law: Administrative Law principles
Language of Arbitration: Arabic

Held

In cases of common liability about torts, the liability will be distributed according to the percentage of participation of each party in the damage.

Facts

The Claimant filed with the Centre a submission agreement expressing its agreement with the Respondent to apply to *ad hoc* arbitration for the settlement of the dispute between them regarding the guarantee by the Respondent for the proceeds of the first shipment of rice exports amounting to 300 tons (the whole amounted to 10,000 tons) of natural rice No. 3 with a percentage of fractions of 12%, exported through an Australian company to Turkey, and the price was not paid. *The submission agreement appointed the names of arbitrators.*

The reason for non-payment was that the cargo was not compatible with the requirements of the importer who had stipulated a maximum percentage of 3% of the fractions. The importer in turn refused the documents but could receive the shipment without documents.

The Respondent arranged a meeting with the Claimant and the Australian company, and all of them agreed that the shipment did not comply and the chairman of the Australian company undertook to indemnify the Claimant and to pay the total loss during the next few weeks.

Soon after, the chairman of the Australian company escaped to an unknown destination and did not pay. Five months later the chairman of the Australian company sent to the Claimant a new offer to export another shipment to the same importer who accepted, this time, rice with fractions not to exceed 15% of the two shipments, and payment would be made by one bill of exchange.

The Claimant said that it had the right to receive the indemnity of 80% of the value of the shipment, in addition to damages for moral prejudice, and this was its initial demand based on the agreement, which covers the risks of export whether commercial or non-commercial. As a subsidiary means the Claimant requested to be granted the whole price of the cargo based on the tortious liability and did not state the moral prejudice.

The Respondent requested to dismiss the case and to order the Claimant to pay the costs of arbitration because its guarantee is subject to a condition precedent that the exporter must have fulfilled all its obligations towards the importer, and this was not fulfilled because the percentage of fractions exceeded the instructions of the importer. For this reason the condition precedent did not materialise.

The Respondent said that the new offer stated by the Claimant was not true and it was an attempt by the Claimant to show that the foreign importer had accepted the first cargo and the condition precedent had materialised.

Award

The Arbitral Tribunal believes that there was a common tort between the Claimant and the Respondent.

1. The Respondent was negligent in making inquiries about the Australian company and its chairman and created, by its policy of guarantee, a deceptive view of them, and it bears its tortious liability.
2. The Claimant was also negligent because it should not have relied on the deceptive view and should have sought the right information about the creditworthiness of the Australian company and its chairman, and this tort is bigger than that of the Respondent.

The Tribunal distributed the price of the cargo saying that the Respondent shall pay 25% and Claimant shall bear 75% of the price.

As to arbitration costs the Tribunal distributed it on equal shares. The claim of moral damages was dismissed because the Claimant waived it in the subsidiary claim. All other claims were dismissed.

Commentary

The Arbitral Tribunal did not refer to the contractual liability emanating from the policy of guarantee and relied solely on the tortious liability of both parties.

CASE NO. 5

Final award of 3 July 1999, case no. 119/1998

Arbitrators: Three Egyptian Arbitrators
Parties: Claimant: A North American aviation company
Respondent: An African aviation training authority
Place of Arbitration: CRCICA
Subject Matter: • fines in administrative contracts
• *cause étrangère* exempting from fines
Applicable Law: Egyptian law
Language of Arbitration: Arabic

Held

Fines of delay in administrative contracts are meant to secure the implementation of such contracts on the dates agreed upon, to provide the safe conduct of the public utilities regularly and constantly, and for this reason the administrative authority is entitled to inflict it automatically without need for a court judgment, so long as the delay from the contractor exists. Administrative authorities may deduct such fines from the dues of the contractor without need to prove any damage resulting from the delay, because damage here is presumed. But if the delay is the result of circumstances beyond the control of the contractor, he will not be responsible for delay.

Facts

The two parties entered in November 1997 a contract of sale (from Claimant to Respondent) of four aviation engines produced by another North American company. The contract provided for arbitration:

Any dispute that arises in connection with the implementation of this contract falls within the jurisdiction of Cairo Regional Centre for Arbitration.

Some delay occurred from the producer, and after having supplied the engines the producer issued a technical declaration to all buyers to stop the use of engines produced during the period of 21.2.1998 to 22.4.1998 because of a technical fault, and ordered that such engines should be returned to the factory. Substitute engines were shipped and received by July 1998, and were released from custom authorities by mid-August of the same year.

Meanwhile, the authority did not pay the price until the date of filing of this arbitration, and on the contrary notified the Claimant that a fine of delay and custom

duties would be deducted from the price. Such custom duties could be recovered in the name of the authority.

The Claimant contended that the delay of the Respondent resulted in substantial and moral damage for the Claimant as commercial agent of the selling company, and the Respondent must pay damages for it.

The Respondent replied that the engines ordered were a substitute for four old engines returned to the producing company against four new engines at a certain price after deducting the price of the old ones. A documentary credit was opened in favour of the North American company, and at the time of arrival of the shipment the experts of the Respondent examined it and discovered a breach of the technical conditions and specifications and concluded in their report to reject the four engines.

The Claimant was notified and it undertook to provide new engines and to return the shipment to North America without any additional expenses to the Respondent. This was done but with a delay of about four months and a fine of 1% for each week was inflicted with a maximum of 4%, in line with the contract. This percentage was calculated upon the price of the engines.

The engines passed twice through the customs zone and custom duties were paid twice, but one of them would be recovered by the Respondent, and at the time of recovery this amount would be paid to the Claimant.

Another amount was deducted from the dues of the Claimant, relating to 154.5 flying hours of an aircraft which was forced to stop until the arrival of the rectified engines, and the damages for this event counter-claimed by the Respondent was deducted from the Claimant's dues.

The local agent of the North American company requested damages for himself regarding moral and substantial damage at a certain amount, and soon after he doubled this amount. The Respondent objected to granting such damages because the agent was not a party to the contract of supply containing the arbitration clause.

Award

The Arbitral Tribunal sees that the decisive point in the dispute is whether the delay was justified by an event of *force majeure* or *cause étrangère* or not.

The Tribunal found that the four engines were technically rejected and that one of them fell in the period warned against by the producing company and were requested to be returned to the producer. Accordingly, the Tribunal said that the delay in regard to this engine was justified by a "*cause étrangère*". The other three engines do not avail of this "*cause étrangère*" because the delay is unjustified, and the Tribunal has to define the damages for delay.

The Tribunal said that fines of delay in the administrative contracts are meant to secure the implementation of such contracts on the dates agreed upon, to provide the safe conduct of public utilities regularly and constantly, and for this reason the administrative authority is entitled to inflict it automatically without need for a court judgment so long as the delay from the contractor is existing. Administrative authorities may deduct such fines from the dues of the contractor without need to prove any damage resulting from the delay, because damage here is presumed. But if the delay

in implementation is the result of circumstances outside the control of the contractor, he will not be responsible for delay.

Accordingly the Tribunal deducted the price of the first engine from the whole price and defined the fine of delay upon the rest at the rate of 4%.

The Tribunal ordered the Respondent to pay the amount of custom duties as soon as it was recovered.

As to the compensation for the lost working hours of one of the aircraft, it was found from the table of aviation hours of the said aircraft that it sometimes included months of stay and that after the engine arrived this aircraft did not fly for three months for reasons other than the delay of engine, and ordered the Respondent to return the money retained for this purpose.

Banking commissions were agreed to be on the side of the Claimant and the Tribunal ordered the Claimant to bear them.

The Tribunal ordered the Respondent to return the letter of guarantee to the Claimant, because there are no other rights of the Respondent to be guaranteed.

The Tribunal awarded legal interest to the Claimant at the civil rate of 4% as of the date of bringing the lawsuit to arbitration.

The damages claimed by the agent were dismissed as being outside the scope of the arbitration agreement and because the agent was not a party to the contract. But the Arbitral Tribunal ordered the Respondent to pay the commission of this agent because it was provided for in the contract. Costs of arbitration were distributed by equal shares.

CASE NO. 6

Partial award of 23 June 2000, case no. 120/1998

Arbitrators: Chairman of Lebanese nationality, two members of Egyptian and Syrian nationalities
Parties: Claimant: An African furniture company (seller)
Respondent: An Asian company (buyer)
Place of Arbitration: CRCICA
Subject Matter: • lack of jurisdiction, applicable law, alter ego doctrine
Applicable Law: The law of the Asian Party
Language of Arbitration: English

Held

US American courts when confronted with the problem under consideration have used the alter ego doctrine or the doctrine of piercing the corporate veil. According to this doctrine “the corporation and those who have controlled it without regard to its separate entity are treated as but one entity, and at least in the area of contracts, the acts of one are the acts of all”.

Facts

The two parties to this arbitration entered into an agreement for sale known as contract No. 2-E (hereinafter referred to as “the contract”), the Claimant as seller and the Respondent as purchaser. Both parties agreed in the said agreement for the sale of the goods stated in the appendices to contract No. 2-E, which was concluded during an exhibition of consumer goods from the African country, held in an Asian country in June 1996 for the purpose of strengthening and developing trade and economic relations and attracting investments.

The settlement of price was subject to clause No. 6.1 of the 2-E contract stipulating that:

Payment under the present contract shall be made by the buyer (Respondent) within 45 days from the date of the signing of the present contract.

An addendum No. 1 to the contract was made stipulating that:

... in view of the non-fulfilment by Respondent, of payment due date as per contract... and as upon the request of the Asian company, Claimant, has agreed on payment as follows: —

Accordingly one third of the contract price was due at the middle of the months of October, November and December 1996 but nothing was paid and the Claimant sued the Respondent for payment.

The contract contained an Arbitration clause:

The Seller and the Buyer will take every measure possible to settle amicably any dispute or differences which may arise between them out of the present contract or in connection with it.

If the Parties do not come to an agreement, all exception of recourse to legal procedure are to be submitted to the Arbitration Court in ARE in compliance with the rules of procedure of the said court. The award of the Arbitration is final and binding upon both Parties.

The Respondent refused to comply with the request of the Cairo Regional Centre for International Commercial Arbitration to appoint an arbitrator after having been notified many times to do so, and the Centre, accordingly and upon request from the Claimant party, appointed a lawyer of Syrian Nationality as arbitrator for the Respondent.

The two appointed Arbitrators agreed upon choosing the third arbitrator of Lebanese nationality as chairman of the Arbitral Tribunal.

The Claimant submitted its statement of claims which was notified to the Respondent, stating the following claims:

- 1. The due sum of money that is equal to US \$——for a direct damage which arose naturally from the breach of contract No. 2-E.*
- 2. The cumulative interest in the rate of 8%, as provided for in clause 6.2 of the contract No. 2-E until payment.*
- 3. The sum of US \$——as punitive damages due to Respondent's wilful, malicious and fraudulent acts.*

In addition, Respondent is to pay all other kinds of relief as may be granted. This includes, but not limited to, costs of arbitration, attorney's fees, all types of indemnity and all costs associated with enforcement and collection.

In the first hearing the Claimant's Representative and his legal counsel appeared, while the Respondent did not appear before the Tribunal despite the notification duly served upon it by courier.

During this hearing the Arbitral Tribunal unanimously resolved to proceed with the case despite the absence of the Defendant legally notified with all the Arbitral procedure and decided that:

- 1. The Arbitral Tribunal confirms the regularity of its formation, its jurisdiction to consider the case and that no conflict of interest between its members and either party is existing or existed before.*
- 2. The language of Arbitration shall be the English language.*
- 3. Both parties are invited to file seven copies of submissions and documents within the Centre concerning the applicable law, the parties to the dispute and the interim measures before a certain date; issues upon which the Arbitral Tribunal will issue its partial award.*

The Respondent did not file any documents and contented to send a fax message. The Claimant filed a memo within the time-limit supported with documents and in this memo it has amended its claims as follows:

Mr. — the chairman of respondent is to pay the debt and damages and must be notified and ordered to appear before the Arbitral Tribunal as second respondent.

Accordingly, the Arbitral Tribunal made deliberations on the issues set forth in the minutes of the previous hearing and agreed unanimously to the following reasoning of this partial award.

Award

A. Jurisdiction

Considering, first, that the Tribunal finds necessary to answer the plea of non-competence raised by the Respondent in its memo of —, where it is stated:

In accordance with the legislation of the Republic of —, judicial actions must be brought on in the place of residence of respondent.

Considering that, this plea is answerable by the fact that the name of the said Court does not state that it has an international character on the one hand, and that the parties agreed in this international relationship that their disputes shall be settled by the Cairo Regional Centre for International Commercial Arbitration, on the other hand. Such forum choice is respected in international trade relations because it emanates from the principle “*pacta sunt servanda*” which means party autonomy. Purporting otherwise means that the Respondent is trying to avoid the legal implementation of its obligations.

B. The applicable law

Considering that, the Agreement between the parties does not contain any choice of law clause but only the choice of the law applicable to the procedure, namely the rules of procedure of the CRCICA, that is, the UNCITRAL Rules.

Considering that, according to Article 33(1) of the UNCITRAL Rules, the Arbitral Tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the Arbitral Tribunal shall apply the law determined by the conflict of law rules, which it considers applicable.

Considering that, according to Article 33(3) the Tribunal shall in all cases decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

Considering that, the Arbitral Tribunal requested the parties to submit their memos regarding the applicable law and gave them full opportunity to plead orally upon this point.

The Claimant’s position

Considering that, the Claimant contends that contract No. 2-E was made, signed and executed in the Asian country and that its law is the applicable substantive law to the merits of the case.

Considering that, the Claimant also added that in the light of predominant jurisprudence of International commercial arbitration and Article 33 of the UNCITRAL Rules, the law of the country of the Respondent is restricted by the limits of international public order principles and the terms of the contract, trade usage, *lex mercatoria*, international contract, business law, and general principles of the law, considering the international characteristics of Contract No. 2-E main issue in this case.

The Respondent's position

Considering that, the Respondent failed to submit his position regarding the applicable law although having been properly notified to do so. However, the Respondent sent to the Centre a letter dated — in which it stated that:

... During conclusion of the contracts the parties.. first of all were guiding by legislation of the Republic of — (sic).

The Tribunal's position

The Tribunal decides to refer to the applicable conflict of law rules in order to compare the outcome of such a reference to the implicit common intention of the parties.

Considering that, the most authoritative present-day doctrine and international arbitration jurisprudence admit that in determining the substantive law, the arbitrator may leave aside the application of the conflict of law rules of the forum (see Lalive *Problèmes relatifs a l'arbitrage international commercial* lectures given at the Academy of International Law, vol. II, 1967, p. 659 & ss, and *Les règles de conflit de loi appliquées par l'arbitre*, Report prepared for the Conference on Private International Arbitration in Switzerland; 2–3 April 1976, publications of the law Faculty at Geneva, vol. 53).

Considering that, the Arbitral Tribunal thus enjoys wide, and even discretionary, powers in the choice of the applicable law (see Clunet, *Journal du Droit international* 1987, p. 924), and if it is authorised to refer to different systems of conflict of laws at its disposal, it is by no means obliged to give preference to one of them, above another.

Considering that, according to Article 33(1) of the UNCITRAL Rules the first task of the Tribunal should be the determination of the conflict of law rules applicable to the contract under examination. The second task is to determine the most appropriate conflict of law rules in order to determine the applicable law designated by such rules.

Considering that, the potential laws that may be referred to in the present arbitration are:

- (a) The law of the place of delivery of goods (Asian country);
- (b) The law of the seat of seller (African country);
- (c) The law of the place of contracting (Asian country);
- (d) The law of the seat of buyer (Asian country);
- (e) The law of the place of performance of the contract (Asian country).

Considering that, these laws are limited to African and Asian laws. Consequently, it seems logical to determine whether these laws contain conflict of law rules for the Arbitral Tribunal to determine which of these rules is most appropriate to the dispute.

Considering that, the application of Article 19(1) of the Egyptian Civil law and Article 1158 of the (Asian) Civil Code, lead to Asian law as the law under which the sole contract would be governed.

Considering that, a comparison of the conflict of law rules of the states in connection with the subject matter of the present arbitration shows that they all are in harmony with each other and that they, therefore, have to determine the proper law of the contract.

The Arbitral Tribunal, therefore comes to the conclusion that it has to apply the law of the country of the Respondent on the subject matter to this arbitration. However, in conformity with Article 33 of the UNCITRAL Rules, the Arbitral Tribunal shall take into account also the provisions of the contract and of the relevant trade usages. This decision is further supported by the implicit, common intention of the parties.

The Arbitral Tribunal is even more convinced with this choice since the contract has been signed and the goods delivered in the country of the Respondent, and the connection with the law of this country prevails without any doubt.

C. The parties to the dispute

The Claimant's position

According to the Claimant, the Respondent parties in this arbitration are both the purchasing company and its chairman of Board of Directors, it being a joint-stock commercial group.

The Claimant asserts that the chairman committed himself to arbitration and he is with the Respondent company joint debtors. The Claimant substantiated his statement as:

1. During various talks between the Claimant and the Respondent the chairman of the Respondent, revealed himself that he was the one and only driving force of the Respondent company and he had such powers because he was running a family business. It was all his money at stake but to complete legal formalities he included his wife, son or brother for the formation of a legal entity.

Replying on the fax of the chairman of the Respondent, the Claimant asserts that (not only is it clear and obvious that it is he who alone controls the company but) it is impossible for any businessman, even if he owns the controlling shares of the establishment, to sell his own property to pay a debt that is supposed to be collected from the establishment.

The Respondent's position

In his fax dated——the Advocate of the Respondent stated that:

in the additional claims made by Claimant there is not clear question about responsibility of the President of respondent, as a physical person, before Claimant. In accordance with demands of legislation of the Republic of——, disputes between the judicial and physical persons must be consider the courts of general jurisdiction (sic).

The Tribunal's position

Considering that, the question at issue is whether the chairman of the Respondent's Board of Directors may become a proper party in this arbitration?

Considering that, the jurisdictional objection raised by the Respondent as to the personal liability of its chairman gives rise to the issue of the scope and effects of the relevant arbitration clauses. Therefore, the sources of law appropriate to the determination of said scope and said effects should be defined.

Considering, however, that in referring to the African country arbitration rules, that is, UNCITRAL Rules, the parties incorporated its provisions concerning the Arbitral Tribunal's authority to decide as to its own jurisdiction, which provisions do not refer to the application of any national law.

Considering that, the sources of law applicable to determine the scope and the effects of an arbitration clause providing for international arbitration do not necessarily coincide with the law applicable to the merits of a dispute submitted to such arbitration. Although this law or these rules of law may in certain cases concern the merits of the dispute as well as the arbitration agreement, it is perfectly possible that in other cases, the latter, because of its autonomy, is governed, not only as to its scope, but also as to its effects, by its own specific sources of law, distinct from those that govern the merits of the dispute.

Considering that, this is particularly the case, unless the parties have expressly agreed otherwise, with respect to an arbitration clause referring to the UNCITRAL Rules.

Considering that, the provisions of the UNCITRAL Rules establish in particular, the principle of the complete autonomy of the arbitration clause (Article 21(2)) and confer on the arbitrator the power to take any decision as to his own jurisdiction (Article 21(1)) without obliging him to apply any national law.

The Arbitral Tribunal reaches its decision regarding jurisdiction, by reference to the common intent of the parties to these proceedings, such as it appears from the circumstances that surround the conclusion and characterise the performance of the contracts in which they appear. In doing so, the Tribunal should also take into account usages conforming to the needs of international commerce.

Considering that, in conformity with the preceding it is appropriate, in order to determine the scope and the effects of the arbitration clauses relied upon, to examine successively the circumstances under which the negotiation, the performance of the contracts in which these claims appear took place, and to explore thereafter if, in this context, the chairman could be a party to this arbitration.

Considering that, it is not disputed that Mr. — is the chairman of the Respondent company and by his own statement he is also the chairman of a bank and he owns 72% of its shares, as it appears from his letter sent to the Claimant.

Considering that, in his letter dated — sent to the Claimant, Mr. — admits that he negotiated and treated with the Claimant by stating that "I regret that I cooperated with you regarding the exhibition in 1996 and spent too much money ... and my time". Thus it appears that Mr. — was the one who negotiated the contract and was aware of the arbitration clause contained in the contract, especially that he is the chairman of the Respondent's Board of Directors.

Considering that two months after the signature of the contract dated —, an addendum to the said contract regarding the rescheduling of the Respondent's due payment was signed between the Claimant and the Respondent on — and Mr. — was the signatory of this addendum acting *prima facie* on behalf of the Respondent.

Considering that, the correspondence related to the settlement of the debt owed to the Claimant was all addressed to Mr. — and that the latter was the one replying to these letters. Thus, Mr. — appears as the main contact in the Respondent company.

Mr.—, therefore played an essential role in the negotiation, which led to signing of the contract and its addendum, as well as the execution of the contract.

Considering that, in his letter dated — Mr. — maintains a confusion between himself and the Respondent, by the use sometimes of the first pronoun “I” and sometimes the plural pronoun “we”:

the question regarding transfer of the dues of the Exhibition goods is deciding really (sic).

and

I inform you that recently I bought 72% of the shares of the acting commercial joint-stock Bank and I am the chairman of its Board of Directors and it will remove many problems of the debts.

In the same letter, he further states using the plural

we are carrying on negotiations with the — Bank in plan of conversion of the sums into USD

and

the present we have the buyer of four-floors building, proceeds of sales will be remittance for payment of the exhibitions goods (sic).

He also added that

we delivered to Russia a big consignment, the supposed returns from its realization will be also remittance for the payment of the Exhibition goods [this is the type of English used by the Respondent].

Considering that, it is not clear whether Mr. — is talking on his own behalf or on behalf of the company, thus creating a confusion between him and the company.

Furthermore, this finding is asserted by further letters of Mr. —, indeed, in his letter dated —, he stated that “I take all measures to repay the debt”, “I have money”, “I put in to a real estate”, “I receive profits ...” And in the same letter added “we have controlling block of shares”, “no question about the debts we will settle”.

Considering that the above documentation shows that Mr. — is confusing the management of the Respondent and the bank and using at his own initiative the money of one company to cover the debts of another.

In his letter dated —, Mr. — stated that:

I inform you, that I take all measures to repay the debt for the goods from the Exhibition together with the payment of banking interests for the delay. I have money in the national currency, however at the present for the commercial banks there are difficulties on its conversion. Therefore the incomes are returning on the banking operations I put into a real estate. I receive profits from transactions with Russian partners, which also will go on with the payment of our debt. In the stage of consideration is a question of receipt by bank, in which, as we informed

you, we have the controlling block of shares (72%) license on the foreign economic activity.

Considering that the two companies, thus, appear to be controlled by Mr. — who declares using his own money as well as the income of his bank to pay the debt of the Claimant to such a degree that the companies and Mr. — appear as if they have no separate mind, will or existence of their own.

Such control goes beyond a mere stock ownership, or even identity of directors, to the point that Mr. — dominated the finance, policy and business practice of the two companies. It can be said that the companies seem to be a mere screen for his own personal activities.

Considering, in particular, that the arbitration clause expressly accepted by a company should bind the controller of the group which, by virtue of its role in the conclusion, performance or termination of the contracts containing said clauses, and in accordance with the mutual intention of all parties to the proceedings, appear to have been the real parties to these contracts.

Considering that, the award of ICC case n. 5721, 1990 rendered in Geneva describes international arbitral jurisprudence in this respect (see P. Fouchard, E. Gaillard, B. Goldman, *traité de l'arbitrage commercial international*, Ed. Litec, 1996, p. 301). In this case the Arbitral Tribunal pointed out that:

En résumé, l'appartenance de deux sociétés à un même groupe où la domination d'un actionnaire ne sont jamais, à elles seules, des raisons suffisantes justifiant de plein droit la levée du voile sociale. Cependant, lorsqu'une société ou une personne individuelle apparaît comme étant le pivot des rapports contractuels intervenus dans une affaire particulière, il convient d'examiner avec soin si l'indépendance juridique des parties ne doit pas, exceptionnellement, être écartée au profit d'un jugement global. On acceptera une telle exception lorsque apparaît une confusion entretenue par le groupe ou l'actionnaire majoritaire.

Considering that, these Awards are ratified by state courts:

La clause d'arbitrage insérée dans un contrat international a une validité et une efficacité propre qui commandent d'en déduire les effets aux parties directement impliquées dans l'exécution du contrat, des lors que leur situation et leurs activités font presumer qu'elles avaient connaissance de l'existence et de la portée de cette clause, stipulée conformément aux usages du commerce international (Cour d'Appel de Paris, Rev. arb. 1989, 691 note P.y. Tschanz, see also aff. 1434 : JDI 1975, p. 978; 2375 : JDI 1945, p. 973-4131 : ThI 1983, p. 899).

Considering that, the US American courts when confronted with the problem under consideration have used the *alter ego* doctrine or the doctrine of piercing the corporate veil. According to this doctrine:

the corporation and those who have controlled it without regard to its separate entity are treated as but one entity, and at least in the area of contracts, the acts of one are the acts of all (see US District Court, SD:Y, 23 January 1992, Yearbook, 1993.506; US Court of Appeals, Cir., 19 August 1993, carte Blanche v.

Diners Club International, 8 Int'l Arb. Rep. 3 (Sept. 1993), in *French law, in case of fraud*, Cass. 1ère Civ., 11 June 1991, Orri, n. 436).

Considering that, International Arbitral Tribunals have already pronounced themselves to this effect (see the awards in Case No. 2375 of 1975, *Journal du droit international* 1976.973; and in Case No. 1434 of 1975, *id* at 978; (case 5730, 1988, p. 410, collection of ICC Arbitral Awards, 1986–1990)).

The decisions of these Tribunals progressively create case law, which should be taken into account, because it draws conclusions from economic reality and in conformity with the needs of international commerce, to which rules specific to international arbitration, successively elaborated should respond.

In conclusion, it is appropriate for the Tribunal to assume jurisdiction over the claim brought against Mr. — (the chairman of Respondent).

In so doing, the Tribunal contradicts no principle nor any rule of “international public policy” in particular, that of the Egyptian legal system (the seat of arbitration). The latter is not based on any principle that would prohibit giving to an arbitration clause implicating companies and physical persons that are legally distinct, the scope attributed to it by the present award. On the contrary, in reaching this result, the Tribunal takes into account the needs of international commerce to which the rules of international arbitration should be responsive.

For these reasons the Arbitral Tribunal awarded that:

1. The law applicable to the substance is
 - (a) The law of the [Asian country]
 - (b) Usages of trade;
2. The plea of non-competence is dismissed;
3. Mr. — (chairman of the Respondent) is admitted second Respondent in the present case.

Commentary

After this partial award the case did not continue because the Claimant failed to provide additional provision for costs.

CASE NO. 7

Final award of 12 April 2000, case no. 138/2000

Arbitrators: Three Egyptian Arbitrators
Parties: Claimant: An African pharmaceutical company
Respondent: A North American software company
Place of Arbitration: CRCICA
Subject Matter: • software linked to certain objectives
• vendor's obligation to warrant goods
Applicable Law: Egyptian law
Language of Arbitration: Arabic

Held

The vendor is liable under his warranty, when, at the time of delivery, the thing sold does not possess the qualities the existence of which he guaranteed to the purchaser, or when the thing sold has defects diminishing its value or usefulness for the purpose for which it was intended, as shown by the contract or resulting from the nature or the destined use of the thing. The vendor is answerable for these defects, even if he was ignorant of their existence.

Facts

In 1996, parties entered into a contract of supply of an international information system containing machinery, equipment of computers, net programs, the right of use of applications, as well as its execution. The preamble of the contract provided for the technical training of the employees of the Claimant to be able to manage and operate the system of commissioning, the outlets of the Claimant in the capital remotes until the installation of telephones and transferring them to the on-line system. The contract contained three phases of implementation: supply, installation and commissioning.

The contract comprised an arbitration clause:

If a dispute arises about this contract or around its implementation, the parties are obligated to settle it amicably. If the amicable settlement failed during one month from the beginning of the dispute, it shall be settled by arbitration under the supervision of Cairo Regional Centre for International Commercial Arbitration, and in accordance with its rules.

The arbitral tribunal shall be formed of three arbitrators, each party nominates its arbitrator and the chairman shall be nominated by the Arbitration Centre.

Procedure, correspondence, pleadings and deliberations shall be in Arabic. The procedure of arbitration shall be made in conformity with the Egyptian Law and this law shall be the law applicable to the merits of the case.

The Claimant said that the Respondent failed to fulfil “the main object of the contract”, that is to connect the branches to the management. The other aspects of breach of contract are:

- (a) The Respondent was required by the contract to supply documents of seven originals Windows 95, while it submitted documents of Windows Group.
- (b) The Respondent was required to supply three sets of type AT&T No. 3249, while the sets supplied were feeble sets of type No. 3238.
- (c) The Respondent did not supply any original suitable program licensed to operate on 12 sets to realise the efficient connection between branches.
- (d) The Respondent did not commission the “mail server” with original copies of suitable programs, but instead with the “past office program”, which is not devoted to the commissioning, except on an experimental basis.
- (e) The Respondent was required to implement pages on the internet for “web server” and “DNS server”, but it did not implement it, keeping the pages of the Claimant in its own net.
- (f) The Respondent did not implement the training programs of employees for: “Unix, Novel and NT”, but did so only for “Fourth Shift”.
- (g) The Respondent contended to use a DOS-w-f-w program and did not provide a specialised program for connections, and did not realise the fluidity of information between the management and the plant.

The Claimant stated the substantial and moral damage caused by these unlawful acts, viz:

- not being able to control the period of after sale;
- accessible dealings with the management;
- depriving the Claimant from having ISO 9001 and 9002 because it could not obtain any, due to the incomplete managerial system payment made to the Respondent for the purpose of connecting branches to the department of sales located in two cities, despite the fact that these works are included in the value of the contract; and
- offending the reputation of the Claimant by supplying non-original programs which were subject to inspection by authorities and criminal prosecution entities.

The Respondent replied that it had fulfilled all the obligations required by the contract:

1. It supplied the equipment loaded with programs of Windows for Workgroups and delivered to the Claimant the certificates of genuineness.
2. The program of Fourth Shift agreed upon does not work except with Windows for Workgroups program. The Claimant could obtain an updated copy of Fourth Shift working on Windows 95 and request the Respondent to bring a genuineness certificate for it.
3. The Respondent says that it implemented its obligations on the internet according to the information and drawings presented by the Claimant, supplied a program N.T3-31, and used a copy of program NT4 which provides the two services of

DNS server and web server, although it was not obliged by the contract to provide it, because it was not yet known at the time of passing the contract, and the Claimant could have obtained it from the Microsoft Company.

4. The Respondent said that it provided the service of mail server by an original copy through the program of "Post Office Mail".
5. The Respondent was required by the contract to supply ten sets of the type 3249 including one having special specifications, and in addition it supplied three free sets of the type 3238 to solve the problem of slow commissioning resulting from the use of telephone lines with slow speeds.
6. The Respondent did not undertake to train all the employees of the Claimant upon all programs, only to train technicians in the fourth shift program.
7. The Respondent did not undertake in the original contract to effect the connections with branches and the two parties agreed to its implementation against new fees, but could not achieve efficient connection because of the lack of fast telephone lines, and for this aim it used program "PC anywhere".
8. The Respondent said that the Claimant did not define what was meant by the integrated information system.
9. The Respondent alleged that the Claimant could not prove any breach on the part of the Respondent as well as the substantial and moral damage it alleged.

Award

The Arbitral Tribunal said that the common intention of parties, taken from the provisions of the contract was to supply, install and operate machinery, computer equipment and systems of integrated applications, as well as to train the technicians of the Claimant, and in brief the Claimant wished to establish an integrated information system as one of the biggest pharmaceutical companies entering this contract with the Respondent, which was also one of the biggest software companies. The contract of installation, operation and training is precisely a contract of supply and enterprise, and as a result:

1. The obligation of the Respondent is an "*obligation de resultat*", and in case the required result is not fulfilled the Respondent remains liable for it.
2. The execution and implementation of the contract does not reside in the issues stated therein, but extends to all issues necessary for completion in accordance with the law, custom and justice as provided for in Article 148 of the Civil Code.
3. Accordingly, the matters stated in the schedule attached to the contract are not exhaustive.
4. The contractual default in the case of the "*obligation de resultat*" is crystallised by the non-fulfilment of the required result or the delay in bringing it to existence, regardless of the fact that the Respondent may allege that it made efforts and took care to fulfil it.
5. Accordingly, the research about the contractual default comprises:
 - (a) The responsibility for the obligation of the Respondent to supply and install all that is necessary for the integrated information system capable of realising all the purposes of the said system;

- (b) The responsibility for establishing a web site for the Claimant on the internet;
- (c) The responsibility for linking the branches of the Claimant all over the city;
- (d) Effecting the training of technicians.

The Tribunal discussed the failure in implementing these obligations one by one:

1. According to the witnesses of both parties the obligation of supply was breached by the Respondent, as it did not supply the programs agreed upon, viz:

The DNS server, the internet mail server and web server: It is not acceptable that the Respondent submits an invoice of purchase of these programs, because this does not necessarily mean that they were supplied to the Claimant after purchase.

It is in vain also to say that the DNS program is easily obtained free, or to say that it provided a “purveyor” program instead of “the internet web server”.

The Respondent undertook to supply eleven 3249 AT&T work stations having special specifications, and three stations of type 3238 of inferior capacity and non-conforming.

The Respondent supplied seven copies of a program known as: “Windows for Workgroups” instead of “Windows 95”, while this last one is necessary because it corresponds with the program of “PC anywhere” which permits the linking of the Claimant’s branches. This failure on the part of the Respondent rendered it impossible to achieve the integrated information system.

2. The Respondent undertook in the annex of the contract to provide a web site for the Claimant on the internet containing pages prepared by the Claimant, containing the serving of the internet DNS server, but it did not implement its undertaking. The proof for its failure is that the web site is still in the possession of the Respondent and it bears its name. The Respondent did not provide the internet web server which is devoted to publishing the pages of the Claimant on the internet and the “purveyor web” is not a substitute.
3. The Respondent undertook in the contract to realise the administration by remote for all the locations of the Claimant in the city.

The Respondent alleged that this obligation was not stated in the articles of the contract, but there was a reference thereto in the preamble. The Tribunal said that the preamble forms part of the contract in conformity with Article one: “The above preamble forms an integral part of this contract and is complementary thereto”.

On the other hand, this obligation is one of the purposes of the contract, and its breach is imputed to the Respondent.

The Respondent alleged during the execution of the contract that it should be paid an extra amount to realise the link required between the management and the branches of the Claimant, and it received this amount without just cause, as it was included in the price of contract. Accordingly, the Tribunal ordered the Respondent to return this amount to the Claimant, being convinced of it, to provide the remaining three sets of the type 3249, and to deliver to the Claimant the internet web site duly completed in conformity with the contract.

4. The Respondent undertook to train the technicians of the Claimant upon the operation and administration of the system, but it alleges that it undertook to train some of them upon the applications known as “Fourth Shift”.

The Tribunal said that the restriction of the scope of this obligation was not found in the contract, and it is contrary to the purpose of the contract which aims to realise the full knowledge of the operation and administration of all locations of the Claimant all over the city.

As it is evident to the Tribunal that the Respondent breached all these obligations damage resulted to the Claimant because the integrated information system was not duly completed and the link was not achieved and the technical and economic objectives of the contract did not materialise, a matter which affected the reputation of the Claimant. Therefore, it had the right to claim for damages, with regard to the following aspects:

1. The Claimant could not control the movement of sales and distribution with its customers especially in the phase of after sale.
2. The Claimant was deprived of the complete information system in respect of the import of pharmaceutical raw materials, and this resulted in an excess of the stored materials, a large part of which expired.
3. Lack of the information system made it very difficult and very expensive to follow the employee relations in connection with wages and other related matters.
4. The reputation of the Claimant was affected by providing non-genuine programs and programs not agreed upon.

The liability of the Respondent for the prejudices is based on the obligation of guarantee of the goods sold in conformity with Article 447.1 of the Civil Code:

The vendor is liable under his warranty, when, at the time of delivery, the thing sold does not possess the qualities the existence of which he guaranteed to the purchaser, or when the thing sold has defects diminishing its value or usefulness for the purpose for which it was intended, as shown by the contract or resulting from the nature or the destined use of the thing. The vendor is answerable for these defects, even if he was ignorant of their existence.

This liability relates also to the case where the contractor provides the material to the employer in line with Article 648 of the Civil Code:

When the contractor undertakes to supply the whole or part of materials to be used in the work, he is responsible for and warrants their good quality to the master.

The Tribunal accorded the Claimant the damages and stated it in figures in the reasoning, but missed stating it in the terms of enactment.

The Tribunal said that the specific performance of supply of the programs agreed upon, and the original copies of supplied programs, became impossible and the training was no longer required because another company undertook it, and the amount of damages stated before included these items and included also the impossibility of linking the branches, a matter that was effected by the Claimant through other sources.

The claim for interest was dismissed because the amount of damages was not certain before the issuance of this award.

As to the costs and fees of arbitration the Tribunal ordered each party to bear a half.

CASE NO. 8

Final award of 8 June 2000, case no. 151/2000

Arbitrators: Three Egyptian Arbitrators
Parties: Claimant: A European export company
Respondent: An African industrial company and a committee of sulphur and pyrites (Sulphur Board)
Place of Arbitration: CRCICA
Subject Matter:

- supply through documentary credits
- dilatory means practised by the Claimant
- may an entity not enjoying juridical personality be a party to arbitration?

Applicable Law: Egyptian law
Language of Arbitration: Arabic

Held

1. *Commercial matters are governed by the contracts of parties, which precede in force the provisions of the commercial law, and all other related laws. Custom and commercial usage come next to the provisions of the contract. Such contracts may not violate public order.*
2. *An entity not having the juridical personality can be a party to arbitration [the Sulphur Board in this instance].*

Facts

In 1999 parties entered into a contract for the supply of — tons of sulphur. The second Respondent (the Sulphur Board) signed the contract on behalf of the first Respondent, although this Board does not enjoy a juridical personality. The parties agreed to an arbitration clause in the said contract:

All disputes arising in connection with the present contract and which cannot be settled in a friendly manner by the parties shall be finally settled under the rules of the Cairo Regional Centre for International Commercial Arbitration. The Egyptian law is to be applicable. Decision of this arbitration court shall be final and binding for both parties, expenses for such arbitration to be borne by the losing party.

The demands of the Claimant were:

1. To say that the Respondents erred in law by claiming the value of the letter of guarantee, and that the Respondents must return the letter of guarantee to the Claimant;

2. To grant the Claimant damages for being forced to buy the goods at prices higher than the price of sale;
3. To grant the Claimant damages for the profit lost, and interest at the world rates until the final settlement, as well as arbitration costs, fees and lawyer's fees.

The goods were agreed to be shipped on one or two shipments, to be of bright yellow first class sulphur of Iranian and/or Arab Gulf countries origin, and/or CIS origin and/or Canadian origin in bulk, suitable for the production of sulphuric acid and having specifications provided for in the contract. The importers will open in favour of the seller letters of credit, irrevocable and confirmed, allowing partial shipments, with charges upon the seller outside the country and upon the buyers inside it, and shall be paid at 180 days from bill of lading date against the following documents:

- Commercial signed invoice —;
- Certificate of origin, issued by the producers or exporters at country of origin of the goods, countersigned by the Chamber of Commerce or the Federation of Industries, duly legalised by —;
- Provisions of the incoterms 1990 and their amendments apply for the interpretation of the commercial terms and abbreviations used in the contract. Changes and amendments of the contract require for their validity a written consent of the above parties.

The seller was required to submit a performance bond to buyers which it did.

The Claimant requested the Respondents to make some amendments to the LC to change the text saying that the certificate of origin issued by the producers shall be countersigned by the Chamber of Commerce or the Federation of Industries and be legalised from a specified diplomatic representation.

The Claimant says that this must be amended and replaced by other wording because the world chambers do not accept certificates of origin prepared by factories but it writes down the certificate and legalises it contending that the factory is registered with it. The Claimant said also that the text to be amended was not stated in previous transactions between parties.

The Claimant said that the period of the documentary credit for shipment expired and it requested the first Respondent to extend it and to amend the clause of certificate of origin, but the first Respondent refused and the first shipment went to another destination.

The Claimant said that the first Respondent approved, for the second shipment, to amend the clause of the certificate of origin but reduced the quantity required and bought other quantities from a new seller at higher prices and ordered the bank issuing the letter of guarantee to pay its value.

The Claimant objected to the payment of the LG but approved its extension for a further period.

The Claimant summed up the claims for damages for the rescinding of its contract with the supplier of the first shipment, damages for the difference of price of the second shipment requested by the first Respondent and the profit lost.

The second Respondent counter-claimed:

1. (By emergency) to cancel a court order issued by the Chief of the Court of Appeal and its effects;

2. To say that the case is inadmissible in respect of the Sulphur and Pyrites Board, because it has no juridical personality;
3. To dismiss all demands of the Claimant;
4. To order the Claimant to pay:
 - (i) A sum for the damage of non-receipt of the first shipment
 - (ii) Fine of delay of the second shipment
 - (iii) A sum for the rent of machinery
 - (iv) Additional fees for old age of the vessel
 - (v) A sum due to the committee of adjudication
 - (vi) Legal interest, costs and fees of arbitrators and lawyers' fees.

The first Respondent explained its counterclaim saying that the order of the Chief of the Court of Appeal is null and void because it ordered the bank, upon request from the Claimant, to liquidate the LG issued in favour of the first Respondent and to deposit the proceeds in an account with the said bank with interest until the arbitration award is given. This court rendered this order but it lacked competence because the Arbitral Tribunal is the competent body and it is entitled to cancel such an order.

The first Respondent also said that the Claimant raised unlawful objections to get rid of its obligations and for the sake of fast delivery it was forced to seek another supplier and to accept higher prices.

The first Respondent added that there was a stipulation in the contract saying: "each document should be issued on the printed forms with the issuers letterhead". The Claimant asked to delete this stipulation, a matter which means that it wants to be permitted to submit documents written on the letterhead of others, and this is not acceptable and such acts are not imagined to be a lawful interest of the seller. The first Respondent could bring forms of previous transactions with the same wording and the Claimant did not object to them.

Award

The award of the Arbitral Tribunal said that the plea of non-admissibility of the case because the Sulphur Board has no juridical personality is not acceptable because such plea must be raised by the chairman of this Board or his legal attorney.

The Tribunal added that the legal relationship of parties is governed by their contract, which precedes the terms of the commercial law and all other laws related to commercial matters. Custom and commercial usages come next to the provisions of the contract.

In the opinion of the Tribunal the decisive point is that the Claimant's request to extend the period of shipment was refused by the first Respondent. In its request the Claimant did not ask for any other amendment whether for the certificate of origin or for any other documents. The Claimant did not show any acceptable reason to require that such certificates may not be written down on the letterhead and did not show what is the legal justification for using the letterhead of others if it were right and straight in implementing its obligations.

The clause of the certificate of origin was not going to render the documentary credit inoperative as the Claimant said.

From the foregoing it results that the failure to supply the first shipment lies on the side of the Claimant and not the Respondents.

It results also from the foregoing that the Respondents have had the right to request liquidation of the LG.

The Claimant, in the opinion of the Tribunal, has no right to damages as a result of rescinding its contract with its supplier, since the breach as aforesaid came from its side.

The Tribunal said that the second shipment was alleged to be purchased against prices higher than the price of sale and the Claimant requests the difference. The Tribunal noted that among the documents of the case there was a message from the Claimant to the first Respondent giving the name of the vessel and that it would apply new prices if it did not receive the approval on the same day. The approval of the first Respondent was given on the same day.

Accordingly there was no increase for the price of the second shipment.

The Claimant alleged that the Respondents were *mala fide* and requested to increase the damages for this reason. The Tribunal noted that the Respondents were *bona fide* as they stopped their claim to the bank for liquidating the LG in order to give time for the Claimant to make a settlement in a friendly manner as it said, and did not receive the value except after the declaration of the Claimant that it refused all the principal demands of the first Respondent. Accordingly the Tribunal dismissed the claim.

As to the counterclaim, the Tribunal said that since it was settled that the default came from the side of the Claimant, it must pay the required damages for the prejudice resulting from this default.

Accordingly, the Tribunal ordered the Claimant to pay the difference of the rest of the second shipment not supplied by the Claimant and for which the first Respondent was forced to buy from others at higher prices to be able to continue its production and to avoid the interruption of work in its factory.

The Tribunal also awarded the first Respondent all the banking commissions of extensions of the LG because the Claimant undertook to pay them.

The Claimant lost all its demands and was ordered also to pay the additional fees of the vessel's old age, and interest on all sums awarded at the legal rate of 5%, from the date of the award until final settlement. The Claimant was ordered to pay all the costs and fees for its principal claim and three-quarters of the costs and fees of the counterclaim and the first Respondent afforded the quarter of it.

CASE NO. 9

Final award of 3 August 2000, case no. 154/2000

Arbitrators: Three Egyptian Arbitrators
Parties: Claimant: Two African printing companies
Respondent: An African printing authority
Place of Arbitration: CRCICA
Subject Matter: • administrative contract for providing printing paper
Applicable Law: Egyptian law
Language of Arbitration: Arabic

Held

The principle of good faith which governs the execution of contracts in accordance with Article 148 of the Civil Code, is not only applicable to the civil contracts, but also to the administrative contracts.

Facts

The Respondent used to launch tenders for purchasing imported paper for printing, and one of the Claimants was the successful offeror during ten years. In the year 1998/99 a new bid was launched requesting the provision of white paper of high quality for coloured offset printing with different measurements. The successful bidder was the same Claimant in its capacity as a commercial agent of an Asian paper company and the contract was executed between the Respondent and this Claimant jointly and severally with the second Claimant.

In this contract, the parties agreed that the Respondent shall open a revolving documentary credit for the payment of the prices of five periodic shipments. The credit must be irrevocable and confirmed. Claimants were required to lodge a bank letter of guarantee of 5% of the value of the deal to be reduced partially after three months from the date of receipt of each shipment.

The contract contained an arbitration clause:

Any dispute arising out of this contract shall be settled by arbitration with Cairo Regional Centre for International Commercial Arbitration.

The Respondent requested the Claimants (after the conclusion of the contract) to submit a new letter of guarantee of 20% of the value of one of the shipments. Although this was not provided for in the contract, the Claimants submitted it through a different bank.

Some time later a civil war broke out in the Asian country and a case of *force majeure* exempting the exporter existed. The agent upheld the same *force majeure* and offered to furnish paper from another Asian country and a new contract was executed.

The time limit of shipment was extended by the Respondent, but it claimed the value of the two letters of guarantee from the issuing banks. The Respondent also abstained from paying the price of other shipments.

The Claimants said that they were faced with other exceptional events, such as a decision from the Ministry of Economy considering the other Asian paper as prohibited because it dumped the African market, and the exporter refused to send shipments unless the decision on dumping was lifted. The Claimants notified the Respondent asking for provision of a permission of import, despite the decision of dumping, stating that the goods were in a port near the African country, but the Respondent did not answer and began to launch a new procurement, to implement the import with expenses to the side of the Claimants.

This caused great moral and substantial damage to the Claimants and this was why they filed this arbitration claiming for:

1. Recovering the value of the two LGs;
2. Payment of two invoices related to other shipments;
3. Payment of moral damages.

The Respondent requested the Arbitral Tribunal to dismiss the claim, and substantiated the request saying that there was a delay in providing the goods which resulted in a fine of delay against the Claimants and in rendering a decision for implementation with expenses to the side of the Claimants.

The Respondent submitted a counterclaim requesting damages, and to order the Claimants to pay all arbitration costs and lawyers fees.

Award

The Arbitral Tribunal said that all contracts are subject to the principle of good faith whether in conclusion or execution thereof. This principle is provided for in Article 148 of the Civil Code (see the text: volume 1 of this book, p. 256). This principle is not only applicable to the civil contracts, but also to administrative contracts. Accordingly the administrative authority (Respondent) was not *bona fide* in doing business with the Claimants because it ought to have given proper attention to the exceptional circumstances which faced them. So many judgments of the Counsel of State (conseil d'Etat) applied the *bona fide* principle upon all administrative authorities, and said that one of the main results is that each party may not abuse its rights.

The Claimants breached the contract because they delayed in the first two shipments for one month, but the Respondent failed to calculate the fines correctly because it applied the fine of delay of 3% on the whole value of the contract and not on the two delayed shipments only. The Tribunal corrected it.

Another failure from the Respondent was that when it ordered an increase of quantities by 25% it applied this on the whole quantity of the contract, while the

contract provides for such an increase to be in relation to each quantity, and if not implemented the fine becomes due on this quantity specifically. Accordingly, the Claimants may not be fined for quantities already provided.

A third failure from the Respondent was that it did not decrease the value of the letter of guarantee by the value of the shipments received.

The Respondent also had no right to request the letter of guarantee of 20%. The Tribunal said that there was a *cause étrangère* which exempts the Claimants from their obligations. This cause was the *force majeure* in each of the two Asian countries, in addition to the negative reaction from the Respondent, which accepted the samples and amended the dates of shipment but thereafter launched a new tender with expenses to the side of the Claimants. The Respondent, in the eyes of the Tribunal, was *mala fide* and the Claimants must recover the value of letters of guarantee, and the value of the two retained invoices with interest of 4%, from the date of filing the arbitration until final settlement.

The claim for moral damages was refused because it was not substantiated by the claimant.

The counterclaim was dismissed because the expenses of the new tender were not caused by a default from the Claimants but due to the default of the Respondent.

The Tribunal ordered the parties to pay the costs and fees of arbitration on equal portions.

Work and Material Cases

CASE NO. 10

Final award of 25 August 1999, case no. 129/1999 *ad hoc*

Arbitrators: Three Egyptian Arbitrators
Parties: Claimant: An African establishment of export, import enterprises and commercial agencies
Respondent: An African housing and construction company
Place of Arbitration: CRCICA
Subject Matter: • works of water pipe-line
Applicable Law: Egyptian law
Language of Arbitration: Arabic

Held

To have the right to damages for premature termination of contract provided for in Article 663 of the Civil Code the contractor must have a legal basis for his hopes to complete the operations withdrawn from him, and he must show that a contract was concluded, studies were made, finance was prepared etc.

Facts

In 1996 parties entered into a contract for the installation of a water pipeline with a diameter of 400mm and a length of 1350m between two suburbs of the capital, to be completed in six months by the Claimant in accordance with the technical specifications and engineering estimations. The said period begins from the delivery of the site or the disbursement of the down payment, whichever comes later.

The Respondent, due to a dispute with the Claimant, withdrew the enterprise and re-entrusted it to the Claimant by virtue of an annex to the contract. A court appointed two arbitrators for the parties, and the parties agreed by a submission clause in 1998 to settle their disputes by arbitration as follows:

Article 1: The above preamble is considered an integral part of this agreement and complementary thereto.

Article 2: The mission of arbitrators is:

- *The Arbitral Tribunal shall settle all demands stated in Article 4 of this agreement.*

- *The aspects of dispute in this submission clause is the substance of the dispute to be settled by the Tribunal and the award shall be conclusive and binding upon the parties and no one of them may raise this dispute before any other body.*

The Arbitral Tribunal may be assisted by experts, it has the right to move to the site or to any other place and peruse all documents with any governmental or non-governmental body.

- *The fees of the Tribunal shall be:
for the president US\$ ——
for the two members US\$ for each ——
for the administrative expenses US\$ ——*
- *The two parties shall bear on equal shares the fees of the president and the administrative expenses, and each party bears the fees of its arbitrator. The fees and expenses shall be paid by certified cheques or in cash before the end of pleadings. All cheques shall be deposited with the president and delivered to each arbitrator after issuing the award.*

Article 3: Appointment of arbitrators:

The Arbitral Tribunal shall be composed of:

Mr. —— umpire

Mr. —— arbitrator for claimant

Mr. —— arbitrator for respondent

Each party acknowledges that it has no objection to the arbitrator of the other party.

Article 4: The demands of each party against the other are as included in the two annexes attached to this submission clause and are considered an integral part of this submission clause.

Article 5: Period and venue of arbitration

- *The Arbitral Tribunal shall give its final award during a period not exceeding three months as of the date of the first hearing. The Tribunal may extend this period for one month, and any further extension shall be by a written agreement of parties.*
- *The hearings shall be held in Cairo in the place it finds suitable and shall notify parties accordingly.*

Article 6: Arbitral Proceedings:

Each party shall appear before the Arbitral Tribunal by one or more representatives, by proxy or by delegation from each party to its representative. The Tribunal shall notify each party of the first hearing and its venue by registered letter with acknowledgement of receipt or any other substitute. Each decision of postponement issued in the presence of the parties or their representatives shall be a notice for them and the Tribunal may continue to consider the case in the absence of parties or one of them, after having followed the said procedure. In case the sequence of hearing is interrupted for any reason, parties shall be notified by a registered letter or any other substitute.

If one of the arbitrators is impeded from doing his work the procedure shall be suspended for fifteen days, and if this period ends without removal of the

impediment the concerned party shall appoint another arbitrator during one week from the end of the said period, otherwise the president of the Arbitral Tribunal shall choose a substitute. These provisions shall apply in the case of resignation of any of the three arbitrators.

The Tribunal shall have a secretary to register the hearing and the presence of parties, as well as their demands and defences.

The award creditor shall deposit the award in the — Court, during the fifteen days following the written award.

Article 7: Each of the parties waives the lawsuits brought against the other concerning the dispute around this contract as from the time of signing this submission clause. The Claimant acknowledges its waiver of all criminal and civil proceedings it has previously brought against the Respondent and its chairman in his personal or official quality.

Article 8: General provisions:

Each party elected legal domicile in the address stated herein, and all notices and correspondence to it shall be valid and have its legal effects.

This agreement has been made of five counterparts; each party has one and the rest for the arbitral tribunal.

*First party
(signed)*

Second party

The three arbitrators

Annex No. 1 (of Article 4 above)

For the operation of the water pipe-line

With 400 mm diameter between — and —

1. Aspects of dispute and the demands of Claimant around the limited tender No. and the contract signed between parties in connection therewith.

*in The Name of God, Most Gracious,
Most Merciful*

*Say: O God! Creator of the heavens
and the earth!*

*Knower of all that is
Hidden and open!*

It is thou that will

Judge between The Servants

*In those matters about which
They have differed¹*

Disputed issues:

- 1. Respondent retreated from implementing the tender in good faith.*
- 2. Respondent refused to adhere to the opinion of Claimant and correct the defects and faults of designs.*

¹ This is a verse from the Holy Qur'an, Surat Alzomar, verse 46 stated in Arabic by the Claimant and the translation is taken from: A. Yusuf Ali published by Islamic Propagation Centre International, p. 1251.

3. Respondent replaced the steel iron pipes with an inferior quality iron, and objected to it later requesting steel iron pipes.
4. Respondent delayed its instructions about the execution until the end of the permits of works.

Claimant said that its demands are:

1. To order the Respondent to pay to the Claimant the value of the performance bonds retained from other operations;
2. To order the Respondent to return to the Claimant the two letters of guarantee claimed and reimbursed without reason;
3. To order the Respondent to pay to the Claimant the value of goods stored for the operation and presently retained by the Respondent;
4. To order the Respondent to pay to the Claimant the value of the statements not yet paid;
5. To order the Respondent to pay for the expenses and fees of studies, bank guarantees, applying for permits and the preparation of residence for the engineers and workmen, as well as charges of engineering surveying;
6. To order the Respondent to pay to the Claimant all the effective expenses for works executed until the date of withdrawal of the enterprise;
7. To order the Respondent to pay to the Claimant damages for the theft from the stores of the Claimant by the employees of the Respondent;
8. To order the Respondent to pay damages to the Claimant for the profit lost because it was prevented from completing the works;
9. Substantial and moral damages required from the Respondent;
10. Recovering from the Respondent the expenses of finance and banking interest;
11. Recovering the difference of wages increased since the Respondent stopped paying the statements;
12. Recovering the increases of prices occurring after entering the contract;
13. Increasing the prices of all items agreed upon by 20% for the non-executed works;
14. In addition to the clarifications to be stated later.

Annex No. 2 (for Article 4)

Demands of the Respondent:

1. To say that all the procedures followed by the Respondent against the Claimant are valid especially: the withdrawal of works, claiming the value of the letters of guarantee and the down payment, because of abstaining from implementing any of the items of works till the end of the period of execution agreed upon, and to say that the Respondent has the right to implement through another contractor at the expense of the Claimant and at the prevailing prices;
2. To say that the Claimant affords all the differences of prices of materials and wages;
3. To say that the Claimant affords the damages in relation to:
 - (i) The substantial burdens afforded by the Respondent to maintain the upward pipe-lines, which replaced the old ones, by a maintenance group working 24 h every day and by the purchase of machinery, equipment and raw material to maintain the old exhausted line;

- (ii) The profit of the company was affected by the negligence of the Claimant because it could not achieve the targeted profits;
- (iii) The moral damage affecting the reputation of the Respondent and its capabilities before its clients, as some of them withdrew the down payments paid to the Respondent for new projects when they saw the complaints published in the newspapers;
- (iv) The legal interest on the down payment for the period from the date of reimbursement to the Claimant until the date of receiving the value of the guarantee of the down payment.

During the following hearings the Respondent insisted upon its counterclaims and added that the Tribunal should order the Claimant to afford the costs and fees of arbitration.

Award

The Arbitral Tribunal said that there were technical contradictions in the specifications of works, and it was impossible to implement the contract with these contradictions, such as:

1. The book of specifications said that the pipes of 400 mm shall be made of steel using helical welding and would be installed by electrical welding. Pipes shall be isolated from its inside by three layers having a thickness of 375 μm of epoxy. These specifications are not consistent because epoxy is a material which does not tolerate a temperature over 165 °C, and this spoils the isolating layers.
2. It was agreed that the pipes made of steel by helical welding shall have straight ends with equal diameters, with edges cut vertically at an angle of 90° over the axis of the pipe, and shall be installed by electrical welding. In another item it was said that the pipes shall have a head and tail and installation is carried out by pushing the tail into the head of the facing pipe. The two methods are completely different [note: one of the arbitrators was a professor in the Faculty of Engineering].

The two parties were responsible for this contradiction in specifications, and it was their duty to apply to the Organization of Supply of Potable Water and to implement its instructions to avoid such situations.

The iron of inferior quality was suggested by the Claimant and approved by the Respondent, but finally, the Claimant bought a new imported sort of iron without getting the prior consent of the Respondent. The examination of these pipes was made in a hurry without due notification to the Claimant and without indications about the type of iron and the reasons for refusal, which means that the poor result is the responsibility of the two parties.

The Claimant had allegations in connection with the tender for water pipe-lines of 500 mm, which was cancelled soon after awarding it to the Claimant. In this respect

the Tribunal said that Article 663 of the Civil Code provides that:

1. *A master may terminate the contract and stop the work at any time before the completion of the works, provided that he compensates the contractor for all expenses he has incurred, for the work that he has done and the profit that he would have made if he had completed the work.*
2. *The court may, however, reduce the compensation due to the contractor for loss of profits if the circumstances justify such reduction. In particular the court shall deduct from such compensation any saving realised by the contractor as a result of the rescission of the contract by the master and any profit which the contractor could have made by employing his time otherwise.*

To have the rights in paragraph 1 of this Article, the contractor has to prove, in conformity with the judgments of the Court of Cassation, that there has been a legal basis for its hopes to complete the operation.

The legal basis here comprises a signed contract between parties and finance prepared to face the execution. The quantum of damages is left to the discretion of the Tribunal or court (Appeal No. 1914 of the judicial year 56, the collection of the Technical Bureau of the Court of Cassation No. 42, page 1034, date 9.5.1991).

The Claimant could not prove the legal basis of its hopes to implement this tender, which was launched in a hurry – no contract was signed for it, no studies were made and no finance was proved to be prepared to execute it.

Accordingly, the Claimant does not deserve damages according to Article 663.1, it only deserves fees for the feasibility study made for the preparation of the documents of its offer in the tender, and the Tribunal awarded these fees to the Claimant.

The Tribunal added that the second tender for pipes of 400 mm was the substitute and the contractors were required to waive any right with regard to the cancelled tender in order to avail themselves of the new tender, and the Claimant approved such a waiver as a condition precedent to the new tender.

The Tribunal awarded the Claimant damages for the works done, the feasibility studies, the letters of guarantee and the differences of prices of pipes and refused all other claims. The Tribunal awarded interest at the rate of 5%.

As to the counterclaim the Tribunal dismissed it, and ordered each party to pay half the costs and fees of arbitration.

CASE NO. 11

Final award of 14 December 2000, case no. 173/2000 *ad hoc*

Arbitrators: Three Egyptian Arbitrators
Parties: Claimant: An African consulting company
Respondent: Union of public sector construction companies
Place of Arbitration: CRCICA
Subject Matter: • how may a juridical person acquire legal personality?
Applicable Law: Egyptian law
Language of Arbitration: Arabic

Held

The judicial judgments are always stable on the principle that the elements of the juridical person are two elements: the first is the objective or material element, being the separate identity of a group of persons or a group of funds severed from the persons of its members or its founders. This element should materialise if there is:

- 1. A common purpose or interest distinct from the individual interests and may not merge with it. This purpose may be either public or private and in the second case it will be one of the private law persons.*
- 2. The existence of a regulatory system comprising the members thereof.*

The second element is the moral one which means that this body represents a considerable social value leading to acknowledging juridical personality for it, a matter which is reserved for the legislator. Accordingly, the juridical personality may not be granted to groups of persons or of funds unless there is an acknowledgement from the State. Such acknowledgement may be general by certain conditions given by the legislator, upon the realisation of which the group of persons or of funds acquires de jure the juridical personality without need for a special permission. The acknowledgement may also be private to a certain group of persons or of funds by special permission.

Facts

The government of an African company decided to attribute to the Respondent the works of purification of sewage waters of the capital. The Respondent entered into a contract with the Claimant and a group of European companies for the preparation

of drawings and designs of the project and submitting it to the concerned government body for approval. The contract contained the preparation of a time schedule of implementation. The fees of the Claimant amounted to 1.25% of the total value of civil works done and evidenced by the financial statements. Any additional works provided for or not provided for in the contract gives the Claimant right to fees on the same basis.

The period of this contract and of implementation is three years. If either party breaches any of its obligations the other party has the right to terminate the contract without need for summons or notification. The contract provided for arbitration:

Any dispute arising between parties in respect of this contract shall be settled by an arbitral tribunal composed of three arbitrators; each party shall choose one arbitrator, and the two arbitrators shall choose the third arbitrator who shall preside the tribunal. Each party shall bear the fees of its arbitrator and shall bear half the fees of the presiding arbitrator. Award shall be final and binding upon parties.

The Claimant demanded:

1. To order the holding company to pay damages for the additional works;
2. To recover the performance guarantee;
3. To dismiss the demands and pleas of the Respondent.

The Respondent requested:

1. To say that the claim is not admissible because the Respondent is not a juridical person;
2. To order the Claimant to pay damages for substantial and moral damage sustained;
3. To order the Claimant to pay all the costs and fees of arbitration including lawyers fees.

Award

The Arbitral Tribunal discussed the plea of non-existence of a juridical personality for the Respondent and said that:

The judicial judgments are always stable on the principle that the elements of the juridical person are two elements: the first is the objective or material element, being the separate identity of a group of persons or a group of funds severed from the persons of its members or its founders. This element should materialise if there is:

1. *A common purpose or interest distinct from the individual interests and may not merge with it. This purpose may be either public or private and in the second case it will be one of the private law persons.*
2. *The existence of a regulatory system comprising the members thereof.*

The second element is the moral one which means that this body represents a considerable social value leading to acknowledging a juridical personality for it, a matter that is reserved for the legislator. Accordingly, the juridical personality may not be

granted to groups of persons or of funds unless there is an acknowledgement from the State. Such an acknowledgement may be general with the legislator laying down certain conditions, upon the realisation of which the group of persons or of funds acquires *de jure* the juridical personality without need for a special permission. The acknowledgement may also be private to a certain group of persons or of funds by special permission.

The Tribunal said that the private acknowledgement applies to the Respondent in our case, and the plea of non-existence of the juridical personality is non-admissible. On the merits of the case, the Arbitral Tribunal invoked several civil law principles among which are the principles of:

- *Pact sunt servanda* (Article 147 of the Civil Code).
- Good faith in the implementation of contracts (Article 148 of the Civil Code).
- Each one who causes by his fault, damage to third parties shall be obliged to pay damages (Article 163 of the Civil Code).
- Where the judge is unable to estimate finally the damages, he may grant the available part and reserve the right of the injured person to claim for a reconsideration of damages during a certain time limit (Article 170 of the Civil Code).

The Tribunal, in line with these principles decided that the price of the contract upon which the fees of the Claimant are evaluated was exceeded by 33% and this requires a proportional increase of such fees.

Another increase is due because of the extension of the period of the contract.

A third increase is due because a new item was added to the consultancy contract, related to making bills of quantities for the concrete iron, which was not provided for in the contract.

Hence, the price of the contract was not finally defined in it, because the contract itself says:

all other dues of the consultant engineer in the original contract shall be reimbursed in accordance with the rules provided for in the contract.

One of the pleas of the Respondent was that the reimbursement of dues was impossible because this is linked to the primary delivery of the project and the contract did not provide for such preliminary delivery.

The Tribunal said that this is not right because the Respondent could not substantiate its plea and could not provide evidence that the purifying station did not yet work.

The Respondent also requested to be granted damages for moral and substantial damage resulting from the non-execution of obligations on the part of the Claimant. As this demand was not substantiated the Tribunal dismissed it.

The Respondent requested to reserve all its other rights, and the Tribunal said this is naturally and constitutionally covered and no body may be deprived of going to court if there is a requirement and the required reservation does not mean anything else in the circumstances of the case.

As the Claimant is not indebted to the Respondent after this award, the Tribunal ordered the Respondent to return to the Claimant the performance bond.

The Tribunal did not admit the formal plea of the Respondent as shown above and ordered it to pay damages and half of the arbitration costs and fees to the Claimant.

All other claims and counterclaims were dismissed, and the secretary of the Arbitral Tribunal was ordered to deposit the award with the clerk of the Competent Tribunal during 15 days of its issuance, in line with the arbitration act No. 27.94.

Commentary

The last paragraph is commented on hereby, because the Arbitration Act does not order a secretary of the Tribunal to deposit the award, but the award creditor is so ordered in accordance with Article 47 of the Egyptian Arbitration act No. 27 of 1994, providing for such deposit to be made by the award creditor.

Construction Cases

CASE NO. 12

Partial award of 12 July 1999 case no. 111/1998

Arbitrators: Three Egyptian Arbitrators
Parties: Claimant: An African industry company
and construction (sub-contractor)
Respondent: An African trade and enterprises
company
Place of Arbitration: CRCICA
Subject Matter: • plea of non-existence of arbitration organisation
Applicable Law: Egyptian law and UNCITRAL rules of arbitration
Language of Arbitration: Arabic

Held

- *The applications directed to the arbitration centre are not considered directed to the arbitrators regarding the case they are considering, because such applications are directed to an administrative entity and not to arbitrators (sic).*
- *In the appreciation of the exceptional damage which exceeds the rate of interest, the creditor has to prove the exceptional damage and the bad faith of the debtor. The mere knowledge of existence of the exceptional damage is not sufficient to constitute the bad faith.*
- *Modifications relate always to matters for which there are quantities specified in the tables of quantities; while in the case of variations, quantities are not specified in such tables.*

Facts

The Claimant entered into a contract (as sub. contractor) with the Respondent who was the contractor in 1996 with a local authority for the erection of a power station. The role of the Claimant was to complete the civil works. The general conditions of this contract contained an Article for arbitration saying that:

any dispute that may arise between parties regarding the interpretation of this contract, not amicably settled, shall be referred to the centre of international arbitration in Cairo (sic).

CRCICA suggested that the parties make conciliation procedures through the Centre; the parties accepted and as this procedure failed the parties proposed to conduct

arbitration. In the first hearing the parties agreed with the arbitrators that:

- The Arbitral Tribunal shall conduct the arbitration with its present constitution;
- The arbitration is institutional and its language is Arabic;
- The law applicable to the substance is the Egyptian law and for the procedure the law no. 27 of 1994 (The Egyptian Arbitration Act);
- As to the amiable composition this will be advised later;
- The award will be given during twelve months from a given date, and the Tribunal may extend it for a further six months.

The Respondent raised during the proceedings a plea of nullity of arbitration because there is no arbitration clause in the contract, and the reference to the general conditions did not specify the Article of arbitration and is not clear enough in the sense of Article 10.3 of the law no. 27 of 1994 which provides that:

Any reference in the contract to a document containing an arbitral clause is deemed to be an arbitral agreement, if the reference expressly provides that such clause is an integral part of the contract.

The Respondent said that it applied to the Centre before the commencement of the procedure asking for the nullity of the arbitration for lack of arbitration agreement.

Award

The Arbitral Tribunal gave this partial award on the issue of the nullity of arbitration and said that there are indeed two issues:

1. The reference to the general conditions;
2. Whether the plea of nullity is acceptable in the sense of Article 22 of the law no. 27 of 1994.

On the first issue the Tribunal said that the general reference to the Article of arbitration contained in the contract is not enough to constitute a valid arbitration agreement, because the arbitration clause is an agreement separate from the contract in which it is embedded; it is an agreement inside an agreement, and the contract of enterprise ought to have referred to it expressly and in a clear manner, as the general reference is not sufficient.

On the second issue, the Tribunal said that the plea of nullity of arbitration came very late. Although Article 22 of the arbitration act (27.94) says that:

1. *The Arbitral Tribunal is empowered to rule on motions related to its non-competence, including motions based on the absence of an arbitral clause, its expiry or nullity, or its failure to include the subject matter of the dispute.*
2. *These motions must be invoked by no later than the date of submission of the Respondent's memorandum referred to in paragraph 2 of Article 30 hereof.*

The appointment or participation in the appointment of an arbitrator by one of the parties to the arbitration shall not disentitle him from invoking any of these motions. As to the motion that the arbitral clause does not include matters raised

by the other party in the course of the review of the dispute, it must be invoked immediately or the right to invoke it shall lapse.

In all cases, the Arbitral Tribunal may accept motions invoked after the prescribed time-limit if it deems the delay to have been for an acceptable reason.

- 3. The Arbitral Tribunal may rule on the motions referred to in paragraph 1 of this Article before ruling on the merits, or join them to the merits in order to adjudicate both together; if it rules to dismiss a motion, such motion may not be invoked except through the institution of case for the annulment of the arbitral award adjudicating the dispute pursuant to Article 53 of this law.*

The Tribunal does not find any acceptable reason for such delay especially if we note that the arbitration has been conducted for one year before.

The Tribunal found that the Respondent in one of its memos said that it:

... does not object to the right of Claimant to resort to arbitration by virtue of the contract concluded between the parties.

The fact that the Respondent has presented the plea of nullity to the Centre on 10.6.1998, is not considered a demand to the Arbitral Tribunal, but to the Centre, which is a mere administrative entity.

Accordingly, the Tribunal awarded the dismissal of the plea of nullity, and referred the case to further arbitration proceedings.

CASE NO.12 (CONTINUED)

Final award of 29 September 1999, case no. 111/1998

Arbitrators:	Three Egyptian Arbitrators
Parties:	Claimant: An African construction company Respondent: An African trading company and enterprises
Place of Arbitration:	CRCICA
Subject Matter:	• modifications in construction liability for delay • exceptional damage
Applicable Law:	Egyptian law
Language of Arbitration:	Arabic

Facts

As illustrated in the partial award upon the plea of non-existence of an arbitration clause, the subject matter of the case related to the sub-contract entered into by the parties for civil works to be completed by the Claimant at a power station in which the Respondent was the general contractor.

The Claimant's demands, for some amounts, are as follows:

- For an initial amount provided for in the contract.
- For the iron for concrete.
- For modifications in line with Article 658 of the Civil Code.
- For additional works of concrete.
- For variations in the concrete and in the right order of implementation.
- For other additional works and finishing works.
- For accelerating finishing works.
- For additional burdens related to the delay of settlement of amounts due to the Claimant.

The Respondent made a counterclaim containing the following demands:

1. The Claimant did not fulfil its contractual obligations in due time.
2. The Claimant did not implement the contract in a *bona fide* manner because it disclosed the secrets of the principal contractor.
3. The Claimant abused its right to resort to arbitration and caused substantial damage to the Respondent.
4. The Respondent counterclaims for damages.

Award

The arbitral award began with the following wording:

In the name of the people: (etc.)

The Arbitral Tribunal said that the general conditions of the contract had regulated the conditions of payment of statements as follows:

- A monthly payment of the value of implemented works.
- Retaining 10%.
- Deducting 20% of the total to recover the down payment.

As 70% of each statement is provided for whatever may be the value of the statement or of the part implemented thereby, the Respondent has no right to cease paying such statement under the pretext that the Claimant did not attain a certain percentage. Accordingly, the Tribunal awards the Claimant the amounts of implemented works.

1. The value of iron of additional concrete exceeding the contracted quantity: the Tribunal said that the contract stipulates that the contract price includes the payment for concrete iron exceeding a certain quantity, calculated as follows:

\$1.8 per 1 kg in addition to the lump sum of the contract.

The Arbitral Tribunal made the calculation and awarded the Claimant the whole amount due for this item.

2. The modifications made according to Article 658 of the Civil Code because they were made upon an amendment of the drawings of execution delivered by the Respondent. On this point the Arbitral Tribunal said that the modifications should satisfy the following conditions:
 - a. They should result in an addition to the quantities of the specifications and drawings;
 - b. Parties should have specified quantities in the tables of quantities. The difference between modifications and variations is that quantities of modifications are stated in the tables, while quantities of variations are not stated;
 - c. Modifications should be ordered by a written request from the employer to the contractor under the request for “modifications”;
 - d. The Claimant did not submit any clear and decisive documents regarding a request for “modifications”, but submitted copies of letters and drafts of minutes of meetings; thus, this claim is dismissed.

3. The claim for additional works of items of concrete:

The contract has defined the percentage of cement to be at least 300 kg of cement for each cubic metre of concrete to give a strength of 300 kg cm². Two architectural factors are to be observed here:

- a. The proportion of cement stated in the contract, which is based on the report of soil research;
- b. The strength of concrete defined by the contract to attain 350 kg cm².

As these requirements were observed by the Claimant and, moreover, as the Claimant increased it to 400 kg cubic meter of concrete and increased, upon request from the Respondent, the iron from 52 to 60 tons, the Arbitral Tribunal considered these works as additional works and awarded the value thereof to the Claimant.

4. The claim of the amendment of the works of concrete and changing the order followed in the execution:

The Tribunal said in this connection that the Respondent and the main contractor had sent requests for completion on 13 occasions to the Claimant, but the Claimant delayed too much and this claim is, thus, dismissed as it indicates that the Respondent did not approve such amendments and changes.

5. The claim of additional works and variations in concrete and finishing works not settled by the Respondent:

The Tribunal said that:

The Respondent kept an engineer in its head office and a representative of the engineer on the site. These works were made before this representative but its price was not agreed between the parties, but the statements prepared by the Respondent included an estimation of the approved additional works and the Tribunal upholds this amount and awards it to the Claimant.

6. The claim for the acceleration of finishing works:

This claim was dismissed by the Arbitral Tribunal because of the long delay by the Claimant, evidenced by several correspondences from the Respondent.

7. The claim for additional burdens resulting from the delay of payment by wilful misconduct of the Respondent and causing exceptional damage to the Claimant in the sense of Article 231 of the Civil Code:

Article 231 of the Civil Code provides that:

The creditor may claim for additional damages to be added to the interest if he proved that the damage exceeding the interest was caused by bad faith of the debtor.

For the application of this Article, two conditions are required:

1. An exceptional damage occurs to the creditor exceeding the familiar damage of mere delay;
2. Bad faith from the debtor: the mere knowledge of the exceptional damage is not enough to prove bad faith, but a wilful cessation of payment should exist.

The creditor bears the burden of proof of these requirements.

As the Claimant could not prove these requirements this claim is dismissed.

8. The claim of additional burdens resulting from failure of the Respondent to harmonise and organise the work, and causing disturbance on the site:

The Claimant says that this was due to the inefficiency of the representative of the engineer and this caused poor decisions to be taken by him. The following is an illustration of this disturbance: the Respondent sent new modifications very late, which did not correspond with the advanced state of works and after finishing the contractual works, like the modification of the buried cables and the modification of most of the trenches in one of the buildings five days before completion.

The Claimant raised Article 221.1 of the Civil Code to substantiate this claim.

This Article says:

If the damages were not quantified in the contract or by law, the judge shall quantify them. Damages shall include the loss sustained and the profit lost by the

creditor, provided that this [loss or profit lost] must be a natural result of the non-fulfilment of the obligation or of the delay in its execution. Damage is considered a natural result if the creditor could not avoid it by exerting a reasonable effort.

The Arbitral Tribunal dismissed this claim saying that this power station project comprises too many parties and it was almost impossible to achieve strict organisation and harmonisation by the Respondent.

9. The claims for additional costs, because of different delays caused by the Respondent, occurring from the beginning of the project and due to the small area of warehousing and the delay of the phase of reinforced concrete.

In this respect the Arbitral Tribunal said that the delay was imputed to a *cause étrangère* for which the Respondent is not responsible, because the authorities did not give the licence to start the project for a long time.

One of the reasons of delay is imputed to the Claimant because it did not present the policies of insurance for workers except after three months from the receipt of the site, while the regulations presume that these policies should be presented before the receipt of the site.

On the other hand, the contract says that:

- *No indemnity may be given for the lack of information collected by the offeror about the site.*
- *Before submitting the offer the offeror should seek personally the information related to the sub-contract regarding the initial surface, weather, ways, nature of soil, and in general shall seek all information which may affect the price of works.*
- *Where the contractor needs additional land for his private purposes he has to get it on his own expense ... etc.*

For these provisions of the contract and of tendering for the sub-contract these claims were dismissed.

The counterclaim:

The Respondent demanded damages for:

1. The delay of the Claimant to fulfil its obligations on time;
2. Implementing the contract in bad faith and disclosing secrets of the general contractor;
3. Abusing the right of resorting to arbitration, causing substantial damage to the Respondent;
4. Awarding interest for the damages allotted.

As the Respondent did not pay the costs and fees of the counterclaim, the Arbitral Tribunal gave it a delay to do so, and by the end of this delay ordered the stay of proceedings of the counterclaim until the payment of the costs and fees, and awarded the Claimant the amounts stated before, and ordered each party to pay half of the costs and fees of the case.

Commentary

The Arbitral Tribunal started the partial and the final awards with the phrase: “In the name of the people”. As we commented on other awards, this should not be

stated because arbitral awards are issued in the names of the parties and the power to give the award does not come from the law, but rather from the arbitration agreement or clause, and also because arbitration was known and is still known in places where no laws existed at all. Such a phrase may be used in the judgments of the judicial authority because the people are the source of all public authorities including the judicial authority. On the other hand, the order of enforcement (the *exequatur*) may state it if this order is given by a judicial authority or its chief. On the other hand, if the award is given in an international arbitration, would we say: ‘in the name of the peoples’ or: “in the names of the peoples”, and in such case what are the peoples meant in this world!

CASE NO. 13

Final award of 18 June 2000, case no. 124/1999 *ad hoc*

Arbitrators: Three Egyptian Arbitrators
Parties: Claimant: An African construction development company
Respondent: An African hotel and resort company
Place of Arbitration: CRCICA
Subject Matter: • claims and counterclaims resulting from a contract of construction
Applicable Law: Egyptian law
Language of Arbitration: Arabic

Held

If the owner insured the works and properties of himself and of the contractor, in case of a force majeure covered by this insurance, he cannot take all the indemnity for himself but he must give the contractor the suitable proportional indemnity.

Facts

In 1995 the parties entered into a contract for the construction of a hotel for the Respondent on a beach. The contract was amended in 1996 and an arbitration clause was added:

Any differences or disputes arising out of this contract or related thereto shall be settled by arbitration by three arbitrators, Claimant appoints one and Respondent appoints one, and the chairman shall be Mr. — and his signature upon this contract is considered approval to be chairman.

It is agreed that no dispute shall be referred to arbitration except after the complete delivery of the project in time and in accordance with the time schedule contained in this contract by virtue of minutes of delivery signed by (Respondent) and the consulting engineer of the project. Arbitrators may act as amiable compositeurs.

According to the Claimant, the Respondent (the owner) did not fulfil its obligations in the two contracts, specifically in that it did not pay the last statement and did not pay the moral and substantial damages for losses sustained and profits lost by the Claimant. In view of these differences the Claimant served a writ of summons upon

the Respondent asking it to appoint its arbitrator and notifying to it the name of the arbitrator it nominated. The Respondent did not appoint an arbitrator, and the Claimant resorted to the court which appointed him.

The arbitrators met in a procedural hearing where they agreed with the parties upon the place of arbitration, its term, language, applicable law, and costs and fees of arbitration. The place of arbitration (being an *ad hoc* one) was agreed to be the premises of the Cairo Regional Centre for International Commercial Arbitration.

In one of the hearings the Respondent challenged the chairman, and the Arbitral Tribunal dismissed the challenge. The Respondent resorted to the court to cancel the previous order appointing an arbitrator for it, and obtaining the cancellation made itself a new appointment and notified it to the Claimant. The court ordered the Claimant to pay the court fees and lawyer's fees to the Respondent.

The two parties agreed to re-constitute the Arbitral Tribunal by fax messages, and in the following hearing the Respondent waived the challenge to the chairman and the plea of non-admissibility in which it said that the arbitration was premature due to the arbitration clause, which stipulated the delivery of the project and its acceptance by the Respondent as a condition precedent to any arbitration on disputes. The Respondent said it no longer upheld this plea and it was interested in the arbitration.

Accordingly, the parties and the Tribunal made new terms of reference, to the effect that:

- The Parties have no objections to all arbitrators.
- The Procedure shall be subject to the Egyptian Arbitration Act (27/1994).
- The period of arbitration shall be one year as of the date of this document.
- The Egyptian law is the applicable law.
- These minutes are considered a submission clause.
- This arbitration is a new arbitration with a new number (no. 124/1999) instead of the previous arbitration (no. 114/1999) the documents of which shall be joined to this new arbitration, except the challenge to the chairman. The memos submitted in the previous arbitration shall be valid under the new arbitration except the plea of non-admissibility waived by the Respondent.

Parties requested the stay of proceedings for two months to make an attempt at conciliation, but could not reach an agreement and the proceedings were resumed.

The Claimant briefed that it undertook to establish, complete and maintain the hotel and two villas near it, built for the residence of the owner of the Respondent company (majority shareholder).

The designer became the consulting engineer of the Respondent and a representative of the owner had been appointed. The statements were paid regularly, but the last two statements were not paid and the owner requested the Claimant to join them to the final statement. A large fine of delay was provided for in the contract for each day or part thereof.

When the Claimant began to prepare the site for works, to mobilise equipment and to begin digging, it discovered that there was a trespass on the beach width, which should not be less than 50 m from a certain line on the shore. The designs were made on 30 m (and sometimes 23 m) from the said line. The Claimant notified the owner who began to prepare new rectified designs to cancel some parts of the project and to add

additional floors to some buildings. The new designs and drawings took more than five months and the work stopped during this period, but the owner refused to extend the contract period except for two months; the rest would be subject to fines of delay.

The dispute extended to other points related to the execution and to the withdrawal of some works from the Claimant. Some other problems occurred with sub-contractors chosen by the owner. The owner claimed the value of the letter of guarantee submitted by the Claimant. The parties tried to dissipate the problems and made an annex to the contract, the most important points of which were to stop the claim of the letter of guarantee and the agreement to arbitrate if necessary. Nevertheless, differences continued until the preliminary delivery of the project in March 1997. The hotel was inaugurated and the final statement was submitted to the owner, but the owner made some comments because of which this statement was no longer the final one.

Award

The Arbitral Tribunal discussed the points of the claim and counterclaim as follows, beginning with the plea of non-admissibility. The discussion included the points of view of each party.

The non-admissibility of the arbitration: the Respondent alleged that the arbitration was premature because it was agreed not to file any arbitration except after the delivery of the project according to the time schedule agreed upon. But the Tribunal said that the preliminary delivery took place in March 1997 with comments from the owner, which do not prevent the use of the hotels, and the arbitration was notified to the Respondent in February 1998. This means that it was not premature, and this plea was dismissed. The Respondent itself waived this plea in one of the hearings.

The claims:

1. Defining the date of final delivery of the project:

The Claimant said that the contract provides that the preliminary delivery must be in March 1997, the period of guarantee is one year from that date, after which the final delivery certificate was given to the contractor (Claimant). As this had materialised, and the owner did not issue this certificate, the Tribunal was requested to say that final delivery is completed.

The Respondent said that the final delivery was not completed and the comments of the owner were still existing. The Tribunal said that the comments of the owner were cured and this award replaced the certificate of final delivery in application to Article 210 of the Civil Code which provides that:

In the obligation to do something, the judgment of judge takes place of its performance if the nature of the obligation so permits.

This is also an application of Article 655 of the Civil Code:

When the contractor completes the works and places them at the master's disposal, the master shall, as soon as possible, take delivery in accordance with

prevailing custom. When the master, in spite of being formally summoned, fails, without reasonable cause, to take delivery of the works, the works will be deemed to have been delivered to him.

Accordingly, this claim of final delivery was honoured.

2. The Claimant wanted to put a plaque beside the hotel to show that it was established thereby saying that it was a custom of contractors to do so. The Respondent refused. The Tribunal said that this demand is in accordance with custom and practice in contracts of enterprise and it should be honoured.
3. Payment of taxes: according to the law the owner is required to withhold tax of 1% from the dues of the contractor and pay it to the Taxes Administration. The Claimant demanded to have the receipts of paying the withholding taxes, and the Respondent refused to furnish him with them. The Tribunal ordered the Respondent to deliver to the Claimant the receipts of payment and said that this award was considered performance for the payment of the withholding tax in line with Article 210 of the Civil Code (see *supra*).
4. The claim for the payment of different sums:
 - (a) the amounts of the final statement: The Claimant said that it accepted to defer the last two statements, to be included in the final statement because against this deferment it could obtain the deferment of the Respondent's demand to cash the letter of guarantee, and this is not a waiver of its right to damages. The parties at that time agreed to make the revision of the final statement by the chairman of the Arbitral Tribunal appointed in the arbitration clause together with a group of engineers of the Respondent, and the result must be approved by the representative of the Respondent, and it must be paid during two months from the date when it was delivered to the consulting engineer. The Claimant said that it acted in accordance with the contract.

The Claimant said that it submitted to the Respondent the detailed drawings "as built", considering that this means that the final statement is approved. The Respondent contested this and said that it did not give any approval.

The Tribunal said that the annex of the contract defined the dates of payment of all statements including the final statement after being reviewed by the chairman and being approved by the representative of the Respondent after the completion of all final surveying.

The Tribunal added that if the representative of the Respondent did not approve the remaining statements, the award was sufficient to replace his approval and to oblige the Respondent to pay this amount according to Article 210 of the Civil Code (see *supra*), because the Respondent abstained from giving the approval without any justifiable reason, and the approval given by the Tribunal is based on the following:

- The contractor deserves the value of all items agreed upon by the two working groups formed by the parties;
- The contractor deserves the value of the items approved by the representative of the owner or by the consulting engineer;
- All other controversial items were reviewed by the Tribunal and it deducted the value of the comments of the Respondent and awarded the net total of these items to the Claimant.

- (b) The claim for damages for delay: on this point the Tribunal said that according to the contract the last two statements as well as the final statement were not approved by the representative of the Respondent or by the consulting engineer, and the approval was made by this award and so there is no delay and the claim is dismissed.
- (c) Claim for differences in the prices of iron and cement: the Tribunal said that the contract provides that

if at the end of works it appears that the final result of all changes (except changes resulting from the change of the official prices of iron and cement) has made an increase or decrease exceeding 15% of the value of the contract, the owner may solely seek whether to amend the prices and to extend the period.

The Tribunal said that this does not mean that the increase was an acquired right of the Claimant because this Article talks about the change of official prices, while the case is that the official prices were cancelled and the prices became free, subject to the law of demand and supply, and such prices are not included in the said Article. So, this claim was dismissed.

- (d) The demands acknowledged by the Respondent: The Respondent acknowledged two of the demands of the Claimant: one for the amendments of sanitary works and the other for the amendments of electricity works, and said in one of its memos that it does not object to such works so long as it was approved by the consulting engineer. So, these two demands were honoured and the same principle applied to the amendments of the two villas of the owner.
- (e) Demand for the value of concrete floors: this demand is based on the agreement of parties to make floors of 10 cm of concrete, and in some places the concrete elevation was 30 cm and sometimes 40 cm and so on, and the difference of cost is requested by the Claimant.

The Tribunal refused to award the difference to the Claimant because it did not get the prior approval of the Respondent or his representative.

Claim for the extension of time because of the amendments of designs and drawings to cope with the permissible width of the beach. This claim was honoured by the Tribunal because the Claimant was obliged to wait for them, received them one by one to speed the works, and did not breach the date of delivery agreed upon. The Tribunal awarded it damages, in conformity with this formula:

$$\frac{\text{The value of the initial contract}}{\text{The duration of initial performance}} \times \text{Overheads according to prevailing ratios} \times \text{Difference of period} = \text{Damages}$$

- (f) Claim for damage by torrential rain: this claim was caused by torrents in the area of the works resulting in great losses. The Respondent had insured all his works and properties as well as those of the Claimant. When the Respondent was paid it refused to pay for the damage of the Claimant, because he put his stores in the way of torrents.

The Tribunal said that since the insurer paid for the losses of the Claimant, the Respondent is not entitled to take all the indemnity for itself and it must pay to the Claimant the amount evaluated by the Tribunal.

- (g) Claim for a percentage of the value of the sub-contracts: this claim stems from the sub-contracts as per the value of each. The Respondent refused to submit copies of these sub-contracts. As the arbitrators were empowered to act as amiable compositeurs, they said that according to the rules of justice and to the usages of tourism projects, they award 2% of the value they estimated for sub-contracts.

Dismissed claims:

- (i) The claim for the expenses of preparing claims;
- (ii) Lawyers' fees;
- (iii) Moral damage (not substantiated).

Additional claim related to the sales tax: in conformity with the law, the Respondent should pay this tax and the Claimant settled it on its behalf and the Tribunal awarded the Claimant this amount, at the legal rate of 2.9% on the final statement.

Claim for interest: the Tribunal awarded a legal commercial interest rate of 5% upon the value of some of the claims honoured.

The counterclaim:

1. The Respondent demands fines of delay, which should be applied on the first day defined for the delivery of any work or sector and until such delivery occurs. The Tribunal dismissed it because the minutes of preliminary delivery said that the committee will not apply any fine of delay. It was dismissed also in respect of the villas of the owner because no date for its delivery was agreed upon.
2. Demand of damages for bad smell in the rooms because of the thin waterproofing laid in the combinations: this demand was right and the Tribunal awarded a certain sum for each of the 350 rooms of the hotel.
3. Demand for expenses of preparing the counterclaim: this demand was dismissed.

The costs and fees of arbitration were two-thirds to be paid by the Respondent and one-third for the Claimant, and each party would bear the fees of its lawyers.

All other claims and counterclaims are dismissed.

Commentary

There are some comments about this case:

1. The Respondent was granted the period provided for in the Arbitration Act to nominate its arbitrator. The period ended and the nomination was not made and the Claimant became entitled to request the nomination by the court, and the court did.

The Respondent participated in the proceedings without objection to the formation of the Tribunal, but some time later it challenged the chairman and resorted to the court to remove the arbitrator appointed by the court and the court removed him.

This procedure is not right, because the appointment by the court is final and not appealable in conformity with Article 17.3 of the arbitration act, which provides at its end that:

“[the court’s] decision shall not be amendable by any form of challenge”. So, the first appointment by the court was not appealable in any way and the request for removal should have been dismissed. The only way of removal in this case is to challenge the said arbitrator, but may not be by applying for the nullity of his appointment.

2. When the court removed the said arbitrator (without lawful reason) it ordered the other party to pay the fees of the court and the lawyer’s fees. The court here erred in law because there is no “other party” in such a case. A party wishes to remove his arbitrator and the other party has nothing to do with this request; he neither objected to it nor approved it! The other party was not a party to this procedure except to have knowledge of the confirmation of appointment or of the removal. The other party did not have any claims or counterclaims in this procedure and may not be charged to pay any expenses or fees.
3. The parties made a submission document with arbitrators at first, but soon the Respondent changed its arbitrator in an unlawful manner and signed with the other party and the arbitrators a new submission document. This is not valid in matters of arbitration.

CASE NO. 14

Final award of 28 October 2000, case no. 161/2000

Arbitrators: Three Egyptian Arbitrators
Parties: Claimant: An African investment company
Respondent: An African tourism company
Place of Arbitration: CRCICA
Subject Matter: • construction of tourism units
Applicable Law: Egyptian law
Language of Arbitration: Arabic

Held

Where an assignment of rights is made from the contractor to its bank in relation to the initial contract of construction, the amendment of the contract between the contractor and the owner at a later date, to raise the value of works to about tenfold, without any mention of the assignment, shall mean that the amendment does not include further assignments.

Facts

The parties entered into two agreements in 1997 for the levelling of land and establishment of tourism units in a peninsula in an African country. The first agreement provided for arbitration:

Any dispute between the parties shall be settled by Cairo Regional Centre for International Commercial Arbitration.

Later on the agreements were amended by increasing their value, to become about tenfold of the initial value.

The Claimant's demands were to award it:

1. The outstanding amounts due;
2. Interest upon the amounts in no. 1 at the legal rate of interest as of the date due;
3. Saying that the day 6.6.1999 is the date of primary receipt of works and that the year of guarantee begins from this date.

The Claimant said that there were several contracts between the parties, the first of which was on 15.6.1997 entrusting to the Claimant the works of levelling land (being 75% of the works) and paving it with stones (being 25% of the works).

The Claimant said that it implemented the first kind of works (levelling), and that the Respondent declared that the value of the second phase (paving with stones) would be suspended until the completion of the works of foundations relating to another contract concluded on the same date above, by virtue of which the Respondent charged the Claimant to establish zone C, composed of eight individual units and two tripartite units. A down payment was paid to the Claimant and the following statements are to be deducted by 20% in settlement of the said down payment and the payment of the net shall take place during 21 days of the time of delivering the statement to the consultant engineer, otherwise the period of delay shall be added to the period of implementation of the project.

On 25.11.1997 the first contract was amended to increase the works and the contract prices, as well as the related items such as the down payment. Primary delivery was to be effected one year later, that is, 25.11.1998.

At the beginning of execution the municipality of the port informed the Claimant that the road by the sea was amended to be 100 m instead of 33 m, and this meant to go back with the execution works for 67 m. The new area behind was not levelled. According to the Claimant, the Respondent entrusted the new area to a local unauthorised contractor who delayed by more than four months in execution. Works of the Claimant began after the said period and payment for the previous works was stopped, in addition to some changes in the specifications made by the Respondent. After ten months from the beginning of the works by the Claimant, the Respondent notified it through the consultant engineer that the contract was terminated. The Claimant estimated the value of the works until that date and made a statement for 80% of the whole works. An inventory of the site and of stored material was made. The statement and the inventory were signed by the representatives of the parties with the representative of the consultant engineer. The Claimant demobilised its equipment and delivered the site free. As the Respondent did not pay the Claimant despite several claims, the Claimant brought its case to arbitration.

The Respondent requested the Tribunal not to admit all claims because the Claimant has waived all its rights in the first contract to a bank extending facilities to it. Accordingly the Claimant has no right to claim for payment and the said bank alone has the right to do so.

The Respondent requested to be awarded damages. The Claimant replied that the transfer of its rights related only to the first contract and its amount was delivered to the bank and the bank was no longer a creditor of the Claimant. The contract of November 1997 raising the price to nearly tenfold did not provide for any such transfer or waiver.

Accordingly the non-admissibility plea must be dismissed.

The Respondent said that it had withdrawn the works from the Claimant because 102 villas were not yet completed. The remaining period of execution was 14 days. Completion during such a period is practically impossible. The correspondence exchanged between the Respondent and the Claimant points out to what extent the Respondent was suffering from delay of the Claimant.

In another hearing the Respondent waived the demand for damages of delay, and said that it still insisted upon the plea of non-admissibility of the case because according to its records the bank still had debts against the Claimant.

Award

The Arbitral Tribunal discussed the plea of non-admissibility saying that it is true that the contract of 15.6.1997 contained an assignment of rights from the Claimant to its bank, but the Tribunal verified the amounts paid by cheques to this bank and found that it exceeds the amount of the assignment of 15.6.1997. Accordingly, the assignment of rights was terminated by final payment, and the plea of non-admissibility based on lack of quality of the Claimant is not well founded.

On the merits, the Tribunal said that the Claimant submitted to the Respondent during the execution ten statements and a final statement. These statements were not contested by the Respondent during the proceedings.

The Tribunal calculated the net value due to the Claimant and awarded it with interest at a rate of 4% per annum as of the date of initiation of the arbitration procedure and until final settlement.

As to the costs and fees of arbitration the Tribunal said that the Respondent shall bear them in proportion to what was awarded against it.

All other demands were dismissed.

CASE NO. 15

Final award of 29 January 2000, case no. 142/1999 *ad hoc*

Arbitrators: Three Egyptian Arbitrators
Parties: Claimant: An African enterprises company
Respondent: The Ministry of Defence of an African state
Place of Arbitration: CRCICA
Subject Matter: • Administrative contract of construction
Applicable Law: Egyptian law
Language of Arbitration: Arabic

Held

The “exceptio non adimpleti contractus” cannot be raised against a legal duty of delivery of public properties to a relevant authority to conduct and continue a public utility.

Facts

In 1977 the parties entered into a contract upon which the Claimant was obliged to buy and install a plant for the production of “W. Panel units”, which can produce annually a quarter million metres square of buildings, to be purchased from a North American company.

By the same contract the Claimant had to train the technicians of the Respondent in the design and installation of these units, to bring raw materials and the spare parts for regular commissioning for a period of 10 years, after which the Claimant shall return the factory to the Respondent in good condition. The Respondent undertook to entrust to the Claimant an annual quantum of works of 100,000 m² that was built on a site granted by the Respondent for ten years, with free water and electricity.

The Claimant undertook to insure the plant. The contract contained an arbitration clause:

any dispute arising between parties shall be settled by an arbitration tribunal assisted by experts so long as is possible.

Claimant’s demands are:

1. To dismiss all demands of the Respondent because they are contrary to the facts and the law;

2. To order the Respondent to pay the value of losses sustained by the Claimant according to the reports of the central auditing agency, from 1985 to 1990 and from 1991 till 1999, the date of delivery of the plant;
3. To order the Respondent to settle the remaining value after the amortisation of the plant;
4. To order the Respondent to pay the wages and salaries of 105 workers, technicians and employees until the date of delivery of the plant;
5. To order the Respondent to pay the expenses of bank finance for production, which is composed of three elements:

the remaining value of amortisation, the stored production, and the losses.

6. To award the Claimant the right to have the loss sustained and the profit lost;
7. To award the Claimant the right to have the expenses of maintenance, guards and insurance until the effective date of delivery.

The Respondent's demands are:

1. To dismiss all demands of the Claimant because they are contrary to the facts and to the law;
2. To dismiss the claim for losses, if any, because it resulted from the failure of the Claimant to distribute its products and if we review the contract we do not find any monopoly of production by the armed forces, especially if we read the Article saying that the Claimant has the right to invest the rest of the production (if any) in establishing buildings for third parties;
3. Claims 3, 4 and 5 are refuted because the Claimant retained the land and the plant after the defined period, while the contract provides that at the time of dispute and referral to arbitration, delivery must take place. The period before delivery is the responsibility of the Claimant;
4. To order the Claimant to pay the counter-value for the usufruct of land and constructions and equipment installed upon it, as well as the legal interest;
5. To order the Claimant to pay for the construction and equipment, which became unfit for use for the purposes agreed upon, as is evidenced by the minutes of delivery;
6. To dismiss all demands of the Claimant related to the loss sustained and to the profit lost, because they resulted from the Claimant's acts, and because the Claimant made an amendment to the activity of the plant to manufacture wood products.

The Claimant substantiated its demands saying that the production in the plant began in 1980, but the Respondent did not fulfil its obligation to buy 100,000 m² of the production and did not buy, except 21% of the minimum of its obligation. The marketing of the rest was impossible because there was no demand upon this kind of production used by the armed forces. The Claimant asked the Respondent each year to aid it in avoiding these losses. The Claimant said also that the expenses of bank finance was 15% and it could have avoided the loss if the Respondent bought the quantities agreed upon.

The Claimant added that it did not abstain from delivering the land and the plant, but expressed its wish to deliver after ascertaining that the damages it claims shall be negotiated.

The Claimant said that the contract with the Respondent is not an administrative contract because it does not relate to a public utility, and the government regulations of procurement were not applied thereto and there are no exceptional clauses in it for which the use of public law methods is required. Accordingly the contract is a civil one.

As to the amortisation of machinery and equipment, it said that amortisation did not exceed 28% and the plant was in good condition by 72%.

The Respondent replied that the quota to be bought by the armed forces is for encouraging the Claimant to continue in the market, as the rest of its production is about 150% of the quota of the armed forces. The Claimant made the first feasibility studies and pretended that it would be able to make the marketing. The Respondent gave the land with utilities free, paid the value of buildings of the plant brought to it, taxes and custom duties exemption over the period of contracting, and paid much to raise the capacity of the plant.

The Respondent refused to accept that the contract was a civil one and upheld that it is administrative and, if so, it has the right to reduce the quantities needed for the armed public utilities.

The Respondent submitted copies of hundreds of documents and papers of the Claimant as evidence of the volume of profit it realised from different activities it practiced, such as dealing in metal, glass and wood products.

The Claimant objected that the Respondent took over its papers and said that its possession of such papers was illegal.

Award

The Arbitral Tribunal said that the contract relates to a public utility administered by a public authority; nevertheless, it is not an administrative contract because no exceptional clauses are found therein, and as a result the Respondent cannot reduce the quantities agreed upon.

The possession of the papers of the Claimant by the Respondent was treated as legal possession because the Claimant had waived them at the time of the delivery of the plant.

The Tribunal tried to discover the nature of this contract and said it was not a company contract, in the sense of Article 505 of the Civil Code which provides that:

A company contract is a contract by virtue of which two or more persons undertake that each of them will participate in a financial project by presenting a quota of property or work, with a view to distributing the profit or loss resulting from such project.

The contract is not a company contract because there is no intention to contribute by the parties.

The Tribunal also said that the nature of this contract is not an enterprise in the sense of Article 646 of the Civil Code which provides that:

An enterprise is a contract by which one party undertakes to manufacture a thing or to do a work against a wage undertaken by the other party.

The Tribunal said that this contract is one of the un-nominated contracts. Accordingly, any breach from one of the parties to its obligations shall result in allotting damages to the other affected party.

The Respondent breached its obligation to charge the Claimant to provide the annual quantity agreed upon, and it was responsible for this breach, and it could not reduce the quantities agreed on as was the case in administrative contracts. Accordingly, the Tribunal considered the capacity of the plant to be 80% and calculated the deficit and awarded its price to the Claimant. The claim for wages of the workers is dismissed because the Respondent could give evidence that the Claimant continued its activity after the end of the contractual period (between 1980 and 1990). The Tribunal said that it was not just to conduct the activity for itself and ask the Respondent to pay for the workers and the guards. This applied also to the insurance upon the plant.

The Claimant had ceased delivery of the plant and the land for the period from 1990 till 1999 under the pretext that it would not deliver until the damages it alleges are paid. The Tribunal said that although Article 161 of the Civil Code says:

In synallagmatic contracts, if the juxtaposing obligations are due, each of the two parties may abstain from executing its obligation, if the other party did not execute its obligation.

This *exceptio non adimpleti contractus* cannot be raised against a public authority in the matters of public utilities because the jurisprudence and the doctrine are unanimous upon the rule of continuance of public utility without any interruption. Accordingly, the Tribunal calculated the rent of the land during the period of delay in delivery and awarded it to the Respondent.

As to the amortisation and the value of the plant the Tribunal said that it agreed to the amortisation of 28% and divided the 72% between the parties, and so the Respondent shall pay 36% to the Claimant.

The claims of financial expenses and the stored products were dismissed by the Tribunal because the Claimant exercised various activities, and it is not sure that the financing related to the “W. Panel”. On the other hand, the minutes of delivery did not state any products in the stores and no one referred to such a matter.

The Respondent had some counterclaims:

1. To have the sum equal to half the value of the plant.
2. To have half of the amount paid by the North American manufacturing company to the Claimant for defects in the plant.

These were dismissed because nothing in the contract permits the award of such amounts to the Respondent.

The demand of sums spent for raising the capacity of the plant and purchasing spare parts not available in local markets was honoured by the Tribunal.

The costs and fees of arbitration rest as already spent by each party.

Commentary

1. This case is a case of a BOT contract entered into in 1977 before this type of contract became widespread. It is worth stating that the idea of BOT contracts appeared and was regulated for the first time in Egypt by the Law of Concessions in 1947.
2. The nature of the contract was scrutinised by the Tribunal and it said that the intention of the parties was not aimed at making a company. In other words the “*affectio societatis*” was not existing in the contract.

CASE NO. 16

Final award of 31 October 1998, case no. 99/1998 *ad hoc*

Arbitrators: Three Egyptian Arbitrators
Parties: Claimant: An African tourism company
Respondent: A European construction company
Place of Arbitration: CRCICA
Subject Matter: • where the arbitration clause embedded in a contract provides for arbitration in all disputes between parties (and did not, say, result from this contract specifically), could arbitration be conducted in any dispute emanating from any other contracts between parties where such contracts do not comprise an arbitration clause?
Applicable Law: Egyptian law
Language of Arbitration: Arabic

Held

- 1. As to the issue of the non-arbitrability of the second contract which does not provide for arbitration, the arbitration clause in the main contract provides for all disputes and did not state that they should be related to the contract in which it was embedded. This arbitration clause is valid for arbitration in whatever disputes arising from any other contract or from liability of any other source of obligations such as torts.*
- 2. The mutual negligence of parties prevents either of them from claiming damages from the other, because the negligence of each breaks the lien of causality between error and damage and in such case each party bears the consequences of its negligence.*

Facts

In 1996 the Claimant entered into a contract with the Respondent to complete designs and manage execution works of a hotel in the African country. This contract contained an arbitration clause saying:

The settlement of all disputes and differences which may arise between Parties shall be by resorting to arbitration in accordance with the law of arbitration, and the seat of arbitration will be Cairo.

Seven months later a dispute was triggered between the parties in one day and the two parties exchanged notices of rescinding the contract if the other party did not comply with its demands. The Claimant gave a notice period of seven days and the Respondent gave fourteen days.

At the end of the notice periods the contract was dissolved by another notice from the Claimant at the end of the seven days, and the arbitration proceedings began six months later.

The parties and the arbitrators agreed that the period for giving the award shall be six months, the language of arbitration shall be Arabic, and translation from or into English is allowed. An interpreter was retained in one of the hearings. The Claimant said in its statement of claims that its contract with the Respondent was based on three points:

1. Completion and delivery of the project before a given date;
2. All works must be of five star world hotels;
3. Implementation shall be conducted upon economic costs.

In return for these works the Claimant had to pay: lump sum total fees, lump sums fixed for the expenses of the supervising agent, and lump sum fixed fees for the follow up, harmonisation and compliance of designs.

The Claimant alleged that the Respondent was not performing at the level expected from an international company and the weakness of the capabilities of its staff became apparent during the seven months preceding the dissolution of contract.

Some of the breaches were:

1. Failure to appoint persons with efficiency and expertise for supervising the project; failure to prepare the plan of project costs; failure to follow up, to comply and to harmonise the designs of the project; failure to supervise the works of different contractors; failure to make a system for quality control for the project; failure to verify the invoices of the contractors; failure to prepare the principal programme of the project; failure to replace the Claimant in its capacity as agent thereof in connection with the mock-up room; failure to complete the works in the periods agreed upon; failure to keep its obligation of secrecy; failure to pay the costs of transport of its employees to the site; exceeding the limits of its powers according to the contract; failure to deliver the project in an orderly manner at the time of dissolution of the contract; and failure to deliver the documents of the Claimant at the time of departure from the site.

The Claimant requested the Tribunal:

1. To say that the contract was mutually rescinded;
2. To order the Respondent to pay damages for substantial damage and for moral damage with legal interest;
3. To order the Respondent to pay arbitration costs and lawyer's fees;
4. To say the Claimant retains the right to claim any other losses that may occur or may be discovered after the statement of claims.

The Respondent said in its statement of defence that the Claimant implemented the contracts with it in bad faith. It did not pay the dues of contractors and

terminated the contracts after satisfying its needs at the cheapest prices or without consideration. It did not provide dwellings for the work force. It did not provide computers and means of telecommunications. It did not provide a laboratory for tests near the site; it did not bring visas of residence for the managers and employees; it did not provide sufficient quantities of potable water for the use of the workers at the site, and some of them were carried to the hospital as a result of the struggle to find water, etc. Hundreds of workers left the site because of bad conditions.

The Respondent counter-claimed the following: to order the Claimant to pay damages at a certain amount susceptible to amendment according to the charges and expenses of its managers and employees.

As to the principal claim, the Respondent requested to be dismissed and to order the Claimant to pay all arbitration costs and arbitrators fees. The issue of the mock-up room was said to be subject to another contract and not subject to the arbitration clause agreed upon in the main contract.

In developing its demands, the Claimant requested damages for the lost profit because of the delay in delivering the hotel and being deprived of investing in it during the period of delay. The Claimant also requested damages for being obliged after the termination of the contract to recruit workmen to reorganise the supervision of the project after the departure of the Respondent, for the prices of air tickets for some of the staff of the Respondent and fees of telecommunications by the Respondent's staff.

The Respondent, in its attempt to develop its defence said that the contract was not a construction contract, but a contract to manage the phase of execution of constructions. This means that its obligation was an *obligation de moyen*, while the obligation of the Claimant was an *obligation de resultat*.

This meant that the duties of the Respondent were to endeavour and do best efforts and care expected from a reasonable party in executing its obligations and it was not responsible if the works could not be completed on the fixed date.

Award

The Arbitral Tribunal said that the dispute had arisen because the Respondent did not implement its obligations and because the Claimant withdrew the work without just cause – these causes are interconnected and this was why the Tribunal was going to deal with them together.

1. The issue of mutual rescinding of the contract:

The parties have expressed their willingness to the mutual rescission of the contract.

Accordingly, mutual rescission here is express and not implied.

The Respondent considered the mutual rescission to mean that the Claimant was not entitled to use the *exceptio non adimpleti contractus* or “the right of lien”.

The Tribunal said that the contract was mutually rescinded.

To liquidate the problems of rights and obligations after the mutual rescission the Tribunal said:

1. The contract contained an obligation that the Respondent shall appoint sufficient resident workers in the posts stated in the table No. 1. On comparing those appointed with the said table it appeared that the Respondent did not fulfil this obligation in due time.

The Respondent said that this was due to the breach of the Claimant to provide residence to workers. The Claimant said that this was not true and in all cases the Respondent could lodge them in hotels and request the Claimant to pay for it.

The Tribunal said that the Claimant was right and the Respondent had acted erroneously.

The sanction for this according to the contract was to give the Claimant a right to reduce the payment of wages to the Respondent by 10%, as a fine.

2. The Claimant said that the Respondent did not provide efficient persons and experts for the supervision of the project.

As the contract says on this point that the c.v. of each of those persons had to be sent from the Respondent to the Claimant to get the approval of the owner, the Tribunal said that this meant that the Claimant knew everything about those persons and did not object to their appointment and a new objection was not acceptable.

3. The Tribunal said that the Respondent presented the budget of the estimated costs to the Claimant too late and had failed to comply with this obligation.
4. As to the obligation of following up designs and their compliance with the purposes and their harmonisation, it is noted that the Claimant had paid 93% of the dues of the Respondent for this item and this means that this obligation had been fulfilled and the Tribunal dismissed the request of the Claimant in this regard.
5. Duty to supervise contractors: the Respondent could not issue instructions to contractors, but it was bound to implement instructions drawing the attention of the Claimant to any defects in the works and define the consequences thereof.
6. The system of quality control: the Tribunal's opinion was that both parties were negligent in preparing an equipped laboratory for tests and presenting the system of quality.

The mutual negligence of parties prevents either of them from claiming damages from the other, because the negligence of each breaks the lien of causality between error and damage and in such a case each party bears the consequences of his negligence.

7. As to the mock-up room, it is not right to say that this issue is not arbitrable because of being subject to a contract which does not provide for arbitration. As the arbitration clause in the main contract provided for all disputes and did not state that they should be related to the contract in which it was embedded, this arbitration clause is valid for arbitration in whatever disputes arose from any other contract or from liability of any other source of obligations such as torts.

Accordingly, the Tribunal ordered the Respondent to pay damages for negligence to follow up the issue of the mock-up room.

8. The obligation to complete the project by a certain date: the Tribunal's opinion was that the professionals say that it meant exerting care and diligence, but the required degree of care here was of a high standard. It was not the care of ordinary conduct but the conduct of a prudent person. The Tribunal said that the late completion was due to common negligence of the parties.
9. The obligation of secrecy in the eyes of the Tribunal does not exist, because the contractors who knew about the financial statements and about the future plans were involved in these matters. On the other hand, the Claimant did not show the extent of secrecy breach and the damage resulting therefrom.
10. Transport expenses: on this point the Tribunal said that the Claimant was bound to pay for the air tickets of visitors, and the Respondent is bound to pay for its employees.
11. The claim of damages for leaving the site in a disorderly manner was not substantiated and the Tribunal dismissed it.
12. Damages: the Tribunal said that the damages requested by the Claimant should be refused because of the negligence of both parties. Accordingly the damages for lost profit and moral damage were dismissed.
13. The Tribunal dismissed the request of the Respondent to have damages for demobilisation.
14. The Tribunal awarded interest at the rate of 5% per annum, for the amounts awarded to each party.

The Claimant shall pay to the Respondent: the wages of workers (reduced by 10%), the rest of the fees for designs and the liquidation of the down payment. Arbitration costs are borne by the parties on equal shares and all other claims or counterclaims are dismissed.

CASE NO. 17

Final award of 31 January 2000, case no. 133/1999

Arbitrators: Three Egyptian Arbitrators
Parties: Claimant: An African construction company
Respondent: A real estate investment company
Place of Arbitration: CRCICA
Subject Matter: • measurement of works
Applicable Law: Egyptian law
Language of Arbitration: Arabic

Held

The owner is entitled to stop the works before completion, provided that he compensates the contractor for all expenses he has incurred, for the work he has done and the profit that he would have made if he had completed the work.

Facts

The parties entered in 1998 into a contract for the establishment of 100 dwelling units to be finished in two phases: the first for 55 units and the second for 45 units. It was agreed that this contract begin at the time of delivery of the site, the date of receipt of the drawings and the licences of establishing, or the date of receipt of the down payment, whichever is later.

The parties fell in dispute and one of them resorted to arbitration, according to the arbitration clause:

The two parties agreed that any dispute which may arise between the owner and the second party in relation to the execution or interpretation of this contract shall be finally settled by arbitration.

Arbitration shall be held in Cairo, in CRCICA, Zamalek, Cairo.

Either party may demand arbitration. Each party shall appoint an arbitrator at his choice and shall notify the other party within fifteen days. If the other party did not appoint its arbitrator as stated before, the first party shall apply to Cairo Regional Centre for International Commercial Arbitration to appoint a second arbitrator. The two chosen arbitrators shall choose an umpire within 15 days. If they fail to do so, Cairo Regional Centre For International Commercial Arbitration shall, upon the request of the two arbitrators, appoint the umpire by whom the

Arbitral Tribunal becomes complete for the consideration of the dispute and issuing the decision.

The award of the Tribunal shall be non-appealable by the ordinary way of appeal and it is to be noted that the arbitration shall not suspend the works in the project subject to this contract. The owner is entitled to complete the work by its own means without waiting for the result of arbitration, in line with the rules, conditions and items aforementioned in this contract.

The Claimant requested:

1. To order the Respondent to pay the expenses of mobilisation and site investigation;
2. To order the Respondent to pay 10% of the value of the works which were implemented by the Respondent for itself while it was part of the contract;
3. To order the Respondent to pay to the Claimant the profit lost and the loss sustained as a result of depriving the Claimant from establishing 47 units to be completed in 1999;
4. To order the Respondent to pay the loss of the Claimant in connection with works completed after the period of the contract;
5. To grant the Claimant an extension of time for the period of seeking to appoint a consulting engineer for the owner to replace the resigning engineer;
6. To order the Respondent to pay damages for breaching its obligations;
7. To order the Respondent to pay damages for giving the Claimant drawings other than the drawings upon which it calculated the prices;
8. To order the Respondent to pay damages for delaying the reimbursement of the Claimant's dues;
9. Damages for the delay of drawings;
10. Damages for the variations and additional works;
11. To order the Respondent to return the letter of guarantee for works not entrusted to the Claimant;
12. To order the Respondent to return the instalment of insurance upon works not entrusted to the Claimant;
13. Setting up a committee for delivery;
14. 10% damages for electrical works made by a contractor from the part of the Respondent;
15. To order the Respondent to pay 10% of the value of the finishing works it makes or in case it entrusts them to another contractor.

The Respondent's counterclaims were:

1. To be awarded damages for non-completion or bad completion;
2. To order the Claimant to pay for the mobilisation and site investigation;
3. Fines of delay;
4. Interest upon the down payment;
5. Damages for bad quality of executed works;
6. To dismiss all the demands of the Claimant;
7. To order the Claimant to pay all the costs and fees of arbitration.

In the first hearing, the parties agreed that the arbitrators were entitled to settle the case *ex aequo et bono*.

In the following hearing the Respondent announced the death of its arbitrator and introduced its new arbitrator, and the two parties agreed that they did not have any objection to the formation of the Arbitral Tribunal.

The Claimant said that the contract with the Respondent comprised one hundred housing units, and it had the right to the difference according to Article 663.1 of the Civil Code:

An employer may terminate the contract and stop the work at any time before the completion of the works, provided that he compensates the contractor for all expenses he has incurred, for the work that he has done and the profit that he would have made if he had completed the work.

The Claimant substantiated its claim for moral damages by stating Article 222 of the Civil Code.

Damages also include compensation for moral prejudice. The right to compensation for moral prejudice cannot, however, be transmitted to a third party, unless it has been fixed by agreement or unless it has been the subject of legal proceedings. The judge may award compensation for moral prejudice only to spouses and to relatives up to the second degree, by reason of grief caused to them by the death of the victim.

The Arbitral Tribunal allowed several engineers working with each party to appear and bear witness upon the facts. One of them said that he worked with the previous consulting engineer who resigned because of the delay of works occurring from the Respondent at a percentage of 80% of the whole delay. Another said that the Claimant was the cause of the whole delay, and that such delay is normal in construction contracts. A third engineer said that there was delay from the Respondent in providing drawings to the Claimant. He added that the tender was launched, and cancelled because of the lack of documents and then launched again. The Respondent was hesitant to award works to contractors because it was not well-informed in the circumstances of the market.

Another engineer gave witness that the mobilisation was made in two phases: one for preparing the land, made by the Claimant, and the other for making the roads, made by the Respondent.

The Tribunal moved to the site to see the details of every demand. The Tribunal relied on the statements of witnesses on the point of roads and preparation of land and awarded the price thereof to the Claimant.

Award

The contract contained an Article saying that:

The owner is entitled to cancel any part of the works before the beginning of it, without need of the approval of the second party, and the calculations shall be made upon the quantities implemented on the site in accordance with the prices

attached to this contract. The second party may not apply for damages except if the cancellation exceeds 25% of the value of the contract.

The Tribunal applied this Article and said that the Claimant was not entitled to claim for 25%, which means 25 housing units, and it has the right to be compensated for 22 units, to be calculated on the basis of the profit expected in the light of the circumstances surrounding the execution of works, and this profit was defined by the Tribunal to be 5%. But the Tribunal ordered the Respondent to bear the insurance instalments of the 25 units withdrawn.

The claim for moral prejudice was dismissed because there was no proof of it. This claim was not included in the aforementioned list of claims but was raised thereafter.

Claim 1 was accepted in its first part, and some mobilisation expenses were allotted to the Claimant, but was dismissed in its second part, being untrue.

Claims 3 and 4 were dismissed, being also untrue.

Claim 5 was partly accepted at a reasonable estimate because damages were exaggerated in the estimate of the Claimant.

Claim 6 (drawings) was dismissed because the said drawings and the related works were not defined.

Claim 7 (of interest) was accepted and the Tribunal awarded interest at the rate of 11% after 15 days from filing the statement with the consulting engineer, and 30 days after the said date the rate became 14%, in conformity with the brief of the general and particular conditions signed by the parties and the consulting engineer. The Tribunal added that the amounts previously settled by the Respondent shall be deducted from this claim.

Claim 8 (losses related to drawings) was dismissed because no evidence was found in relation thereto.

Claim 9 (variations and additional works) was accepted to about 15 types of works.

Claim 10 (LG) was dismissed because the contract provided that the letter of guarantee shall continue to persist for one year after the completion of works. As the Claimant was still working during the arbitration, it could not apply for returning it because it was needed for the good performance of the contract.

Claim 12 (setting up a committee for delivery) was dismissed because the arbitration clause said that its use is for the disputes that may arise and this point was not disputed between the parties and was not subject to arbitration.

Claim 13 (10% of electrical works made by a separate contractor) was accepted because it was provided for in the contract.

Claim 14 (10% of finishing works of units not entrusted to the Claimant) was dismissed because it was provided in the contract that these works are subject to the approval of the Respondent and to entering a separate contract therefor.

The Tribunal turned to the counterclaim in which the Respondent alleged that it suffered damage as a result of the negligence of the Claimant and lack of quality of the works.

The Tribunal noted that adequate preparation for the project in advance was overlooked on the part of the Respondent.

There were several consultants for the project having divergent opinions. The drawings were not delivered to the Claimant as a complete set, in addition to changes made therein. The licences of the building were delayed, and in such circumstances it could not be said that the Claimant was negligent.

As to the lack of quality of execution, some of the engineers giving evidence said that the Claimant's execution was not bad, but moderate and it was cooperating with the consultants to rectify any error.

Accordingly the first, second and fifth counterclaims were dismissed.

The fines of delay were dismissed because there was no timetable agreed upon for the works.

The fourth counterclaim was dismissed because the works done exceeded the down payment by several millions.

As to the costs and fees of arbitration, the Tribunal ordered each party to pay half of it.

Commentary

In this case the Tribunal awarded interest of 11% and 14%. These rates were agreed upon by the parties, although they exceed the maximum contractual rate of 7% defined by Article 226 of the Egyptian Civil Code.

The Egyptian new Code of Commerce provides that the rate of interest for commercial acts may reach the rate applied on loans and discount by the Central Bank, but this provision (Article 50.3) came into force as of 1 October 1999. The loan and discount rate is nearly double the legal interest rate of 4% in civil matters and 5% in commercial matters (presently around 10%).

Consulting Engineering

CASE NO. 18

Award of 29 April 1999, case no. 118/1998

Arbitrators: Three Egyptian arbitrators
Parties: Claimant: An African building and construction company
Respondent: The Ministry of Defence of an African State
Place of Arbitration: CRCICA
Subject Matter: • obstacles in building a wave barrier in a beach
Applicable Law: Egyptian law
Language of Arbitration: Arabic

Held

The liability for drawing and design is shouldered by the architect and not the contractor except where defects are clear enough and known to the contractor.

Facts

The two parties entered into a contract in 1991 for erecting a barrier for waves in a beach on the Mediterranean Sea to allow the exercise of some sea sports. The contracts contained the following arbitration clause:

Any dispute that may arise out of this contract shall be settled by three arbitrators; each party appoints one and the parties agree upon the third arbitrator, and if they differ the Ministry of justice shall appoint him. The award issued by the arbitrators according to this contract shall be final and not appealable.

Works began and were about to be finished when the parties were faced with the problem of sediments and residues gathering around the barrier and the problem of acute corrosion and abrasion on the east side of the barrier.

The parties held a meeting and arrived at a supplementary agreement in 1994 introducing amendments to the execution of the barrier by adding a new 60 m extension to the body of the barrier towards the west, and making a new opening by deleting some sectors in the western vertical barrier, as well as continuing the completion of purging works to arrive at the original bottom inside the area between the barrier and the line of the beach. There were two canals and a bridge to be established, which were deleted by this agreement.

The statements of executed works were not paid to the company, therefore it stopped working and resorted to arbitration, asking the ministry to appoint its arbitrator.

In its statement of claims, the Claimant stated the amount it had received for the whole works done and requested the difference due, and to order the ministry to pay the costs of arbitration.

The Claimant stated the obstacles that hindered the execution and were the reason of stoppage of the works for months, and the refusal of the Respondent to pay its dues while the Claimant was obligated to pay for its engineers and employees without doing any work, and to do that it was obliged to take loans from banks at the current banking rates of interest. The Claimant requested the Tribunal to order the Respondent to pay its dues together with the costs of arbitration and fees of arbitrators. The dues contained a claim of 25% as damages for the delay in the settlement of dues, taking into consideration that if it could obtain its monies it would have received 25% as profits from other operations it was engaged in, in accordance with Article 221 of the Civil Code which provides that:

The judge will fix the amount of damages if it has not been fixed in the contract or by law. The amount of damages includes losses suffered by the creditor and profits of which he has been deprived, provided that they are the normal result of the failure to perform the obligation or of delay in such performance. These losses shall be considered to be a normal result if the creditor is not able to avoid them by making a reasonable effort. When, however, the obligation arises from contract, a debtor who has not been guilty of fraud or gross negligence will not be held liable for damages greater than those which could have normally been foreseen at the time of entering into the contract.

The Respondent answered that the Claimant did not fulfil its obligations because it did not establish the barrier of waves by following the technical principles, and this led to the appearance of residues in front of the beach. The Claimant could not cure it, and the Respondent could have rescinded the contract according to its provisions. The contract provides that the Claimant must examine the drawings and the designs as if they were made by the Claimant and this must be done before the beginning of execution and it should notify the consulting engineer or Respondent at that time. This examination imposed upon the Claimant the duty of ensuring the standard of design behind the barrier according to the contract and the technical principles. This failure is the liability of the Claimant scientifically and on the standard of execution. The contract provides that the Claimant shall establish the barrier in accordance with the principles of the industry, which meant that the barrier must fulfil its purpose. The Claimant entrusted the drawings and the designs to a consulting engineer on its part and paid his fees and it had to bear the consequences of bad execution. To avoid rescinding the contract the Claimant suggested rectifying by the supplementary agreement concluded in 1994 and by expenses to the side of Respondent.

The Respondent said that the Claimant continued to breach the contract and the supplementary agreement as it did not complete the works of purging to achieve the original bottom, did not make the required openings in the body of the barrier and it threw the waste of purging on the west side of the barrier instead of the east side, as agreed in the contract. The Respondent referred the matter to the Ministry of Water

Resources which reported as follows:

The main reason for residue gathering is the wave barrier. A sea survey was made and it revealed that the barrier caused the stagnation of water and raised the percentage of pollution and upset the equilibrium of the beach area, and this was seen from the corrosion in the east of the beach. The solution is to undergo the barrier completely and to raise the debris from the sea.

Accordingly, the Respondent requested the Tribunal to say that the contract is rescinded and to order the Claimant to pay damages including the expenses of the destruction of the barriers, raising the debris and establishing a new safe barrier. The Respondent also requested that the Claimant be ordered to pay arbitration costs and fees.

The Respondent also requested that the Claimant be ordered to return all the amount previously reimbursed from the Respondent to it with compound interest and to dismiss all demands of the Claimant.

The Claimant said that it cannot make all the studies required itself, because such studies last for many years, and it is supposed to be made by the engineers of the Respondent as it costs millions of dollars. It also said that the Respondent paid more than 80% of its dues, and if execution was defective it would not have paid these amounts. When the parties met and made the supplementary agreement, no comments were made by the Respondent in regard to the finished works. The Claimant alleged that it did not make the drawings and designs but the engineering maritime branch of the Respondent Ministry made it, and submitted as evidence a copy of its message to the Respondent asking for drawings and designs to get the necessary approval from the Authority of Protection of Shores before the execution, but the Respondent refused saying that the area belongs to the armed forces, which do not require any approval from any other authority. After the problem of corrosion and residues appeared the Respondent invited the Authority of Protection of Shores to give the possible solution.

In a later hearing the Authority of State Litigation appeared before the Arbitral Tribunal representing the Ministry of Defence (Respondent) and presented a plea of non-competence of the Tribunal saying that a new law provides for the necessity of the approval of the competent minister to arbitrate. The Claimant said that this was not necessary because this law was issued after signing the contract and the law does not have any retroactive effect.

The Tribunal ordered that the plea of non-competence be joined to the merits of the case to issue one award for both.

Award

The Arbitral Tribunal discussed the plea of non-competence and said that it was dismissed because the approval of the competent minister is required in the case of an administrative contract, and in this case the contract is a civil one for the

following reasons:

1. The subject matter of the contract is an area of a beach used for summer days and this is not a part of the functions of the Ministry of Defence and is not a public utility for which administrative contracts are entered into.
2. The clauses of the contract are mere civil clauses and the Ministry did not use the methods of public law as we do not find any exorbitant or exceptional clauses in this contract.

Accordingly, the plea is dismissed as the arbitration clause does not need any approval from the minister. On the other hand, this new law has no retroactive effect. The counterclaim of the Respondent was discussed by the Tribunal as follows:

1. The Claimant is not responsible for the problem of residues as this phenomenon, as well as that of corrosion, are ordinary matters that appear after the establishment of such a barrier which results from the change of the balance of the shore area.
2. No failure was alleged by the Respondent regarding the finished works and the statements 1–10 were paid, a matter which shows that the Respondent was satisfied and had no comments, otherwise it would have rescinded the contract.
3. The Arbitral Tribunal was convinced that the drawings and designs are not the responsibility of the contractor (Claimant) but the responsibility of the architect chosen by the Claimant and approved by the Respondent.
4. The Respondent alleged that the obligation of the Claimant is an *obligation de resultat* and the result was not achieved because the use of the barrier was not realised. On the other hand, the Claimant is responsible for delivering the work and this was not completed because the Claimant withdrew the workers and the equipment from the beach and refused to continue.

The Arbitral Tribunal said that these allegations are unfounded because the corrosion and residues are natural in such cases, and unavoidable. All the suggestions made by the Respondent and by the professors of universities invited did not lead to a solution, and at last a decision was taken by the Respondent to destroy the barrier completely, which was done and it was not the fault of the Claimant.

From the foregoing, the Tribunal said that the counterclaim was dismissed.

The Tribunal also arrived at the conclusion that the Claimant has a right to its remaining dues but without interest, because these dues were not final but contested.

The claim for 25% as damages was dismissed because the Claimant could not give good grounds for it.

The arbitration costs and fees were distributed between parties on equal shares.

CASE NO. 19

Final award of 30 September 1998, case no. 108/1998 *ad hoc*

Arbitrators: Three Egyptian Arbitrators
Parties: Claimant: An African consulting engineer
Respondent: An African tourism company
Place of Arbitration: CRCICA
Subject Matter: • fees on consulting engineering
Applicable Law: Egyptian Law
Language of Arbitration: Arabic

Facts

Claimant (a consulting engineer) entered in 1995 into a contract with a tourism company to provide consulting services for studies and design of a five star hotel on one of the beaches, and some villas around the hotel to be sold. The said contract contained an arbitration clause saying that:

If a dispute arises between the two parties related to this contract or its implementation, or the interpretation of its provisions, and having a technical or administrative or financial nature, and the two parties failed to solve it by mutual understanding as illustrated in the previous article, such difference shall be referred to an ad hoc arbitral tribunal upon request from both parties or either of them, according to the following:

A. The arbitral tribunal shall be composed of three arbitrators; one to be appointed by each party within fifteen days of receiving a notice from the other party requiring arbitration.

The two appointed arbitrators will nominate the third arbitrator who presides over the tribunal, within fifteen days of their appointment.

If a party fails to appoint its arbitrator or if the two chosen arbitrators fail to nominate the third arbitrator during the said period, the claimant may apply to the chairman of the Syndicate of Engineers or to the chairman of the Association of Consulting Engineers to appoint the third arbitrator or to appoint an arbitrator for the abstaining party, as the case may be.

Arbitrators so appointed may act as amiable compositors.

B. The arbitral tribunal may request the assistance of experts if it finds this necessary, examine the documents presented by either party and hear their points of view. It will define the place and time of hearings, the schedule of its work and the fees of arbitrators and experts.

The arbitral tribunal shall convene for the first time during fifteen days from the date of appointing its chairman.

C. The arbitral tribunal will give the award during three months from the date of the first meeting and it may extend it for further period or periods as need be. The award shall be final and binding upon the two parties and not appealable.

D. The arbitral tribunal is not bound by the rules of the law of civil and commercial procedure except the essential guarantees of the parties.

E. The provisions of this article, in addition to the documents stated in the previous article, form a submission clause to arbitration and the signature of the two parties on the contract, its conditions and annexes as acceptance of this submission which gives the tribunal the right to consider the arbitration and to conduct it.

The previous Article referred to says:

If one party sees that it has the right to amend the amounts due by virtue of this contract or to amend the period necessary for the completion of services or otherwise, it will send to the other party a detailed written claim supported by its papers and documents and the two parties will do their best to settle them by a settlement acceptable to both of them during sixty days from the date they are presented.

If the two parties disagree in respect of this claim or did not arrive at a settlement during the period stated in the preceding paragraph, the claiming party may take steps to refer the matter to arbitration, and in all cases the parties shall continue to implement their obligations according to this contract during the examination of the claims or during the arbitration.

The Claimant's demands are to award him some amounts as follows:

- An amount representing the rest of his fees agreed upon in the contract;
- An amount for the additional works agreed upon after the increase of the surface and the amendment of the designs and the drawings related to this surface;
- An amount as fees of studies made for the building of services related to hotel beach cabins.

The Claimant explained his claims saying that the Respondent made substantial changes affecting the planning and construction after approval, and requested the implementing drawings, also after approval, and the Claimant made these changes and amendments and the parties agreed upon the additional fees guided by the original fees and period.

The Claimant said that the services he rendered included:

- The amendment of the hotel from four star to five star and increasing the number of rooms from 250 to 305 rooms and suites, and amending the dwelling of the employees after its implementation and getting licences for these works;
- Amending the planning of the general site and getting the approval of the Respondent and the licencing authority. This amendment included corridors, ways, the architectural composition suited to the new hotel beach cabins and the infrastructure;

- The preparation of dwelling units, beach cabins, employees residence and commercial shops.

The Claimant alleged that the Respondent took all drawings, architectural, construction and electro-mechanical disks belonging to him and to two other consulting offices working with him and under his responsibility.

The Claimant said that he gave the Respondent all the architectural ideas and the study of the additional programme with different capabilities for permission to add these buildings to the general view. He had amended the levels of roads to be qualified for the addition of these buildings in the future, together with harmonisation with the neighbouring project on the west site. But the Respondent took all these services and conveyed them to another consulting office to implement the studies and make the drawings of the additional building without the approval of the Claimant.

The Respondent requested to dismiss the demands of the Claimant and made a counterclaim as follows:

- To order the Claimant to return amounts of fees received without any right;
- To order the Claimant to pay damages for delay;
- To order the Claimant to settle the expenses of construction and electro-mechanical works;
- The Respondent retains its rights to have the profit lost and the loss sustained and all other rights;
- To order the Claimant to pay the costs and fees of arbitration, as well as lawyer's fees.

The Respondent substantiated its demands and counterclaims saying that:

- The Claimant did not implement his contractual obligations, therefore a writ of summons was served upon him by the Respondent to implement it but he did not comply. As a result, the Respondent rescinded the contract because only 50% of the services were executed and requested the Claimant to return the excess of fees received.
- The Respondent also said that the Claimant resorted to the Association of Engineers asking for the appointment of an arbitrator for the Respondent. This application was fraudulently made to do harm to the Respondent, as the Arbitral Tribunal was formed and held its first hearing one month before the contact of the association with the Respondent.

The Respondent retains the right to have damages for this bad faith.

- The Claimant did not present any works related to the phases 1, 4 and 5 of the required services and works.
- The Claimant did not implement his obligation to present the drawings and licences of the hotel which represent about 50% of the contract value.
- The Claimant did not present any drawings for licensing the sports club.
- The Claimant submitted 21 specimens instead of 55 specimens.
- The total works presented for licensing residence and services is 45.76% of the project and 37.939% of the hotel.

Award

The Tribunal retrieved the final demands of parties as follows:

A. Claimant: his claims are the same as before with an increase in the amounts and with interest at the rate of 5% per annum, and to make the Respondent bear the costs and fees.

B. The Respondent's demands are as follows:

- To recover the difference of fees received by the Claimant;
- To apply the fine of delay upon the Claimant;
- To allot it damages for the completion of the works withdrawn;
- To give damages for the profit lost and loss sustained;
- To dismiss the final claims as amended;
- To order the Claimant to pay the costs and fees of arbitration.

The Tribunal said that, because of the close relations between demands, it will treat identical demands together instead of one by one.

Accordingly, the Tribunal took the demand of fees with the counterclaim of recovering the fees received without any justifying right, and stated the relevant items of the contract as follows:

- The Respondent is obliged to settle the dues of the Claimant in accordance with the provisions of the contract, its conditions and its annexes, and the Respondent shall take the related decisions in writing in all matters submitted by the Claimant for approval or for giving an opinion, during a reasonable period to be fixed by the Claimant in a manner that may not delay the performance of services.
- The Respondent, for exceptional circumstances or for its own reasons, may decide, by virtue of a written notice, to cancel all the phases of consulting services remaining with the Claimant or to delete integrated parts or to rescind the contract.
- The periods of completion of consulting services as shown in an annex, and further agreements entered into by the parties after the date of this contract, shall begin from the date of giving a written notice to the Claimant to start the engineering services entrusted to him and complete by the end of the period referred to, augmented by the extensions prescribed by the provisions of this contract and its conditions.
- The Respondent may rescind the contract and be contented with this vis-à-vis the Claimant or may withdraw the work from him and have it completed by others and claim suitable damages if needed.
- In case the Respondent requests the Claimant to make substantial modifications related to planning and construction sides previously approved by the Respondent or to repeat implementing drawings, the Claimant shall effect them and the two parties shall agree to the additional fees to be paid and the necessary period for their completion guided by the original fees and period.
- The Claimant may rescind the contract in case the Respondent falls into bankruptcy or delays in taking decisions on matters submitted for approval or in case of delay in the settlement of amounts due to the Claimant.

The Claimant requested in the final phase to have the fees of the two consulting offices working under his responsibility. The Respondent said that these offices were sub-consultants proposed by the Respondent to be assistants for the Claimant and the Respondent acknowledged their fees and was prepared to pay to them directly.

The Tribunal accepted this and dealt with the fees of the Claimant himself and found that each party denied the allegations of the other.

So, the Tribunal relied on the documents presented by them:

- In one document the Claimant said that he had been exempted from the fourth and fifth phases of services, but the Respondent said that no such exemption is evidenced. On the other hand, the Claimant requested fees for these two phases despite the fact that he did not provide any services in these phases. The Tribunal calculated the services provided by the Claimant and said that his fees regarding these services are subject to a withholding tax of 15% to be deducted from the fees of the Claimant and paid by the Respondent to the Taxes Administration. This calculation resulted in the indebtedness of the Claimant to return 15% of the fees he had received before and the Tribunal awarded this amount in favour of the Respondent.
- The Claimant requested damages for moral and substantial prejudice, while the Respondent requested to apply a fine provided for in the contract for the delay. The Tribunal said that the damages for the Claimant were not substantiated and the documents revealed that there were several correspondences from the Respondent requesting the Claimant to adhere to the time schedule and finally the Respondent applied the item of rescinding the contract.

So, this claim was dismissed.

The counterclaim was also refused because the Respondent used its right to rescind and did not raise the item of fines at all and it is, thus, considered to have waived it.

The Claimant requested fees for additional work and explained this work as the establishing of a hotel other than that contracted for, and alleged that he gave ideas and some sketches for it to the Respondent and could not agree with it for his fees.

The Respondent said that this work was not in preparation for the establishment of a new hotel but it was the area of services for the hotel beach cabins and the Claimant had no proof that he had been requested to do such work, and on the contrary it has been stated before that one of the items of the contract provides that

... further agreements entered into by parties after the date of this contract shall begin from the date of giving a written notice to [Claimant] to start the engineering services entrusted to him and complete by the end of the period referred to, augmented by the extensions prescribed by the provisions of this contract and its conditions.

Accordingly, the Tribunal dismissed this claim.

The Arbitral Tribunal dismissed all other claims and counterclaims (including the demand for interest) and ordered the parties to pay the costs and fees of arbitration on equal shares.

Distributorship Cases

CASE NO. 20

Final award of 19 April 2000, case no. 134/1999

Arbitrators: Three Egyptian Arbitrators
Parties: Claimant: An African enterprises and commercial agencies company
Respondent: Three African affiliated companies selling cars
Place of Arbitration: CRCICA
Subject Matter: • distribution of foreign cars by a contract of sole distributorship
* Interim measures
Applicable Law: Egyptian law
Language of Arbitration: Arabic

Held

When the loss exceeds the amount fixed by the contract, the creditor cannot claim for an increased amount, unless he is able to prove that the debtor has been guilty of fraud or gross negligence.

Facts

In 1997 the Claimant entered into a contract with company A of a group of companies having the commercial agency of a type of Korean cars. The contract appointed the Claimant as sole distributor, and included an arbitration clause:

Any differences arising out of the items of this contract shall be settled between parties by amicable means or by resorting to arbitration. The arbitral tribunal shall be composed of three arbitrators; each party chooses one member and the members choose a presiding arbitrator. The decision in this arbitration shall be binding upon the parties.

In 1998 the Claimant entered into a contract with companies B and C of the said group appointing the Claimant as sole general distributor and the contract included the same arbitration clause.

A dispute arose between the parties of the first contract, then between the parties to the second contract and one Arbitral Tribunal was set up to settle all disputes.

In the first hearing the Tribunal decided:

1. That CRCICA shall be the place of arbitration;
2. That Arabic shall be the language of arbitration and if a document in a foreign language is presented it shall be accompanied with a translation in Arabic;
3. The law applicable to the arbitration proceedings shall be the Arbitration Act No. 27.1994, and the Egyptian law shall be applicable to the substance.

In the second hearing the Claimant requested an interim measure for imposing a kind of reserve around the cars existing in the possession of the three Respondent companies, which were meant by the first and the second contracts, until the settlement of the dispute, for fear of taking criminal prosecution against the Claimant that it breached the trust of the said cars. The Claimant requested also, as an interim measure, to put the cheques signed by it (in execution of the first and the second contract) under custody till the end of the arbitration.

In a further hearing the Arbitral Tribunal decided to join the motion of interim measures to the merits of the case.

The demands of the Claimant were:

1. To order the Respondents to file their contract of commercial agency concluded with the mother company to ascertain its existence, and to file a copy of the commercial register of each;
2. To order the legal representative of the three Respondents to file with the Tribunal the original of the documentary credit relating to the import of three thousand cars;
3. To order Respondent A to pay to the Claimant:
 - (i) The difference between the sum paid by the Claimant to Respondent A, and the value of cars supplied in addition to the interest until the date of final settlement;
 - (ii) A sum representing interest, commissions and banking expenses paid by the Claimant and any other identical amounts that may be paid in the future;
 - (iii) A sum under the calculation of the industrial and commercial taxes;
 - (iv) A sum under the sales tax imposed upon the cars;
 - (v) A sum for the preparation of cars;
 - (vi) A sum for custom release;
 - (vii) A sum provided for in the contract as damages for the non-execution on the part of Respondent A and its breach of contract;
 - (viii) A sum for the profit lost and loss sustained by the Claimant for being forced to sell the cars supplied at a price lower than that of purchase. This was caused by Respondent A, as it marketed a new model of the same cars at a price lower than the cars subject to this contract.
4. To order Respondent A to return to the Claimant four cheques and to say that the Claimant is not indebted to pay them;
5. To order respondents B and C to pay:
 - (i) A sum for the damages provided for in the contract because they rescinded this contract;
 - (ii) A sum for the lost profit;

- (iii) To return the originals of the 17 cheques delivered to them by the Claimant in settlement of the price of the cars and to say that the Claimant is not indebted to pay for them.
- 6. To order the three Respondents to pay a sum for the moral prejudice suffered by the Claimant, which affected its reputation and good will;
- 7. To order the Respondents to pay the costs and fees of the arbitration;
- 8. To conserve the right of the Claimant to amend these demands during the proceedings.

The Claimant substantiated its case by saying that it was appointed as the sole distributor of this type of car for ten months or until the quantity comes to an end, whichever is earlier.

The Claimant alleged that there was a penal clause of one thousand dollars for each car in case there is a breach from the seller, but the seller with bad intention, when preparing the draft contract did not mention the phrase: “for each car”, and the Claimant could rectify it. The Respondent breached the contract in connection with the quality of sole distributor and sold cars to others at prices lower than the contract price, which affected the movement of sale in the commercial business of the Claimant.

Before the end of the first contract, Respondents B and C were going to sell the latest models at lower prices, and for this reason the Claimant was forced to sign a new contract with them to buy the said cars.

At that time, the customs authority notified Respondent A that the rest of the cars of the first contract are in the custom warehouse under the item “neglected items”, and if not released customs will sell them. According to the contract these cars are stored in the free zone of Respondent A and A bears the unpaid custom duties for them.

The three Respondents counter-claimed:

- 1. To say that all demands of the Claimant are dismissed;
- 2. To say that:
 - (i) The contract with Respondent A is dissolved within the value of the unpaid cars;
 - (ii) The complementary contract of 157 cars is dissolved;
 - (iii) The Claimant shall pay the marketing expenses with interest;
 - (iv) The Claimant shall pay the difference of air conditioning for some cars, with interest;
 - (v) The Claimant shall pay the value of the penal clause;
 - (vi) The Claimant shall pay the difference of price of the rest of the cars not sold because they will not be sold except with loss;
 - (vii) The Claimant shall pay a sum for the moral prejudice;
- 3. To conserve the right of Respondent A to amend their demands during the proceedings.

Respondents B and C counter-claimed:

- 1. Initially to say that their contract is null and void;
- 2. As alternative subsidiary to dissolve the contract because of the impossibility of its execution;
- 3. To order the Claimant to pay a sum for moral and substantial prejudice.

The Respondents B and C substantiated their counter-claim saying that they made a mistake as to the creditworthiness of the Claimant who was abstaining from paying the instalments of the first contract. Their bank refused to accept the cheques drawn by the Claimant as guarantee for the loan extended to them.

The Respondents requested the Tribunal to dismiss the demand for interim measures because in line with Article 24 of the Arbitration Act, the parties must agree upon the power of the Tribunal to take such measures, which was not the case here, and, on the other hand, there was no risk to be avoided.

Respondent A argued that the clause of exclusivity is not opposable against it because it is entitled by the contract to re-purchase any quantity it requires, and the Claimant distributed only one-quarter of the quantity agreed upon.

Award

The Arbitral Tribunal dealt at first with the claims beginning with interim measures saying that it had expedited the procedure to avoid any problems. As to the taxes the Tribunal said that the contract price contained all taxes and custom duties, but it had no competence to say how much the said taxes and duties amounted to, and who paid or did not pay, and the Tribunal therefore dismissed it.

The Tribunal also dismissed the claims for the originals of the contracts of the commercial agency and of the commercial register of each Respondent because there was no debate on its contents and the qualities stated in the contract were not contested.

The Tribunal said that although the Claimant did not pay to Respondent A the last two cheques subject to reconsideration, the Claimant had paid by the previous cheques more than the value of the cars it had bought and it deserved to recover the difference, with interest at the legal commercial rate of 5%, to begin from the date of initiating the arbitration case. But the Claimant had no right to the commissions and banking expenses.

The Tribunal dismissed the claim of a sum for the preparation of the cars and another for the fees of customs clearing because the contract was silent upon them.

The Tribunal said that the alleged bad faith of Respondent A did not exist at all, and the events stated to prove it did not affect the opinion of the Tribunal.

The Tribunal said that although Respondent A notified the Claimant that the contract was dissolved, the parties continued to apply it and to exercise the right of retention provided for in it, in conformity with Article 246 of the Civil Code:

A person who is under an obligation to supply something, may refrain from performing his obligations so long as his creditor does not supply adequate security to guarantee the performance of his obligation.

Respondent A thereafter notified the Claimant either to withdraw the rest of the paid up cars from the warehouse, failing which it would sell them for the account of the Claimant at any market price. The Tribunal said that this was not a legal right of Respondent A under the applicable law.

As to the counterclaim of the Respondents, the Tribunal said that the nullity of the second contract for mistaking the creditworthiness of the Claimant was not

established, because the legal representative of the Respondents said that he knew the owner of the Claimant company through previous transactions.

The Tribunal approved the dissolution of the second contract because of the impossibility of executing it, caused by a decision of the Minister of Trade who stopped the delivery of cars from the free zones and ordered that delivery should be from fresh shipments coming from the mother company abroad. But this could not exempt Respondents B and C from paying damages to the Claimant because of the delay in delivery before the said decision.

The Tribunal awarded damages to the Claimant for the losses in selling at prices lower than the purchase prices, because this loss resulted from the default of Respondents B and C when they offered in the newspapers to sell at lower prices and to change the old cars.

Respondents B and C were ordered to pay a sum for the moral prejudice caused to the Claimant when they sent a note to the bank of the Claimant, which extended loans to the latter, saying that the Claimant did not enjoy the quality of sole distributor and was not a distributor of this kind of car at all. The Claimant gave his bank the contracts concluded with them but it nevertheless deserved damages.

As to the damages regarding profit lost, the Tribunal dismissed it and said that Article 225 of the Civil Code does not allow damages over those granted by the contract except in case of fraud or gross negligence from the debtor:

When the loss exceeds the amount fixed by the contract, the creditor cannot claim an increased amount, unless he is able to prove that the debtor has been guilty of fraud or gross negligence.

The Tribunal ordered the Respondents to return to the Claimant the cheques not paid because all demands were settled by this award.

The Tribunal dismissed the counterclaims of Respondents B and C for moral and substantial damages for the dissolution of the contract and said that the dissolution occurred as a *cause étrangère* by 80% and by 20% for the breach of Respondents B and C.

All other claims or counterclaims were dismissed and the Claimant was ordered to pay one half of the costs and fees of arbitration and the Respondents the other half, and each party had to bear the fees of its lawyers.

Tourism Cases

CASE NO. 21

Final award of 17 March 1999, case no. 117/1998

Arbitrators: Three Egyptian Arbitrators
Parties: Claimant and Respondent in the counterclaim:
An African tourism regional authority
Respondent and Counter Claimant: An African
tourism company
Place of Arbitration: CRCICA
Subject Matter: ● failure in realisation of a world festival
Applicable Law: Egyptian law
Language of Arbitration: Arabic

Held

Those who are implementing the instructions of the debtor in the execution of its obligation are not third parties, but their actions are considered as if occurring from the debtor himself, whether they may be employees or workers with him or assisting persons or substitutes to replace him in the execution of its obligation, and whether their relationship may be contractual or non contractual.

Facts

Parties entered in 1996 into a contract related to an international festival of the Second World, in one of the ports of an African State, considered to be a tourism cultural event of the highest standard. The authority (Claimant) allowed the company (Respondent) to enter into contracts regarding all the elements of the festival, to supervise the ceremonies of inauguration and closure, to invite kings, princes and presidents of states, the most celebrated actors, well-known personalities, businessmen and bankers, as well as the organisers of tourism activities.

The authority said that it was a disappointment to find that the company did not fulfil any of its obligations and that the festival was a huge failure, which gave a very bad image of the country.

Some of the important obligations were:

- To present a well known opera in one of the ancient citadels;
- To establish an exhibition of national products;
- To launch a competition for song and music in the festival;

- To establish an international tourism exhibition in the city;
- To prepare memorial gifts and certificates of gratitude for guests.

The authority said that the failure to fulfil these obligations constitutes the element of tort in the contractual responsibility of the company, in addition to the element of damage, which includes several aspects of moral and material damage, and this damage was a natural result of the failure of the company. Several companies and other entities sued the authority for losses resulting from the failure of the festival. It was agreed also that the authority shall have 5% of the net profits of the company from the festival and the company did not pay anything.

The contract contained an arbitration clause:

Any dispute which may arise between the parties shall be settled by Cairo Regional Centre for International Commercial Arbitration and its decision shall be binding upon parties.

The parties agreed that the Egyptian law is the law applicable to the dispute.

Accordingly, the authority said that its claims are: to order the company to pay damages at a certain amount sufficient for the relief of the moral and substantial damage.

The company counter-claimed for damages for moral and material damage also. The company substantiated its counter-claim saying that the responsibility for the failure of the festival lies with three entities: the authority, another tourism company and a named person having an individual establishment, because their acts were fraudulent and these acts are a *cause étrangère* for which the company is not responsible. The company alleges that the three entities caused it a lot of moral and substantial prejudice. The company said that it was directed by the authority to agree with the other tourism company, which is a public sector company responsible for advertising, propaganda and marketing, and it enjoys a monopoly in these fields.

The company said that the third responsible establishment was concerned with theatre realisation by the owner of this establishment, who undertook to present the decorations, accessories and the designs for clothes.

This man was paid for the above but undertook none of them.

Award

The Arbitral Tribunal stated that the dispute shall be subject to the provisions of the contract between parties supplemented by the provisions of the Civil Code, particularly Articles 147.1, 175, 221 and 222. The Arbitral Tribunal also said that those who implement the instructions of the debtor in the execution of its obligation are not third parties, but their actions are treated as if occurring from the debtor himself, whether they may be employees or workers with him or assisting persons or substitutes to replace him in the execution of his obligation, and whether their relationship may be contractual or non-contractual.

The Claimant considers that the failure of the Respondent was due to:

1. Failure to hold performances of the opera in four ceremonies;
2. Failure to hold the competition for music and songs in the festival;

3. Failure to hold an international tourism exhibition;
4. Delay in the preparation of memorial gifts and certificates for the guests of the festival.

The Tribunal said that the documents of the case bore too much proof of each kind of failure, and the Respondent did not contend otherwise but just tried to throw the burden of failure upon others. The said “others” had contractual relationships with the Respondent and, thus, it was responsible for their failure too. As to the authority, it could not be imagined to be responsible for the failure of the Respondent since the Respondent did not submit any proof against the authority. This authority was the Claimant in this case and was upholding its rights against the Respondent.

The Respondent requested the Tribunal to re-stabilise the contract with the Claimant because it had borne destabilised obligations. The Tribunal said that this was not right, because the said obligations were suggested in a memo submitted by the Respondent before signing the contract. On the other hand, the obligations of the Claimant were great, and the income was distributed in the contract, allotting 95% to the Respondent and only 5% to the Claimant. It must also be said that if the Respondent had implemented its obligations the income would have doubled through the sale of tickets for the exhibitions and other activities of the festival.

The damage on the side of the Claimant is represented by the bad reputation obtained by the city and the country, in general. One of the elements of the damage was the percentage of 5% not paid by the Respondent.

For the moral damage the Tribunal granted about US\$2,000,000 to the Claimant and US\$150,000 for 5% of the festival income.

The Tribunal refused the demand of the Respondent to be granted US\$7 million and ordered it to bear all the fees of the arbitrators, as well as the costs of arbitration. Each party had to bear the fees of its lawyer.

CASE NO. 22

Final award dated 22 November 2000,
cases no. 139/1999 & 152/2000

Arbitrators: Three Egyptian Arbitrators
Parties: Claimant: A North American international
hotel company
Respondent: An African tourism and hotel company
Place of Arbitration: CRCICA
Subject Matter: • management contract
Applicable Law: Egyptian law
Language of Arbitration: Arabic

Held

It is up to the Arbitral Tribunal to consider whether late presentation of claims is justified or not.

Facts

A “management contract” between parties was entered into in January 1980, by virtue of which the Claimant was entrusted to manage two floating hotels owned by the Respondent for 20 years beginning from the day of inauguration and ending on 15.3.2000. An arbitration clause was agreed upon:

Any dispute relating to the interpretation or the execution of this contract which the parties could not settle amicably, shall be settled by arbitration in accordance with the provisions of arbitration contained in the procedural law, by a tribunal of three arbitrators acting as amiable compositors. The party wishing to resort to arbitration shall notify the other party with such wish, stating the subject matter of dispute and nominating the arbitrator it appoints. The other party shall be required to respond during 30 days, appointing an arbitrator. If the other party abstains from appointing its arbitrator as above, the applicant for arbitration may resort to the local court to appoint the second arbitrator. The two arbitrators shall during 15 days from the appointment of the second, choose the third arbitrator, who must be a citizen of the State having diplomatic relations with the two States to which the parties are nationals. The third arbitrator must have a good reputation in the field of hotels and may not have relations with either party. If the two arbitrators fail to appoint the third arbitrator he will be appointed by the court.

The decision of arbitrators shall be final, binding on both parties and not appealable. Costs of arbitration shall be distributed by a decision from the arbitral tribunal.

The Claimant notified the Respondent that it wished to refer to arbitration the dispute related to the application of clause 31 of the management contract and any other clause linked thereto. The Claimant appointed its arbitrator. The Respondent also appointed its arbitrator and the two arbitrators appointed the third arbitrator, notifying the parties of the completion of formation of the Arbitral Tribunal for the case no. 139/99. The same procedure and the same Tribunal was retained for the case no. 152/2000, and the Tribunal decided to join the two cases together and to issue one award to settle the two cases. Hearings were held for the two cases together. The two hotels in case no. 152 were subject to a similar management contract containing the same arbitration clause.

The Claimant requested the Arbitral Tribunal:

1. To say that the Claimant did not bear the losses sustained during the years 1993, 1994 and 1995, because the Respondent refused to renew the contract of management; and to say the Respondent shall bear these losses;
2. To apply the same principle in No. 1 upon the losses of 1998 that occurred as a result of a terrorist incident in the previous year;
3. To order the Respondent to pay the Claimant damages for the substantial damage from 1993 till 2000, the date on which the contract terminated;
4. To say that the right of exploitation of the four beaches in the tourism cities is exclusive for the Claimant, because the licences were issued solely in its name;
5. As a subsidiary alternative, to order the Respondent to pay damages to the Claimant for the damage it suffered when it was deprived from the use and exploitation of the four beaches, and the unauthorised use of another company during the period of management;
6. To order the Respondent to pay the costs and fees of arbitrators and lawyers.

The Claimant substantiated its claims saying that the Respondent approved to carry forward the losses of the years 1993 till 1996 to the following years, which meant that the management agreement could be extended for a further four years.

The Claimant said that the profits were agreed to be distributed as follows: 94% for the Respondent, and 6% for the Claimant, but the terrorism accidents caused losses.

The Claimant invoked Article 147.2 of the Civil Code, which provides for common exceptional events, as a reason to return economic equilibrium to the contract.

The Respondent requested the Arbitral Tribunal:

1. To dismiss all claims;
2. To order the Claimant to deliver the two floating hotels to the Respondent;
3. To order the Claimant to pay all the expenses of arbitration.

The Respondent substantiated its demands saying that it had waived 65% of its secured profits for the year 1993 and waived its profits totally for the years 1994 and 1995. In 1996 the two parties signed an amendment to the management agreement to cure the losses of previous years and to anticipate recession in the tourism industry in the following years. The losses of 1998 are a result of the abuse of management by

the Claimant. The management agreement does not allow any extension except in the case of a *force majeure*, leading to the interruption of implementation of the agreement.

The Respondent said that the Arbitral Tribunal appointed a time limit for the Claimant to submit its statement of claims. This time limit ended without submission of any claims, and the claims submitted thereafter were not admissible.

The Claimant said that it did not submit the statement of claims because it thought that the Tribunal was going to make terms of reference in which its claims would appear, but the Tribunal did not make it and for this reason the Claimant submitted its claims at a later time.

The Respondent replied that the Arbitration Act does not stipulate making terms of reference and clause 34 provides that the procedure must be closed unless there is an acceptable excuse.

On the other hand, the Claimant did not substantiate or present any evidence for the damage for which it had applied.

Award

The Arbitral Tribunal dismissed the plea of closing the proceedings because of the late presentation of claims, because the reasons stated by the Claimant form an acceptable excuse of delay. These reasons are that CRCICA rules and usages provided for making terms of reference under the name "Submission document" to be signed by parties and arbitrators.

The Arbitral Tribunal said that the provisions of the management agreement of the first two floating hotels are almost the same as the agreement of the other two floating hotels.

The Arbitral Tribunal said that each party requested to alleviate its losses, but this could not be done by the Tribunal, since the parties had already agreed in the years 1993 till 1996 upon an annual agreement during this period to allocate the losses between themselves. These agreements were final and could not be amended by the Tribunal.

In September 1996 a new agreement was entered into by the parties to reconsider their contractual relationships and this agreement had regulated these relations until the end of the two principal agreements in the year 2000.

In 1998 a terrorist incident occurred and resulted in a great drop in tourism. This incident was certainly an exceptional event in the sense of Article 147.2 of the Civil Code, which needs to call upon judges or arbitrators to render the obligations becoming very onerous to reasonable limits. Certainly the losses in such a year cannot be attributed to the mismanagement of the Claimant, but to uncontrollable events.

The Arbitral Tribunal said that the profits of the two management agreements are to be distributed according to the following:

- 10% for the Claimant and 90% for the Respondent in the first agreement (Case 139);

- 14% for the Claimant and 86% for the Respondent in the second agreement (Case 152). The Tribunal calculated the profits and losses of the years 1998 to 2000 and the net balance of loss for the Claimant of about US\$—— million, was divided between the two parties. The stores of the hotels contained material and food stuffs lodged by the Claimant amounting to about US\$—— million. The Respondent refused to take them up despite the fact that the Claimant offered to deliver them at cost price. The Tribunal ordered the Respondent to take up the stored goods and to pay the price to the Claimant.

The Claimant said that the Respondent ought to have furnished the hotels with suitable working capital, but the Tribunal found that the two principal agreements provided that the Claimant shall open an account for operating to include the funds sufficient for this purpose and the Claimant shall charge this account with all operating expenses. For this reason this demand was dismissed.

The claim of extending the period of each of the principal agreements for four further years to recover the losses of the four previous years was dismissed because the agreement of September 1996 said that the losses from 1993 to 1996 shall be carried forward to each following year until the end of the initial periods of the two agreements, and by the end of each agreement no carrying forward may be done.

The Tribunal ordered the Claimant to bear two-thirds of the costs and fees of arbitration and the Respondent to bear the rest, and each party had to bear the fees of its lawyers.

All other claims or counterclaims were dismissed.

Commentary

This case is one of the “consolidation” applications. Consolidation is not provided for in the Egyptian Arbitration Act (the *lex arbitri*), but the parties agreed upon consolidation of the two cases. It is a “contractual consolidation”.

The Author.

CASE NO. 23

Final award of 19 December 2000, case no. 155/2000

Arbitrators: Three Egyptian Arbitrators
Parties: Claimant: An African advertising company
Respondent: An African industry federation
Place of Arbitration: CRCICA
Subject Matter: • organising a tourism festival
Applicable Law: Egyptian law
Language of Arbitration: Arabic

Held

The administrative contract is required: (1) To be concluded with a public administrative authority; (2) To relate to the satisfaction of common public needs; and (3) To include exceptional clauses.

Facts

The Claimant filed this arbitration with CRCICA saying that the chief of the Respondent federation sent a request to the Claimant asking it to organise yearly a tourism and shopping festival in the capital of the country for three consecutive years. The Claimant approved and entered into an agreement with the committee organising the festival (constituted by a decree of the Minister of Tourism). This committee was headed by the chief of the Federation of Industry. The agreement provided for the cost of advertising films made by the Claimant, the value of which shall be paid by the Respondent to the Claimant. The Respondent did not pay and the Claimant sued it, in accordance with an arbitration clause:

Any dispute which may arise shall be settled by Cairo International Arbitration Centre.

The Claimant left the nomination of its arbitrator to the Director of CRCICA. The Respondent did not appoint an arbitrator and the Director of CRCICA appointed the two arbitrators who, thereafter, agreed upon the chairman.

Before the first hearing the counsel for the Respondent informed the Director of the CRCICA that he represented the Respondent Federation, and that the arbitration

clause does not apply to the Federation, and for this reason it would not pay arbitrator's fees and arbitration costs.

In the first hearing the representatives of the parties appeared and were asked if they had any objection to the formation of the Tribunal, and answered in the negative. The Claimant requested to have permission to introduce the chairman of the Federation and the committee as party to the case to hear the award of holding him personally responsible for damages, and requested a time limit to notify him. The Tribunal gave the permission and the time limit.

In this hearing too, the Respondent submitted a plea of non-admissibility of the case because it was brought against the Federation, which has no capacity, because the arbitration clause is not opposable against it. The Federation is a public juristic body and the approval of the competent minister to arbitrate is required by law in such a case.

In the second hearing the Respondent requested the Tribunal to give a partial award on the pleas related to the form before giving the final award on the substance; but the Tribunal decided to join such pleas to the substance.

Before the third hearing the Respondent applied to the Director of CRCICA to reconsider the formation of the Tribunal as this formation was null and void. The basis for such nullity was that the chairman of the Federation and of the committee of the festival was empowered by the Minister of Tourism to sign the agreement with the Claimant in his capacity as chairman of this committee, which did not have any legal personality and could not be legally sued. In the meantime, the Ministry of Tourism, which was the real Respondent, was not notified, no arbitrator was appointed, and a representative appeared in this arbitration. Accordingly the Tribunal had to be reconstituted in a valid form and the real parties had to be notified anew.

The Director of CRCICA referred this application to the Arbitral Tribunal.

In the third hearing the Claimant requested the Tribunal to dismiss the plea of nullity submitted by the Respondent, because it is a formal plea which must be initiated *ab initio*, and in the first hearing the Respondent was asked if it had any objection to the formation of the Tribunal, to which it answered in the negative.

The agreement between parties provided for a festival to be held every year for a period of three years and to be organised by the Claimant, which had to implement:

- The printed items and films for the festival;
- The advertising campaign in major cities;
- Decoration of the airports;
- Having a web site on the internet; and
- Conducting laser shows and vocal concerts.

The Claimant notified the Respondent to pay the price of films delivered by it but the chairman of the Respondent answered that there was no contractual relationship between the Claimant and the Federation. The Federation is one of the public juristic persons which may not conclude any agreement exceeding US\$1500, except with the approval of the State Council "conseil d'Etat".

Award

The Arbitral Tribunal discussed the pleas of the Respondent:

1. The plea of non-admissibility of the case because of lack of capacity on the side of the defendant

The Respondent explained this plea saying that the chairman was sued in three capacities: for himself as guarantor for the Claimant in banking facilities, and this capacity was not acceptable because he was not a party to the agreement for himself; second, for the Federation, but the Federation was not a party; third, for that of chairman of the committee and this was not acceptable because the Minister of Tourism ought to be introduced and accordingly the arbitration clause was null.

The Claimant replied that the encouragement of Egyptian industries was the main objective of the festival, the contracts of all participating entities were concluded with the Federation, the bank account was opened in the name of the Federation, cheques issued in settlement of the festival's obligations were issued by the Federation etc. In Article 2 of the agreement, the chairman had undertaken, on behalf of the federation, to pay the Claimant the price of the advertising films. If he had no capacity in this respect, then he had signed a *promesse de porte forte* that is, an undertaking for a third party, in which he became liable in case the said party did not implement its obligations.

The Tribunal said that: although the agreement was concluded between the committee and the Claimant, it contained in clause 2 an obligation on the part of the Federation because this clause provides that:

The Federation is obligated to the process of marketing for the festival of industries and imported goods, and the income of these festivals shall be allotted to (Claimant) for its expenditure for the festivals as well as the immediate settlement of the advertising films implemented by (Claimant).

As the chairman signed this obligation and did not argue invalidity of such a signature, this obligation emanated from a person possessing the capacity of disposal of the Federation and is binding upon the Federation.

2. The plea of nullity of the arbitration clause

The Tribunal said that the committee of the festival is constituted by a decree from the Minister of Tourism, and it did not enjoy a juridical personality, and it had no capacity to arbitrate. In the meantime, the said Ministry was neither a party to the agreement nor a party to the arbitration case. Accordingly, the arbitration clause was invalid whether in respect of the Ministry or in respect of its committee.

Nevertheless, the arbitration clause was valid for the Federation, because the agreement was not an administrative contract. Such contracts require that the contract must relate to public utilities established to satisfy common public needs, the other party to such a contract must be a public law juristic person, and the contract should contain exceptional clauses, or in other words the administration should use the means of public law in concluding it. Two of these characteristics of an administrative contract

were not found in this case, namely the exceptional clauses or the use of the means of public law, as well as satisfying common public needs. For this reason the agreement could not be considered an administrative one, and as a result it did not need the approval of the competent minister upon the arbitration clause embedded therein.

The Respondent contended that Article 58 of the law of the State Council “conseil d’Etat” provides that

any contract [having a value exceeding a certain amount] should not be concluded except with the approval of the State Council.

The Respondent said that the agreement with the Claimant exceeded the said amount and was not approved by the State Council “conseil d’Etat” and for this reason it must be rendered null and void.

The Tribunal said that this contention was not valid because contravening the provisions of Article 58 did not entail the nullity of the agreement, but just inflicting the suitable disciplinary measure against the contravening officer.

The arbitration clause, on the other hand, was valid in respect of the chairman of the Federation, in connection with his personal undertakings.

3. *The plea of nullity of the formation of the Arbitral Tribunal*

This plea was based on the fact that the real party was the Ministry of Tourism and notifying the Federation does not validate the lack of notifying the said Ministry. It was dismissed because such a formal plea should have been submitted before any other plea in the case, in accordance with Article 108 of the procedural law

The plea of lack of domestic competence, the plea for referral of instance to another court for relevance with the plea of nullity of the instance, as well as all other pleas related to the procedure shall be initiated together before initiating any claim or defence in the case and before the plea of non-admissibility, otherwise such pleas shall fall down within the part not initiated in time.

On the other hand, the parties were asked in the first hearing if any of them had an objection to the formation of the Arbitral Tribunal, and both agreed to the validity of such formation.

4. *The substance of the case*

The Tribunal said that the case was brought for the settlement of the price of advertising films made by the Claimant in accordance with the agreement, but the Federation pretended that it was not the other party in the agreement, and the chairman signed for the Ministry of Tourism. The Tribunal refused this contention saying that in clause 2 of the agreement the Federation was specifically responsible to pay for the films. If the argument of the chairman of the Federation was right, then he was responsible *in personam* for the obligation he imputed to the Federation, in line with the provisions of the undertaking for third party (*promesse de porte forte*) in line with Article 153 of the Civil Code which provides that:

1. A person who binds himself to procure the performance of an obligation by a third party does not in so doing bind the third party. If the third party refuses

- to perform the obligation, the person who bound himself to obtain such performance will be liable to indemnify the other contracting party by himself performing the obligation, the performance of which he undertook to procure.*
2. *In the event of the third party consenting to perform the obligation, his consent is effective only from the time that it is given, unless it is indicated expressly or by implication that the consent is retroactive as from the date of the agreement between the contracting parties.*

This Article may reveal that the chairman of the Federation is *in personam* responsible for the films, but it must be noted that the guarantee given by him was limited until the end of September 1998, and the arbitral proceeding began in 9.2.2000, that is, after the expiry of his personal obligation. Accordingly, the Federation was ordered to pay the cost of films to the Claimant.

As to the interest upon the cost of films, the Claimant requested 7% as of the date of bringing the lawsuit to arbitration and until final settlement. The Tribunal said that the agreement did not contain anything regarding the interest and its rate. The 7% rate was applicable if stipulated in the agreement, otherwise the legal rate of 5% for commercial debts applied.

The Tribunal awarded interest at the rate of 5% as of the date of bringing the lawsuit to arbitration and until final settlement.

The Tribunal ordered the Federation to pay the whole amount relating to costs and fees of arbitrators because it lost its case. Each party was ordered to bear the fees of its lawyer.

All other claims or counterclaims were dismissed.

Freightage Cases

CASE NO. 24

Award of 4 April 2000, case no. 145/1999

Arbitrators: Three Egyptian Arbitrators
Parties: Claimant: An African maritime navigation company
Respondent: The Ministry of Defence of an African State
Place of Arbitration: CRCICA
Subject Matter: • maritime transport – typing error resulting in doubling the obligations of one party
Applicable Law: Egyptian law
Language of Arbitration: Arabic

Held

Where an error of pen is noted in the contract it must be corrected and parties must have good faith in this respect.

Facts

The parties had entered, in 1993, into a contract of maritime transport regarding military equipment for the army. The transport included moving the equipment from a port in the Respondent state to a port on the Black Sea and vice versa, for several voyages. The parties agreed that the freight of transport shall be a certain amount for each cubic metre FIOS in foreign currency but payment would be in the local currency at the rate declared daily for transfers in a certain bank. The Claimant accordingly would not be responsible for any charges of shipping or discharging in the ports frequented by the vessel. The freight of the return trip shall be double the going trip, and certain vessels shall charge not less than 75% of its total weight even if the cargo is less than that.

A dispute arose between the parties regarding the interpretation of these clauses and the parties agreed upon a submission clause before a three-member Tribunal and defined their claims and counterclaims as follows:

Demands of the Claimant:

1. To order the Respondent to settle the differences of freight for the period from 1993 until 1998 and the differences for the remaining period of contract.
2. Dismissal of all demands of the Ministry of Defence.
3. To order the Respondent to pay the costs and fees of arbitration.

Demands of the Respondent:

1. To dismiss the demands of the Claimant.
2. To seek the common intention of parties for the interpretation.
3. To order the Claimant to pay moral damages equal to the amounts it claimed for defamation of the armed forces, and giving an impression that it did not pay its obligations.
4. To order the Claimant to pay the costs and fees of arbitration.

Each party filed a memo; the Claimant objected to the allegation that the differences resulted from the word “double” the going trip. The Respondent alleged that this word had been used by mistake or it was a typing error. The Respondent also refused to pay 75% of the total freight where the cargo was less than that.

The Claimant said that the double freight is justified by the fact that the return cargos are risky and hazardous. Freight is defined in each case according to the circumstances of transport, the costs of the vessel and the nature of the cargo. The Claimant also said that the Respondent alleged that the calculations should be on the basis of metre length and not cubic metre, and said that this was contrary to the contract. The cargo was comprised of boxes and barrels and could not be evaluated in metre.

The Respondent answered that there was a real mistake or typing error in the contract, because it provided for the return trip to have the same freight as the going trip and this (in Arabic) is expressed by the word *mathilah*, but the operator made it *mithlaihi* which means in Arabic “the double”. The two words contain the same letters and the change of the right order resulted in doubling the freight. The right intention of parties, indeed, was directed to the first and not the second word. This was sustained by the fact that the operations of transport were subject to a tender in which the Claimant submitted an offer giving a high price, and reduced the price thereafter, and in its offer did not state that the return trip shall be double the going trip, and no other competitors in the tender stated that, and this meant that what was customary in such transport was the same price for going and returning trips, and not double. The draft contract was presented by the Respondent and did not contain any “mithlaihi” (double) for the returning trip but just a “mathilah” (identical) clause. The armed forces discovered this error in due time and requested the Claimant to correct it and the two parties dealt from 1993 until 1998 with this freight. The Claimant raised this point in 1998 and in the same year a meeting was held in the presence of a representative of the Claimant and he said that freight *aller-retour* is the same. In one of the letters of the Claimant to the Respondent in 1999 it said that the going and return trips are charged the same freight.

The Respondent said that the minimum of 75% was not made for the freight, but as an indication of the vacant areas of the vessel available for transport. The Respondent upheld the period of limitation of rights by two years provided for in Article 244.1 of the Maritime Code, which stipulates that:

actions emanating from the contract of transport of goods by sea shall prescribe by the lapse of two years from the date of delivery of the goods or from the date in which delivery ought to have been made.

The Claimant invoked that during the negotiations the point of double freight was raised on the grounds that shipment prices from the Black Sea are more than that of their home country.

The Claimant said also that the contract was not a contract of transport, but a charter-party by journeys and its limitation was subject to Article 171 of the Maritime Act which provides that:

1. *Actions of law, resulting from the lease deed of a furnished and outfitted vessel shall lapse with the expiry of two years, and the period for lapse of the action in case of chartering the vessel for specified period, shall begin at contract termination, or the date of ending the last voyage, in case the period is extended... or the date of learning about the occurrence of the incident which renders the implementation or continuing the implementation of the contract feasibly impossible.*
2. *The period in case of leasing the vessel per voyage shall lapse from the date of completing the voyage or the date of learning about the accident occurrence which makes the start of or continuing the voyage practically impossible. The voyage shall end with the vessel's arrival at the port agreed upon, and with unloading the merchandise placed on it by the charter.*
3. *The period, in case of the vessel's destruction, shall begin from the date of deleting it from the register of ships.*

The Claimant invoked Article 150.1 of the Civil Code providing that:

when the wording of a contract is clear, it cannot be deviated from in order to ascertain by means of interpretation the intention of the parties.

The Claimant also said that the competitive offers did not state the double freight because there were too many details not disclosed because of being military secrets, which relate to the national security of the state, and these details were divulged to the Claimant after the adjudication and the Claimant requested to insert the word “mithlaihi” to bring economic equilibrium to the contract and the Respondent approved. The Claimant alleged that the fact that another contract was concluded with the armed forces in 1999 making the return trip with the same price of the going trip could not affect the contract of 1993 because each contract has its own nature and circumstances.

The Claimant requested to be awarded interest at the rate of 5% (commercial interest) from the date due until the date of settlement.

Award

The Arbitral Tribunal said, concerning the first claim, that it was dismissed because the offer of the Claimant did not differentiate the going from the returning trips, the error of *pen erreur de plume* can be rectified. The Respondent told the Claimant at the time the contract was signed to rectify it but the Claimant kept silent, and this is contrary to good faith in contractual matters. The right interpretation according to Article 150.1 of the Civil Code is to say that the right word in Arabic is “mathilah” and not “mithlaihi” and this is exactly the common intention of the parties.

As to the minimum of 75%, the Tribunal said that it was stated in one of the clauses of the contract as follows:

The tonnage of each of the vessels as to rolled goods is 1050 metres (linear) and the minimum should not be less than 75% of the said metres (linear) and in case of presenting goods less than the tonnage of the vessel, the freight will be for 75% of the tonnage of the vessel.

The parties differed in whether the tonnage should be calculated in metre (linear) or in cubic metre.

The Tribunal said that the contract had expressly defined it as metre (linear), and, thus, this claim was dismissed, and no difference was due to the Claimant.

As to the claim of the freight for the remaining period of the contract, the Tribunal said that the Respondent did not object to it, but the basis of calculation was the metre and not the cubic metre.

The Tribunal dismissed the request for moral damages counter-claimed saying that each person had the right of resorting to the judicature and the right to sue did not form a tortious responsibility on their part. So the elements of the tortious liability did not exist because there is no tort.

The Tribunal ordered each party to pay half of the costs and fees of arbitration and each bore the fees of its lawyers.

The Tribunal said that all other demands not stated in the submission clause were dismissed.

Investment Cases

CASE NO. 25

Award of 29 September 1998, case no. 112 *ad hoc*

Arbitrators:	Three Arbitrators: one Syrian, one Libyan and the Chairman, Egyptian
Parties:	Claimant: An industrial and agricultural investments company established by a Convention between two Arab States to do business in the territory of one of them Respondent: The Minister of Economy and Finance in the host State
Place of Arbitration:	CRCICA
Subject Matter:	• investment incentives
Applicable Law:	the statutes of the company as well as the common general principles of the prevailing laws in the two parties and the principles of justice
Language of Arbitration:	Arabic

Held

The provisions of Arab Treaties of investment and transfer of Arab Capitals can be applied wherever a discriminatory treatment among investors is found.

Facts

Two Arab States: one from Africa and the other from Asia had signed in 1978 a bilateral international Convention by virtue of which they established a company for industrial and agricultural investments, to support the joint Arab economic business. Each state paid half of the capital. A legislative decree was issued in the host State to recognise the company. The statutes of the company provided for the settlement of disputes by arbitration:

Any dispute relating to the treaty of establishment or to these statutes which could not be solved by mutual understanding, shall be settled by arbitration by each party appointing one arbitrator and the two arbitrators will agree upon a third umpire and the two parties shall be bound by the result of the arbitration.

If the two arbitrators could not agree upon the third during thirty days, the Secretary General of the Arab League upon request from either party shall appoint him.

The arbitral tribunal shall draw the rules of procedure appropriate for its mission without being bound with the procedural laws of the two States.

As substantive law the arbitral tribunal shall apply these statutes, the common general principles of the prevailing laws in the two parties and the principles of justice.

A dispute arose between parties because the host State imposed custom duties upon the transport means imported by the joint company, and ordered it to pay stamp duties upon all the contracts it made, at the rate of 1.2% of the value of each contract.

The company notified the host government with the notice of arbitration, the two arbitrators were appointed and, as they could not agree upon the third, the Secretary General of the Arab League appointed him upon request from the claimant.

The Claimant explained in its statement of claims that the host government honoured its request to be exempted from custom duties upon vehicles imported by it, and issued a law in 1990, referring in its explanatory note to the treaty of establishment, which stated the exemption of machinery and equipment owned by the company from taxes and custom duties as well as municipal duties and any other taxes or duties, but the Convention inadvertently disregarded the vehicles imported by the company, unlike another Convention with another Arab Asian State from which the present Convention was copied, and which stated transport means imported and their exemption from taxes. So this new law declared exempt all transport means imported by the Claimant.

The following day a new legislative decree was issued to cancel the law of the day before, motivating its issuance saying that the abrogated law gave the company a new advantage that was not enjoyed by it at the time of signing the treaty.

As the dispute remained, the Claimant applied for arbitration to get the accurate interpretation of the treaty by which it was established.

The Arbitral Tribunal took a decision to apply the UNCITRAL Rules of Arbitration to the dispute and notified the parties accordingly.

The Tribunal stated some legal provisions from the treaty and the state regarding the constitution of the company:

- The company is a juristic body enjoying complete financial and administrative independence. The statutes of the company form a part of the treaty. The company enjoys all advantages, exemptions and guarantees prescribed in the laws of the host country in regard to the encouragement of the investment of foreign and Arab Capital.
- Without prejudice to any other tax exemptions in any law in the host country, the company shall enjoy the exemption of its profits from all kinds of profit taxes on circulated capitals for five years as of the date of the first profitable balance sheet.
- If the profits are re-invested in the project they shall enjoy the same exemptions for an identical period.
- The shares of the company are exempted from stamp duties. The machinery and equipment owned by the company are exempt from taxes, custom duties, municipal duties and other taxes and duties.
- The company can directly import all its requirements of machinery, equipment, tools, vehicles of transport and raw materials for the erection or enlargement of its

projects as well as raw materials for the operation of its projects, by exception from the provisions of limitation and restriction and from the system of direct import from the country of origin.

- Each of the two parties to the treaty has the right to dispose of its quota in the capital to any juristic or natural person of its nationality without being subject to any financial, fiscal or legal restrictions, especially the right of first refusal.

The Claimant in this case arbitrates in its capacity as agent for the guest party (the other Arab State) by virtue of a law issued for the initiation of this arbitration.

The Respondents presented a formal plea of non-admissibility and in substance requested the dismissal of the case and to oblige the Claimant to pay the arbitration costs and fees.

The Respondent said that the arbitration clause related to: (1) the treaty of establishment and (2) the statutes of the company. This clause may not exceed the two parties, that is, the two governments. The dispute was not related to the treaty or to the statutes and was not a dispute between the governments, but was existing with the company, which enjoys the nationality of the host country and was independent from the two governments, and from the finance of the host country. Accordingly, the arbitration is null and void.

The Respondent also said that the representation of the Claimant was not legal because the arbitration was initiated in the name of the company of external common investments, which was the other party before the host country. The Ministry of Finance was not a party to the treaty or to the statutes.

The Respondent also said that the company of external investments was not duly represented because its chairman did not hold a proxy to arbitrate, and this leads to the dismissal of the application for arbitration for nullity.

The Respondent said that the UNCITRAL Rules of Arbitration could not be applied except with the agreement of the parties. The amendments introduced by the parties have priority and the national law of arbitration shall prevail over these rules.

The Respondent also said that, although the arbitration clause said that the Arbitral Tribunal shall draw the rules of procedure without being bound by the procedural laws, this meant only the procedures such as the administration of hearings and inviting the parties to attend; but it could not be enlarged to comprise a certain system of arbitration like the UNCITRAL.

In substance, the Respondent said that the deletion of cars from the item of exemptions was not by negligence but was intended to exclude them from exemptions.

The claimed exemption must satisfy two conditions:

1. It must be provided for in the laws of investment in the host country.
2. It must relate to taxes and not duties.

The exemption from stamp duties recognised in the treaty relates to the share of the Claimant, but does not extend to the contracts and transactions of the Claimant with third parties.

In a later hearing the Respondent acknowledged that it did not object to the company of external common investments being the representative of its government, but it said that its representation was not valid from a legal perspective.

Award

The Arbitral Tribunal ordered to join the plea of the nullity of arbitration with the final award.

In the final award the Tribunal said that the statutes of the company contained an arbitration clause providing for the power of the Tribunal to make rules of procedure irrespective of the procedural laws of the two countries. This power was general and gave the Tribunal the right to choose the appropriate system of procedure, the Tribunal found this system in the UNCITRAL arbitration rules, and there was no reason to restrict the power of the court in this respect, and the plea of nullity of applying the UNCITRAL rules is dismissed. The provisions of the procedural law of the host country which imposed the provisions of the procedural law upon arbitration are meant for the cases of submission clauses and do not apply to the cases in which there was an arbitration clause, as in the present case.

The company of external common investments was the real party in this arbitration and not the company established in the host country, as this company had just submitted the notice of arbitration on behalf of the first one. The Claimant then had all the rights referred to it from its government in accordance with the civil law in the two countries, which provided that:

He who subrogates another person legally or by agreement is entitled to his right with the peculiarities of such right, its accessories, its sureties as well as its pleas. Such subrogation occurs within the value of the consideration presented.

Accordingly, the Claimant had lawful rights to claim in this arbitration and could be a party.

There is no fault in arbitrating against the two Ministers of Finance and Economy instead of the Prime Minister, because:

the juridical personality of the State is one, but the State may grant some provincial or administrative units to the juridical personality to assist it in exercising its functions, and to sue and be sued.

This does not mean that these units had become isolated islands from the State, as it was recognised that the responsibility of the Cabinet was joint in the provisions of the constitution of the State, and each minister was responsible for implementing the public policy of the State in regard to his ministry and they represented the State and the government as public authority. The notice of arbitration was directed to the Minister of Finance because his ministry demanded the custom duties and stamp duties, and to the Minister of Economy because he was the signatory of the treaty on behalf of his government, and they were the proper responsible persons and not the Prime Minister.

As to the legal representation of the Claimant, the situation in arbitration is different from litigation, as attorneys are not required to be lawyers, and they assist the parties in the manner stated in Article 4 of the UNCITRAL rules and they are not required to get permission from the authorities in their countries. The attendance of lawyers with the head of the legal department of a party is an indication, without doubt, that this party had empowered these lawyers to represent it.

The Arab treaty of investment and transfer of Arab Capitals through Arab countries provides in Article 5 that these countries shall always give the most favoured nation clause to Arab investments, and Article 4 provides for the non-discriminatory treatment among Arab investments.

This treaty was adhered to by the two countries and the same two clauses were repeated in the treaty between the parties.

The Tribunal noted that the word “machinery” does not include in any case the cars and means of transport. But it was possible, according to the Convention of the Arab league of August, 29, 1970, to apply the discrimination prohibition, because there was a company from another Arab country working in the same area, which enjoyed in its treaty the exemption of cars and transport means, and the treaty in the present case had to avail of the same rule especially since the Respondents did not object to the allegation of the Claimant that the exemption fell from this treaty by negligence, and this was the accurate interpretation of the treaty.

As to the exemption from stamp duties, the Tribunal said that this exemption was provided for the shares of the company. There was no exemption for contracts and transactions of the company, and the treaty of the other Asian company belonging to another State stated the same thing and there was no discriminatory treatment in this connection.

The Tribunal ordered each party to pay half of the costs and fees of arbitration and distributed the fees among arbitrators in the ratio 40 : 30 : 30.

Works Contracts

CASE NO. 26

Final award of 11 March 1999, case no. 101/1997

Arbitrators: Three Egyptian Arbitrators
Parties: Claimant: An African company
Respondent: One of two European companies
(one bought certain assets of the other)
Place of Arbitration: CRCICA
Subject Matter: • failure to define Respondent
• termination of procedure
Applicable Law: Egyptian law
Language of Arbitration: Arabic

Held

It is impossible to oblige a party to accept the mandate of an arbitrator appointed by another party even if this party has replaced the appointing party.

Facts

The Claimant (a thermal insulation company) entered into a sub-contract with the Respondent. The Respondent is a European company awarded a contract in the project of establishing a power station by a government authority.

Some months later, the Claimant applied for arbitration with CRCICA, as there was an arbitration clause in its sub-contract:

In case of dispute between the two parties it shall be settled by arbitration with CRCICA.

The Claimant alleged that the Respondent notified it with the dissolution of the sub-contract and retained the equipment mobilised by the Claimant and prepared for the operations of thermal insulation and industrial painting in the power station.

The claims were as follows:

1. To order the Respondent to pay the total value of the sub-contract;
2. To order the Respondent to pay damages to the Claimant for the harm of termination of the sub-contract.

A message from the lawyer of the Respondent was received by CRCICA saying that she represented the Respondent, that she received the application for arbitration,

and before any discussion on the merits of the case, she would like the Claimant to submit a copy of the sub-contract. She said that, in principle, she did not object arbitration if it was needed.

She requested that English should be the language of arbitration and that the Egyptian law should be the law applicable to this arbitration.

She stated that she was awaiting the Claimant to appoint its arbitrator in order to appoint the arbitrator of the Respondent.

The Claimant appointed an arbitrator, and requested that Arabic be the language of arbitration. It made an amendment to the application for arbitration saying that the Respondent was another European joint stock company and that it applied to the Arbitration Centre to order that the conservatory attachment be levied upon the funds and properties belonging to this new Respondent, under the hands of the local power authority. It gave as reason for this attachment the bad financial situation of the new Respondent.

The Centre refused this demand saying that it was one of the aspects of competence of the Arbitral Tribunal and it was not yet formed and that the Claimant could apply to the judiciary to get an order of conservatory attachment.

The Arbitral Tribunal was formed from an arbitrator for the Claimant and an arbitrator for the Respondent (the first Respondent) and the two arbitrators appointed the presiding arbitrator.

After the formation of the Tribunal, the Claimant filed an application for arbitration against the second Respondent ending with the same demands of the first application and reducing the amounts claimed.

In the first hearing, two shareholders from the Claimant company were present, accompanied by three lawyers, two for the first shareholder and one for the second, because there were some differences between the two shareholders although they both constitute the Claimant party.

One of the lawyers of the Claimant applied for a conservative attachment of the dues of the Respondent with the power authority. He asked the Tribunal to give him an authorization to the power authority to enable him to obtain information about the data of the power station and about the new legal completion certificate of the Respondent and if there were new projects awarded to the Respondent.

The power authority replied that the Respondent (the old one) was a member in a consortium who entered into a contract with the authority to implement boilers for the power project, which was expected to be completed five months later, and that the new Respondent had applied for the authority saying that it bought most of the assets of the old defendant, and after the authority was ascertained of the due transfer of obligations and rights of the old Respondent to the new Respondent, it approved that it shall replace the old Respondent in all the contracts made with it.

The new Respondent alleged that the Arbitral Tribunal had no jurisdiction to consider the case because there was no arbitration agreement between the Claimant and the Respondent and that the copy of the sub-contract submitted by the Claimant was different from the original of this contract signed by the Respondent. When the two parties submitted the originals they had, it was found that they were different, as the contract submitted by the Claimant contained the arbitration agreement stated

before, while that of the Respondent was (in the same item) providing for litigation with the court of first instance.

The signatories of the Claimant and Respondent on the sub-contract were present in the hearing and both said that the signatures on the submitted copies were not their signatures and these signatures were forged.

The lawyers of each party alleged the forgery of the copy submitted by the other party, and requested the Arbitral Tribunal to settle the issue of forgery. The hearing was postponed and each party brought a lawsuit of forgery before the court of first instance to say that the sub-contract submitted by the other party was forged, and the Arbitral Tribunal was notified accordingly by both parties.

The Claimant sent another memo to the Tribunal saying that the lawyer of the Respondent had approved arbitration in the first meeting and that she discussed the substance related to the forged sub-contract and this Respondent was no longer entitled to talk about forgery according to Article 14 of the Evidence Act.

The Claimant said also that the new Respondent was the particular assignee (*ayant cause à titre particulier*) of the old Respondent, after having bought its assets especially in the power station.

As a result of the allegations of the Claimant the Centre requested the Arbitral Tribunal to give its opinion on the representation of the new Respondent in the dispute.

The Arbitral Tribunal convened for deliberation and decided:

1. To suspend the case until the settlement of the original forgery lawsuit, being a matter lying outside the mandate of the Arbitral Tribunal related to a challenge for forgery of the arbitration clause;
2. Requesting the new Respondent to give a reply to the allegations of the old Respondent.

The new Respondent said that it bought some assets from the old Respondent but each of them was keeping its own entity and juridical personality and it refused the demands of the Claimant.

The Claimant filed a new memo saying that it waived its proceedings against the old Respondent and insisted upon the new Respondent to submit to arbitration, as its sole defendant, and requested the court to stop the stay of proceedings and to accelerate the procedures.

The old Respondent said that it accepted the waiver made by the Claimant, and considered that there was no need for the arbitrator nominated from its part, and for the presiding arbitrator who was appointed by the approval of the two panel members.

The Arbitral Tribunal noted that the conduction of the proceedings became almost impossible and requested the Claimant and the new defendant to file memos upon the impossibility of conducting procedure.

The new Respondent said that the proceedings must be terminated because it was impossible to continue arbitration without the arbitration clause signed by it.

The Claimant said that it insisted upon the validity of the proceedings and requested the Tribunal to continue until a final award be given and notified the Tribunal that it had brought a lawsuit before the court of appeal to order the arbitrators to continue their mission.

Award

The Arbitral Tribunal gave the following decision:

1. The juridical personality of the old Respondent did not vanish or expire but it still exists and the decision of the European Court approved the auction in which a part of the old Respondent was sold to the new Respondent, and gave permission to the board of directors of the old Respondent or its legal representative to sign the contract of assignment with the new Respondent.

The old Respondent was discharged by the Claimant and as a result the nomination of its arbitrator became invalid and the same applied to the chairman of the Arbitral Tribunal. It was impossible to oblige a party to accept the mandate of an arbitrator appointed by another party even if this party had legally replaced the appointing party.

2. The lawsuit brought before the court of appeal does not oblige the arbitrators to wait or to continue because the impossibility of conducting the arbitration was evident, and the main principle on the issue was that the arbitrator had the competence of competence.
3. According to Article 34.2 of the UNCITRAL Rules:

If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in paragraph 1, the arbitral tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings. The arbitral tribunal shall have the power to issue such an order unless a party raises justifiable grounds for objection.

As either party did not raise justifiable grounds for objection the Arbitral Tribunal ordered the termination of proceedings for impossibility of continuance.

4. Arbitration costs shall be borne by the Claimant and the old Respondent equally.

Commercial Business Sale Cases

CASE NO. 27

Award of 28 September 1998, case no. 106/1998

Arbitrators: Three Egyptian Arbitrators
Parties: Claimant: An African tourism and hotels company
Respondent: An African tourism and hotels holding company
Place of Arbitration: CRCICA
Subject Matter: • purchase of a five star hotel
• reserve of replacement and renovation disputed
Applicable Law: Egyptian law
Language of Arbitration: Arabic

Held

- 1. The commercial business is not a distinct patrimony separate from that of its owner.*
- 2. Although no terms of reference has been made among parties and the arbitrators, the dispute is brought before the Tribunal through the statement of claims and the statement of defence.*

Facts

The Claimant bought from the Respondent a five star hotel in one of the African capitals, the price was paid and the real estate registration was made. Before this sale the hotel had been entrusted to another management company. The buyer says that it did not terminate the management contract of the third company.

Dispute arose upon a reserve in the balance sheet of the hotel for replacement and renovation, and this allocation amounted to about 7.5% of the price of purchase.

Each party alleged that it was entitled to have this reserve, and as they could not agree the purchasing company initiated arbitration proceedings based on an arbitration clause in the contract of sale:

The settlement of any dispute arising out of this contract or related thereto shall be by arbitration with Cairo Regional Centre For International Commercial Arbitration in accordance with the rules of arbitration applicable in the said Centre. The language of arbitration is Arabic, place of arbitration is Cairo, the Arbitral Tribunal shall be composed of three arbitrators to be appointed by the

said rules of arbitration. The award shall be final and binding upon the two parties and is not appealable. The award shall settle the issue of expenses and fees of arbitration and all other issues.

The proceedings, as well as the formation of the Tribunal were satisfied in accordance to this clause and the Tribunal held a hearing in which a schedule for the parties was laid to file their statements of claims and counterclaims and to make suggestions for the terms of reference by both parties to be made in eight copies, before the following hearing.

The difference between parties relates to an item in the balance sheet annexed to the sale of the hotel regarding the allocation of replacement and renovation. The Claimant alleged that this item was one of the items included in the sale of the hotel and it was noted by the parties at the time of conclusion of the sale contract. The Claimant said that the Respondent had deducted this amount from other amounts due to the Claimant, and it insisted on recovering this amount by arbitration, the expenses of which shall be to the side of the Respondent.

The Claimant substantiated its claims on the following grounds:

1. The object of sale had a complex nature, as it was composed of the sale of the land and the building and the sale of the hotel as a commercial business in the field of hotels and tourism. Item 6 of the contract of sale stated in paragraph 9 that one of the components of the sale was: "The monetary allocations according to the contract of management." These words were not included in the registration of the land and the building, but it was known that by the sale meant a sale of a commercial business which was composed of material and moral elements defined by the purposes to which such elements are devoted.

This implied that the deductions provided for in the contract of management from "the income of global operation" to constitute a reserve for replacement, maintenance and additions, shall devolve to the buyer because it was the actual owner, especially if we note that the management contract to a third company was still existing and valid.

The commercial business sale contract did not need to be registered and the registration of the land and the building could not contain something about the reserves or allocations because these are items in the sale of the commercial business.

The Claimant crystallised its claims as follows:

1. To say that the Claimant was entitled to have the balance of the allocation of replacement and renovation;
2. To say that the Respondent had unlawfully deducted this amount from the profits of the Claimant, because it was contrary to Articles 703 and 706 of the Civil Code;
3. To order the Respondent to return the said sum to the Claimant with interest as provided for in Article 706 of the Civil Code;
4. To dismiss the counterclaim of the Respondent and to oblige it to pay the expenses and fees of arbitration and the fees of lawyers and any other expenses incurred by the Claimant.

The Respondent requested to dismiss the demands of the Claimant, to order the Claimant to pay the costs and fees of arbitrators and to retain all other rights of the Respondent. The Respondent substantiated its case by saying that the contract of management was valid for 20 years ending in 2010, and by virtue of this contract the allocation of replacement and renovation is a percentage of 4% of the global income of operating in each financial year, and at all times it rests as an acquired right of the owner, and by the end of the contract of management this fund shall devolve directly to the owner, because the management contract was terminated by the sale to the Claimant, and the continuance of management was by agreement with the new owner. The Respondent said that the commercial business was not a distinct patrimony separate from that of the owner, and the rights and obligations of the old owner did not devolve by the sale to the new owner. The contract of management did not devolve to the new owner as a particular assignee (*ayant cause à titre particulier*) but by a tripartite agreement containing the two parties and the managing company. The Respondent alleged that its position in this dispute was upheld by the Central Auditing Agency.

In its final memo the Respondent requested that the award shall:

1. Dismiss the demands of the Claimant;
2. Order the Claimant to pay arbitration costs and fees as well as the fees of the lawyers of the Respondent;
3. To safeguard any other rights of the Respondent.

Award

The Arbitral Tribunal said that although no terms of reference had been made among the parties and the arbitrators, the dispute was brought before the Tribunal through the statement of claims and the statement of defence and no plea of non-competence was alleged.

The contract of sale provided that:

... the second party (Claimant) shall implement all contracts and agreements signed between the first party (respondent) and the managing company during the period in which (Respondent) had been the owner, and specifically the contract of management and the contracts of shops and establishments, and the (Respondent) shall notify the managing company accordingly.

In other items of the sale contract it was stipulated that the two parties agreed that all the dues of the first party (Respondent) shall be settled in accordance with the financial position of the hotel on the day following the settlement by the second party (Claimant) of the price in full.

The Respondent made a set-off between the profits of the Claimant existing under its hands and the amount of the replacement and renovation allocation based on Article 362 of the Civil Code which provides that:

The Arbitral Tribunal finds that the conditions of set-off are not satisfied in the present case, because the Respondent is indebted to the Claimant with the profits

kept by the Respondent, but the other consideration of the set-off belongs to the third party i.e. the managing company and exists under its hands and in such case the set-off cannot be effected and the plea of the Claimant that the set-off is null succeeds, and the Respondent should return the amount deducted to the Claimant.

Accordingly, the Respondent had to refer to the managing company or any other party if it had the right to sue them.

The Claimant pretended to have the right to this allocation, which was not available to him but was existing in the bank of the managing company and the way to obtain it either through the Claimant or the Respondent was by introducing the managing company into a lawsuit for this purpose.

As the managing company was not introduced as a party, it was impossible to give either party the right to the replacement and renovation allocation.

Accordingly, the demand of the Claimant to own the replacement and renovation allocation was not permissible in this case because the managing company was not represented in it.

The Arbitral Tribunal awarded the Claimant the right to recover the amount of set-off with interest at the rate of 5% (being a commercial matter) as of the date of bringing the lawsuit, and ordered each party to pay half of the costs and fees of arbitration and to bear the fees of its lawyer.

Commentary

1. A “Separate Opinion” in this case was filed by the arbitrator nominated by the Respondent as he preferred that the case be postponed to allow the parties to try to convince the managing company to enter as a third party in this case, but the other arbitrators refused and issued the award as such. [see also case No. 31].

This is not a dissenting opinion, as this arbitrator did not disagree with his fellows and he signed the award with them, and this is why we said that it was a separate opinion and not a dissenting opinion.

2. The Arbitral Tribunal said that:

Although no terms of reference has been made among the parties and the arbitrators, the dispute is brought before the tribunal through the statement of Claims and the Statement of Defence.

Indeed, this is slightly different from Article 27 of the Arbitration Act in Egypt which provides that the dispute is brought before the Tribunal by the notice of arbitration, which is filed earlier than the statement of claims.

Lease Contract

CASE NO. 28

Final award of 1 March 2000, case no. 135/1999

Arbitrators: Three Egyptian Arbitrators
Parties: Claimant: A European oil company doing business
in an African state
Respondent: An African group managing leased
stations for petroleum services
Place of Arbitration: CRCICA
Subject Matter: • contract of lease of petroleum service station
and a coffee shop
• agreement upon automatic dissolution
in case of breach
Applicable Law: Egyptian law
Language of Arbitration: Arabic

Held

Challenging the arbitrators may not suspend the arbitration and it shall be continued until the issuance of the final award, but if the challenge succeeds the award is considered non-existing.

Facts

The parties entered in 1994 into two contracts of exploitation of a station of petroleum services and a shop existing in the same station. The two contracts provided for the obligations of both parties and the cases of instant dissolution of contract without need for notice or summons or a court decision. The contracts provided for amicable settlement and arbitration:

Any dispute that may arise out of this contract or be related to the contract or its annexes will be settled by amicable efforts of parties. The amicable settlement fails when a party gives written notice to the other party and in such case all disputes, differences or claims shall be finally settled through regional arbitration in Cairo (sic), by three arbitrators without recourse to the ordinary courts.

The Claimant said that the Respondent had committed several breaches of the contract upon the occurrence of which dissolution may be effected; among these breaches:

1. The Respondent did not pay the value of exploitation of the station and the shop.
2. The Respondent gave to the Claimant cheques without provision and criminal proceedings were continued.

As a result the Claimant gave notice to the Respondent for the dissolution of the two contracts, requested it to deliver the station during two weeks as of the date of this notice, requested the payment of the delayed amounts with legal interest and in case of any further delay the Respondent shall bear all liabilities.

As the Respondent did not pay the rent or deliver the premises, the Claimant filed this arbitration requesting to:

1. Order the Respondent to deliver the premises;
2. Order the Respondent to pay the dues with interest;
3. Order the Respondent to pay a certain sum of money for each day of delay, and to safeguard all other rights of the Claimant.

About one month after the filing of the arbitration, the parties agreed for the dissolution of the contracts and the Respondent undertook to evacuate the premises during three and half months. But the proceedings of arbitration continued.

There was an obligation in the contract that in case of dissolution the concerned party shall pay the amount of a penal clause and damages. This obligation was waived in the dissolution contract as well as the differences of lease, but all on condition that the new obligations of the dissolution contract be implemented during the agreed period; otherwise, the penal clause in addition to a new penal clause shall be paid. The parties agreed that CRCICA shall be competent to settle any disputes related to the dissolution contract.

As the dissolution contract was not implemented, the Claimant requested to apply the most stringent clauses of this contract, but due to the dilatory tactics of the Respondent which will be stated, the Claimant waived its rights in the dissolution agreement and upheld the original demands once more.

The Respondent submitted its statement of defence beginning with a plea of non-competence of the Arbitral Tribunal, because the arbitration clause was signed by persons who did not represent the parties and do not have the legal capacity to bind the parties they alleged to represent. As to the representative of the Respondent, he was empowered for acts of management and did not have any power of disposition, and the representative in an arbitral clause must have the power to dispose. The same thing was said about the representative of the Claimant. In a later hearing the Respondent said that it challenged the chairman and one of the arbitrators. The Respondent filed a lawsuit for the challenge in the court and served writs of summons upon the director of CRCICA, the challenged chairman and the arbitrator notifying them with the case of recusation. It added another notification through the prosecutor general containing the same indications, requesting the Arbitral Tribunal to stay the proceedings of the Claimant until the end of the procedure of challenge, and warned the arbitrators to rule upon the challenge saying that the Supreme Constitutional Court said that Article 19/1 of the Arbitration Act, which gives the arbitrators the competence to rule upon the challenge, was contrary to the constitution.

The Arbitral Tribunal decided to join the plea of non-competence to the merits and that in accordance with the fourth paragraph of Article 19 of the Arbitration Act the initiation of the challenging procedure does not prevent the continuance of the arbitral proceedings. So, the Arbitral Tribunal ordered the continuation of the

proceedings, and gave the Respondent a time limit to file its defence as to the merits of the case.

The Respondent said that in addition to the plea of non-competence it requests that the original contract be nullified in concern with the Article of arbitration, and as a subsidiary demand it requested the stay of the proceedings until four cases were settled:

1. The case of cheques without provision;
2. The case of defining the consideration for the exploitation;
3. The case of challenge;
4. The case which would be filed regarding the unconstitutionality of the fourth paragraph of Article 19 of the Arbitration Act.

Award

The Arbitral Tribunal discussed the plea of non-competence and found that the representative of the Claimant was the manager of his company, and according to the law of limited liability companies he had the most extensive powers to manage it and to make dispositions needed for the existence of the company. If we suppose that this representative had exceeded the limits of his powers, his acts would have been affected with relative nullity, which would have been cured by the express or implicit approval of the company, and the company had said that it approved all his actions. Such nullity may not be upheld by the other party.

As to the representative of the Respondent, the deeds of his company said that the management of the company was entrusted to the first and the second partners jointly or severally. They have the right to sign all contracts, agreements, invoices, cheques and, in general, all documents related to the commercial transactions between the company and third parties. They had the right to sue and to represent the company before all governmental and non-governmental entities. All the partners together had the right to sell the properties of the company or to pledge it. Any of the partners may not do any business competing with the activity of the company, directly or indirectly.

The Tribunal said that the deeds of the Respondent did not prevent for the representative except the sale of properties, whereas the pledge and disposition and any other acts are allowed to him, including the arbitration agreement. For these reasons the plea of non-competence was dismissed.

The Arbitral Tribunal dealt with the four cases for which the Respondent requested the stay of proceedings in the present case and found that:

1. The case of fixing the value of exploitation by the court was not acceptable and the Claimant (Respondent in that case) requested the court to say that this case was inadmissible because there was an arbitration clause between the parties. The Tribunal also said that the value of exploitation does not need re-fixation because it was already fixed in the contract and there was no default from the Claimant or negligence, and if the Respondent had any comments it could have submitted them to the Tribunal, thus the Tribunal refused to stay the present case for this reason.

2. The case of misdemeanours of cheques without provision was not one of the preliminary issues necessary for the settlement of the arbitration, and the Tribunal refused to stay the present case.
3. The case of challenge: this case did not prevent the conducting of arbitration until the end, and the Tribunal refused to stay the arbitration.
4. The stay for unconstitutionality of paragraph 4 of Article 19 of the Arbitration Act came too late because the Respondent submitted the memo containing it after the time limit given to the Respondent, and the Tribunal did not accept it.

The Arbitral Tribunal, in respect of the claims, said that the two contracts were automatically dissolved as from the date of the notice and the Respondent was ordered to deliver the station and the shop with its equipment to the Claimant. The Respondent shall pay for the late delivery a certain sum of money for each day until final delivery.

As to the costs of arbitration and the fees of arbitrators, a contradiction occurred in the award: the Tribunal in paragraph 5 of the terms of enactment ordered the Respondent to pay the costs and fees, and in paragraph 6 ordered each party to pay half the costs and fees and to bear the fees of its lawyers. All other demands were dismissed.

Commentary

Article 19 of the Egyptian Arbitration Act relating to the challenge of arbitrators is found in page 239 of the first volume of this book.

In the case of CRCICA No. 34/1995 (see volume 1, pp. 161–72) one of the parties challenged the Arbitral Tribunal, the Tribunal dismissed the challenge and issued the final award despite the appeal of the decision of dismissal of challenge. Before the court of appeal, the challenging party requested to stay her appeal and to give her a permission of recourse to the Supreme Constitutional Court to say that Article 19.1 of the Arbitration Act which gives the arbitrators the power to rule upon the challenge was contrary to the constitution. She went to the said court and could obtain a judgment of unconstitutionality of the said paragraph. This judgment was rendered after the final award in the case. The award given before would be subject to the judgment of the court of appeal, which would disregard the decision of the arbitrators refusing the challenge and give its judgment upon it; if such judgment approved the challenge the award would become null and void.

In the present case (No. 135/1999) the Respondent wanted to use all dilatory tactics against the Claimant and to gain time for several years in courts before being evacuated from the premises and for this reason, *inter alia*, it tried to stay the case until it got a new judgment for the unconstitutionality of Article 19, paragraph 4 which permits the continuance of arbitration despite the challenge. The Respondent knew that the constitutional court could not be resorted to except by court permission, but it requested this permission from the arbitrators to stay the arbitration case, which was not accepted by the arbitrators and because the Arbitral Tribunal could not give permission to plead before the constitutional court.

It was noted also that the Respondent sent a notice to the arbitrators through the prosecutor general, although this was not a way of serving summons, but the Respondent wanted to make a sort of disturbance and “procedure disturbance” (if this expression is acceptable) for arbitrators who thought that the notice contained a personal accusation against them. Of course, such a notice was sent in bad faith but, fortunately, the Tribunal did not give it any attention.

Sale and Lease Cases

CASE NO. 29

Final award of 29 April 1998, case no. 98/1997

Arbitrators: Three Egyptian Arbitrators
Parties: Claimant: An African tourism company
Respondent: The general authority for
tourism development
Place of Arbitration: CRCICA
Subject Matter: • simulation of price
Applicable Law: Egyptian law
Language of Arbitration: Arabic

Held

If the sale prices of land are doubted (simulated) because of the relationship between parties (a company and its affiliates) the arbitrator may seek other prices in the area for guidance.

Facts

The subject matter was a contract of sale and lease of lands for tourism development. Dispute arose and amicable settlement did not succeed and the parties signed a submission document saying that:

As the parties are willing to accelerate the liquidation of the dispute concurrently with safeguarding the interest of public welfare and the stability of tourism development, the parties agreed hereby to settle this dispute by arbitration with Cairo Regional Centre for International Commercial Arbitration and its rules shall be applicable.

The Egyptian Law is the law applicable to the dispute, including the articles related to the public order of the Law of Arbitration no. 27 of 1994.

The Arbitral Tribunal shall be composed of three members whose names are: —

The Tribunal shall decide the sums due to either party resulting from the contracts concluded between them or from the implementation of such contracts.

Arabic shall be the language of arbitration and any document in a foreign language shall be accompanied with a translation into Arabic.

Seat of Arbitration is Cairo and the documents and memos shall be deposited with the Centre and it shall distribute copies to the Arbitrators and Parties.

Claimant shall pay the arbitration costs except the fees of the agent of the authority, whatever may be the result of the case.

The award issued by the arbitrators shall be final, binding upon parties and enforceable.

The contract provided for the sale of one million square metres of land from the Respondent to the Claimant in 1990. In 1993 an annex to the contract was made to include sale and lease. The Claimant had the tasks of global development of the area of a bay beside the Red Sea, to make studies in the scopes of economy, finance and marketing, to prepare the general and the detailed planning including the sites of different projects of development, the areas of services, the area of housing for employees and to implement the nets of public utilities to be approved by the Ministry of Tourism.

It was provided also for the lease for ten years for nine million square metres after which the Claimant was entitled to buy it in whole or in part.

The Claimant had the right to sell or lease parts of the lands upon certain conditions provided for in the contract and its annex. Among these conditions, the Claimant shall pay to the Respondent 50% of the price of sale after deducting the relative portion of the infrastructure provided for and some other charges.

The expenses of the infrastructure amounted US\$12 for each square metre in addition to the financial charges and the charges of the land, calculated on the basis that the sold plot of land was equal to half the purchased surface.

In the annex of 1993 the deductible amount from the price of the sold land became US\$40 for each square metre. The Claimant established two affiliated companies, to which it sold a piece of land each. The share of the Respondent according to these two contracts of sale was disputed by the Respondent, alleging that this share is 50% after deduction of the infrastructure charges as shown by the balance sheets of the company in the years 1992–1993.

On the other hand the company alleged that the balance sheets of 1992–1993 did not contain the effective charges of infrastructure of the project. All contractual documents between the parties did not provide for the calculation of infrastructure charges by using the balance sheets of the company, but had expressly provided that the share of the authority shall be calculated as 50% of the price of the developed lands after deducting an agreed sum which represented the development of lands, the utilities and the infrastructure.

This rule was agreed upon because there were no defined accountancy rules applicable in case of dispute.

The financial statements of the company represented the income and expenditure at a certain period of time and did not represent the total charges of the company incurred for the execution of the works of the project until its end.

The company provided the authority with a certified cheque representing the dues of the authority, and as a guarantee for any further dues it submitted a bank letter of guarantee for the operations of lands devoted to the two affiliated companies.

The Claimant raised the problems encountered by the project and said that it needed long-term financing for the infrastructure and requested, in collaboration with the authority and the International Bank, to extend this financing, and this bank approved on condition that generating, desalination and drainage should be outside

the limits of the project for reasons of environment protection. This change led to an additional expenditure of eightfold for the infrastructure from the previous estimations at the beginning of the project.

This finance was granted to the authority upon guarantee from the government and could be granted to private sector investors who would avail of 60% of the loan and submit the other 40% from their own resources.

The demands of the Claimant were:

1. To say that the Respondent is not entitled to any amounts regarding the two contracts of devotion of lands;
2. To order the Respondent to return the amount of the certified cheque because the Respondent had no right to such an amount, and it was paid under threat from the Respondent to withdraw the land from the hands of the Claimant;
3. To order the Respondent to return the letter of guarantee for the same reasons;
4. To order the Respondent to pay interest for the amount of the certified cheque because it was borrowed with banking interest;
5. To order the Respondent to pay the expenses of issuing the letter of guarantee;
6. To order the Respondent to pay damages to the Claimant because of the losses caused to the project by unlawful acts from the Respondent;
7. To order the Respondent to pay legal interest for all the amounts awarded until the date of final settlement.

The Claimant reserved its right to amend and make these claims precise during the proceedings.

Later, the lawyer of the Claimant sent a message to the Director of CRCICA declaring that his principal had waived Claim 6 (damages).

The Respondent alleged that the Claimant had abused its right to sell plots of the land and did not fulfil the conditions of the agreements, as it began to sell before the completion of the infrastructure, a time at which the prices were very low. One of the obligations of the Claimant was to get the approval of the Respondent before disposing of the land, but the Claimant did not fulfil its obligation and the Respondent knew about the sale from the Investment Authority.

As a result the judge or the arbitrator had to prevent fraud and bad faith by obliging the debtor to pay damages and such damages include the expected, as well as the unexpected damage, because of the bad faith of the Claimant.

The two contracts of sale to affiliates were not official but just simple contracts because the Respondent authority was not a party to them, and as such, the Respondent had to rely upon the data included in the balance sheets of the Claimant.

The Respondent requested to dismiss the demands of the Claimant and to award the Respondent 50% of the profits as agreed upon and to award interest at banking rates.

Award

The Arbitral Tribunal said that the decisive points in this dispute were:

1. The charges of infrastructure, the land and the loan finance;
2. The price of the lands sold to the affiliated companies.

The Tribunal discussed them as follows:

1. The infrastructure, the land and the charges of the loan

The contract of 1990 says that:

50% shall be paid to the first party (Respondent) from the value of sale of land after deducting the share of the sold plot in the charges of the infrastructure prescribed to be US\$12 for each square metre, in addition to the costs of financing and the cost of land calculated on the basis that the sold surface equals half of the purchased surface.

The Arbitral Tribunal considered that this clause means:

1. That the charges of the infrastructure is a lump sum of US\$12 for each square metre;
2. Financing costs are calculated on the basis that the sold surface equals half of the purchased surface, and there is no lump sum, and these costs are not part of the charges of infrastructure, as such interpretation is contrary to the provisions of Article 150.1 of the Civil Code which do not allow any deviation from the clear meaning of the wording of the contract;
3. The cost of land is not included in the lump sum of the infrastructure for the same reason of correct interpretation.

In the annex of 1993 it is said that:

the second party (Claimant) has the right of disposal of the whole or part of the sold area provided that it shall pay to the Authority (Respondent) 50% of the sale value of the lands after deducting the charges of the infrastructure, the value of purchase of the land and the financial costs, as said before on the basis of US\$40 for each square metre.

This means that the lump sum became US\$40 per square metre.

The application of these two texts was disputed: The Claimant considered that the annex of 1993 has a retroactive effect which comprises the two contracts of sale made to the two affiliates, while the Respondent said that this annex did not apply except from its effective date and without retroactivity and the infrastructure lump sum rests at US\$12.

The Arbitral Tribunal decided that the interpretation of the Claimant was the right one based on the following:

- (a) The circumstances surrounding the conclusion of the annex were clear enough to justify this interpretation.
- (b) The civil law rule said that: “the latter cancels the former”.
- (c) The two parties exchanged the general plan and the milestone with some comments, which were remedied, and a new offer and acceptance were exchanged in 1991, and this meant that the changes abrogated the previous provisions.

This change extended to the developed land as it was one million square metres in 1990 and become one and a half million square metres in 1991 and 1993, and several correspondences between the parties confirm that.

- (d) The parties wanted the development of the whole surface to start with the annex of 1993 and this meant that the new lump sum of this annex should apply.
- (e) The reason behind the annex was that the financial equilibrium of the contract was going down.
- (f) Another reason was the change made by the International Bank for the safeguard of the environment.

Although the loan of the International Bank was not received until 1997, the agreement of parties was based on the effective expenditure and not upon the sums loaned.

The Arbitral Tribunal arrived at the result that the charges of each square metre of the infrastructure was US\$40.00.

2. *The price of the two plots sold to affiliates*

This was the second decisive point of the case. The two contracts contained the surface and the price. The Respondent considered this price as simulated, because the report of the committee of the Investment Authority said that the proceeds of sale exceed the price alleged by the Claimant by 150%. This committee brought the figures from the books of the Claimant. These books were commercial books and were opposable against this trading company. These figures were also correct because the profits were distributed among shareholders according to them.

The Claimant said that the prices in the two contracts were for encouraging investors to invest in this area.

The Arbitral Tribunal said that the contract had defined the solution to this problem (according to the rule *pacta sunt servanda*) and the price must be the prevailing price in the area, as there were other contracts from other companies concluded on dates subsequent to the dates of contracts of the Claimant, but the prices did not change because the area was very far and important changes were not expected.

In the light of these contracts the prices of the two affiliates of the Claimant were raised by the Arbitral Tribunal by 50% for one of them and 25% for the other.

The average adopted for these two contracts was the same price as for the contract no. 3 to a third party.

The Tribunal made the calculations of the prices of the two plots of land, deducted the charges of the infrastructure, awarded the Respondent the net profit due and deducted this net from the amount paid by the Claimant before the dispute (lest the Respondent should withdraw the lands) and ordered the Respondent to return the bank letter of guarantee to the Claimant.

Although the costs of arbitration could be distributed among parties, the submission clause provided that they would be borne by the Claimant and it accepted that, and the Tribunal said that each party had to bear the fees and expenses of his lawyer and that any other claims or counterclaims were dismissed.

Commentary

A lawful demand of the Claimant was not discussed in the reasons of the award, that is, the banking commissions on the letter of guarantee, which should have been borne by the Respondent, but the Arbitral Tribunal dismissed it without giving reasons. No correction could be made after 30 days from the date of the award, in accordance with the Arbitration Act (Article 50/1).

Commercial Agency Software Contract

CASE NO. 30

Award of 11 March 1999, case no. 109/1998

Arbitrators: Three Egyptian Arbitrators
Parties: Claimant: An African software company
Respondents: Two software companies; one
North American and the other European
Place of Arbitration: CRCICA
Subject Matter: • contract providing for arbitration and litigation
Applicable Law: Egyptian law
Language of Arbitration: English, Arabic

Held

Two clauses of the agreement were contradictory because clause 21 provides for arbitration and clause 22 provides for litigation. The arbitration clause in clause 21 of the agreement is valid and it is clear that the intention of the parties is to use arbitration as a means for settling disputes arising out of the interpretation or implementation of the contract or any matter related thereto. The said clause defines in detail and over three paragraphs the general principle being the settlement of disputes between the parties through arbitration by reference to a single arbitrator to be agreed upon by the parties or otherwise, each party shall appoint one arbitrator within the period of time set in clause 21 and the two arbitrators thus appointed shall agree upon a third arbitrator. On failing to reach an agreement in this concern, such third arbitrator shall be appointed on application of either party, by the court of law according to the law of civil procedure. Paragraph 3 of clause 21 states that the award made by the single arbitrator, all three arbitrators or a majority thereof, as the case may be shall be final and binding upon the parties and subject to no appeal. Article 22 then provides for the applicability of the Egyptian law for the interpretation and implementation of the contract in all respects and provides also for the acceptance of the parties to submit to the jurisdiction of the Courts. The interpretation of clause 22 has to be considered in the light of the rulings of clause 21 which approves arbitration as a means for settling disputes arising out of the contract and regularises in detail the rules of arbitration. Thus, claiming the clauses 21 and 22 to be contradictory and the arbitration clause of clause 21 to be invalid offends the express will of the parties to the contract.

Facts

The Agency Contract comprised an arbitration clause:

All disputes related to the interpretation of this contract, its application or any other matters related thereto shall be referred to a single arbitrator to be agreed upon by the parties. If the parties are unable to agree as to the appointment of the arbitrator within 15 days of either party giving notice of reference to arbitration, each party shall within 15 days appoint one arbitrator and the two arbitrators thus appointed shall agree upon a third arbitrator. If agreement between the two arbitrators upon the appointment of a third arbitrator cannot be reached within 15 days from the date upon which the last is appointed, such third arbitrator shall be appointed, on application of either party, by the ordinary courts of Egypt according to the law of civil procedure.

The arbitral award to be issued by the single arbitrator, all three arbitrators or a majority thereof, as the case may be shall be final and binding upon the parties and subject to no appeal.

An agreement was entered into in June 1991 between the parties regarding the marketing of computer programs via a non-exclusive agent (Claimant), as a step forward in establishing a limited liability company between them.

The said agreement ended in May 1993 and the parties agreed to keep renewing it on an annual basis until May 1997, the date on which termination was made by the Respondents. The Claimant began to ask for damages and compensation, and due to failure to reach an agreement on settlement, the Claimant filed this case of arbitration containing:

- Claims alleging the existence of a *de facto* company between parties;
- Claims based on enrichment without cause;
- Claims based on alleging illegal competition;
- Claims on the termination of the agency;
- Claims for compensation on moral damages based on the concept of abusive use of rights.

The Respondents raised a plea of non-jurisdiction of the Arbitral Tribunal to adjudicate the said claims, and a plea to the non-admissibility of the arbitration because of: the non-validity of the arbitration clause and of the notification procedures, as the Claimant was not a party to the agreement, as well as the non-validity of the agency agreement being incompatible with the commercial agency law of the African country.

The points to be adjudicated were:

1. Defining the scope of arbitration and matters related to the jurisdiction;
2. The plea of non-admissibility of the arbitration;
3. The Claimants' demands;
4. The first and second defendant's counterclaims.

Award

On the first point the Arbitral Tribunal considered the arbitration as: “international commercial”. The issues covered by the arbitration clause were:

all disputes in relation to the interpretation or application of the agreement on any matter relating to this agreement.

Accordingly, the issues covered include the agency agreement and should not exceed this scope.

1. The Tribunal negated the existence of the *de facto* company because this was expressed in the agreement as a hope to be realised through a new contract not according to this agreement.

2. Enrichment without cause: The Claimant pointed out that a *de facto* company has been established under its name between the parties. This new company realised profits and transmitted it to the Respondent and paid taxes on these profits.

The Claimant concluded that on denying the existence of the *de facto* company, and whereas the Claimant paid the taxes of the local subsidiary company, such gains and profits should devolve to the Claimant according to the rules of enrichment without cause.

The Respondents said that this claim was not relevant to the commercial agency and was outside of the arbitration clause.

The Tribunal said that the claim was non-arbitrable and not true because the *de facto* company was ruled to be outside the ambit of the arbitration clause.

3. Illegal competition and abusive use of rights: The Claimant requested compensation for moral damages resulting from defamation of its reputation made by the Respondents in the local and international marketplace. The Claimant asked for the application of Article 163 of the Civil Code (tortious liability) because customers stopped dealing with the Claimant.

The Respondents denied any illegal competition because the Claimant was a non-exclusive agent, and the Respondent was thus entitled, during the term of the agreement, to compete with the Claimant either directly or indirectly, by entering into contract of agency with third parties.

4. The Claimant also raised its demand for moral damages because of the abusive use of right.

The Tribunal said that this claim which stemmed from the tortious liability was within its jurisdiction because the provisions of the Civil Code in this respect apply to both tortious and contractual liabilities, and the claim was acceptable.

5. Admissibility of arbitration: The non-admissibility was raised by Respondents saying that the arbitration clause was invalid due to inconsistency between clauses 21 and 22 of the agreement. While clause 21 referred disputes to arbitration, clause 22 included acceptance of jurisdiction of the courts of Cairo. The interpretation of clause 22 made by the Claimant to the effect that the court jurisdiction was limited to the matters of appointment of arbitrators and of enforcement of award, was not acceptable to the Respondents.

The Respondents said that if there was no discrepancy between the two clauses, then clause 21 must be applied to nothing more than disputes based on the interpretation and application of the agreement as a kind of an agreement to conciliate between the two parties in this concern, whereas clause 22 comprised a general rule admitting the jurisdiction of the ordinary courts to decide on other disputes between the two parties.

The Tribunal said:

The arbitration clause in clause 21 is valid and as it is clear that the intention of the parties is to use arbitration as a means for settling disputes arising out of the interpretation or implementation of the contract or any matter related thereto. The said article defines in detail and over three paragraphs the general principle being the settlement of disputes between the parties through arbitration by reference to a single arbitrator to be agreed upon by the parties or otherwise, each party shall appoint one arbitrator within the period of time set in clause 21 and the two arbitrators thus appointed shall agree upon a third arbitrator. On failing to reach an agreement in this concern, such third arbitrator shall be appointed on application of either party, by the court of law according to the law of civil procedure. Paragraph 3 of clause 21 states that the award made by the single arbitrator, all three arbitrators or a majority thereof, as the case may be shall be final and binding upon the parties and subject to no appeal. Clause 22 then provides for the applicability of the Egyptian law on construing and implementing the contract in all respects and provides also for the acceptance of the parties to submit to the jurisdiction of the Courts. The interpretation of clause 22 has to be considered in the light of the rulings of clause 21 which approves arbitration as a means for settling disputes arising out of the contract and regularises in detail the rules of arbitration. Thus, claiming the clauses 21 and 22 to be contradictory and the arbitration clause of clause 21 to be invalid offends the express will of the parties to the contract.

Accordingly the Tribunal dismissed the plea of non-admissibility of the arbitration.

6. Objection to the validity of notice and the validity of arbitrating with Respondent: This objection was raised by the second Respondent because it was not a party to the agreement and had not been validly served notice. The objection was substantiated by the principle of separate juristic personalities recognised in Egyptian corporate law. The first defendant was neither a contracting party nor a universal successor of the second Respondent.

The Tribunal said:

The common principle in the field of international trade especially as set by various awards is that the concept of the "party" to arbitration does not exclusively mean the person signing the agreement but extends to include its successor whether universal or private, as is the case in the assignment of the contracts, which extends to include the provisions thereof.

Furthermore, the arbitration agreement includes "all founding projects of a joint venture if the latter concluded a contract including an arbitration clause".

For these reasons the Tribunal dismissed the objection to the validity of arbitrating with the first Respondent and that the notification of the notice by fax to it was considered validly made according to Article 7.1 of the Egyptian Arbitration Act No. 27.1994.

7. Non-validity of the agency agreement: This plea was made because the agency agreement was not registered in the register of agency contracts with the administrative authority according to Article 4 of the Commercial Agency Act.

The Tribunal found that the Claimant had fulfilled the legal requirements of the Commercial Agency Act and the agreement was valid.

The Tribunal awarded that the Claimant's demands on the following points were accepted:

Compensation for termination, damages for pecuniary damage, damages for moral prejudice, and expenses and commissions not paid. As to the fees, they were distributed equally between the Claimant and the defendants.

Management Contract Cases

CASE NO. 31

Final award of 2 July 2000, case no. 147/1999

Arbitrators: Three Egyptian Arbitrators
Parties: Claimant: An African tourism company
Respondent: A multi-national tourism company
Joining Party: A third African tourism company
Place of Arbitration: CRCICA
Subject Matter: • allocation for hotel renewal claimed by each of
the three parties [see also case No. 27]
Applicable Law: Egyptian law
Language of Arbitration: Arabic

Held

Obligations and personal rights created by contract relating to property that has subsequently been transferred to particular successors in title, are transferred to such particular successors in title together with the property, when such obligations and rights constitute essential elements of the property and the particular successors in title had knowledge at the time of the transfer of the property to them.

Facts

The Claimant, as owner, entered into an agreement in 1976 with the Respondent for the management of a hotel owned by the Claimant, for a period ending in 2010.

This agreement had provided for making a reserve fund of 4% of the total of the income of operations of the hotel to finance the replacements, innovations and additions to the machinery, equipment and furniture. The unused amounts of this fund shall accrue over the period of the agreement and form a reserve fund allocated for the said purpose, on condition that at any termination of the agreement this reserve fund becomes the special property of the owner.

Twenty years after this agreement, the Claimant sold the hotel to another native company and a day was agreed on in this contract for the settlement of the whole price.

One week after the said date the Claimant asked the Respondent for the balance of the reserve fund of innovations claiming that it was its own property in line with their agreement. The Respondent refused and this arbitration was filed, as it was provided for in the agreement of 1976:

All topics, disputes or issues, on which the parties may disagree concerning the interpretation or execution of this agreement shall be settled through arbitration

according to the law of civil and commercial procedure, by an “arbitration council” composed of three arbitrators acting in the capacity of “amiable compositeurs” arbitrators.

The party applying for arbitration shall serve a notice upon the other party indicating the disputed issue, that it chooses arbitration settlement and the name of its arbitrator. The other party shall during thirty days reply and state the arbitrator it chooses, failing which the Claimant party may apply to the competent court to nominate the second arbitrator. The two appointed arbitrators shall during 15 days of the appointment of the second of them, appoint the third arbitrator who shall have a nationality other than those of the two parties. The third arbitrator must have no relations with either party, must have a good reputation, and be expert in the hotel industry, otherwise the third arbitrator shall be appointed by the court. The decision of the arbitration council shall be final, non-appealable and binding upon both parties. The decision of the arbitration council shall include the distribution of the burden of expenses, among parties.

During a procedural hearing the parties agreed that the place of arbitration shall be the premises of CRCICA, that the parties agreed to the formation of the Arbitral Tribunal, that the language of arbitration shall be Arabic and any documents in a foreign language shall have an Arabic translation, that the law applicable to arbitration is the Egyptian Arbitration Act No. 27.1994, and the substantive law is the Egyptian law, and that the parties empowered the arbitrators to act as “amiable compositeurs”.

The Respondent declared, in this hearing, that it intended to file a petition for joining a new party to the arbitration, which was the purchaser of the hotel, but the Claimant objected to it saying that it was not party to the management agreement, but in a later hearing withdrew its objection.

The purchaser of the hotel filed a petition to be accepted as an intervening party with the Respondent, and this petition was accepted, but later the Respondent and intervening party discovered that they had an interest in being separate parties and applied for this but the Tribunal dismissed their applications because the settlement of the dispute would be delayed.

The three parties substantiated their demands as follows.

The Claimant requested the Tribunal to order the Respondent to pay to it the balance of the reserve of replacement and innovation, on the date defined for obtaining the full price of the hotel, and to order the Respondent to pay the costs and fees of the arbitration.

The Claimant alleged that its agreement of management with the Respondent provided that the said reserve became the property of the Claimant at any termination of the agreement. The sale of the hotel was one of the causes of terminating this agreement, because it was up to the new owner to undertake the management itself or to entrust it to the Respondent or to any other person.

The Claimant said that the intervening party approved that the Respondent paid to the Claimant the balance of the said reserve and undertook to indemnify the Respondent with the same amount.

This undertaking was signed by the managing director of the intervening party. The Claimant said that it accepted this offer from the intervening party and a new

contract was concluded thereby and the intervening party could not withdraw from it. The Respondent had no right to object to pay the reserve balance, because it would take the same amount from the intervening party.

The Respondent alleged that the said reserve was not the property of the Claimant because it belonged always to the owner of the hotel and now it belonged to the new owner. The transfer of title of the hotel was not a cause of termination of the management agreement, because the contract of sale provided for the continuance of the management agreement and considered this matter to be one of the obligations of the intervening party. So, the reserve fund had to continue to exist until the end of the management agreement.

The Respondent also alleged that the intervening party did not request it to provide it with the reserve, but to provide the statement revealing the balance of the reserve; and even if it meant the payment of the reserve to the Claimant, this was upon condition precedent that it would pay the equivalent to it, and this condition did not crystallise yet.

The Respondent said that the Claimant took up the management of the hotel for several months at the time of contracting with the purchaser and deducted from the profits due to the purchaser the amount of the reserve balance, but the purchaser (the intervening party) brought an arbitration case against the seller and succeeded in recovering this balance, and this was proof that the Claimant did not deserve it. The Respondent ended by saying that the case was not admissible because it was premature and brought against a party who has no quality. The Respondent demanded that in case the reserve was awarded to the Claimant, the intervening party should be ordered to pay the same amount to the Respondent, to re-constitute the reserve.

The Respondent based its demand of inadmissibility on the premature initiation of the case because the owner was not entitled to claim for the reserve except in the year 2010, and this is in line with the good faith provided for in Article 148 of the Civil Code, and in line with the principle *pacta sunt servanda* provided for in Article 147.1 of the Civil Code.

The intervening party (the purchaser) pointed out the previous arbitration between it and the Claimant (the seller) (see Case No. 106 in this volume), which ended with an order for the seller to return to the purchaser the amount of reserve it deducted from the profits of the purchaser, and that the said Tribunal was not in a position to define the fate of the reserve fund, because the party retaining it was not present and this party had some rights upon it. Now, the party absent in the previous case was present in this arbitration.

The intervening party argued that the contract of sale contained a list of the items included in the sale, one of which was: “the pecuniary allocations related to the management agreement”, and there were no allocations in the said agreement other than the replacement and innovation reserve. This meant that said reserve became the property of the purchaser (the intervening party) in the contract of sale and by the mutual consent of its parties. Article 146 of the Civil Code provides that:

Obligations and personal rights created by contract relating to property that has subsequently been transferred to particular successors in title, are transferred to such particular successors in title together with the property, when such obligations

and rights constitute essential elements of the property and the particular successors in title had knowledge at the time of the transfer of the property to them.

The intervening party said that according to this Article it had the right to the disputed reserve, being one of the essential elements of the property transferred.

The intervening party also argued that the ownership pretended by the seller does not contain any of the three elements of ownership as there was no possibility of disposition of the reserve or any right to the usufruct or to the exploitation.

The intervening party argued that the case of the Claimant was a case of request to complete the price, and this case prescribed by the lapse of one year from the date of effective delivery of the thing sold in conformity with Article 434 of the Civil Code, which provides as follows:

In a case of deficiency or excess in the thing sold, the right of the purchaser to apply for a reduction of the price or for cancellation of the contract, and the right of the seller to claim that the price be made up, are both prescribed within one year from the date of the actual delivery of the thing sold.

The intervening party said that the limitation period of one year had lapsed and the case must be dismissed. It argued also that its managing director had no right to dispose of its properties except by the approval of the general meeting of shareholders in line with Article 99 of the company law which provided that:

all founders of the company as well as any of its board members, may not during the first five years following its establishment, be a party to one of the onerous contracts which are submitted to the board for approval, unless authorised in advance by the general meeting of shareholders, and any disposition which does not comply to these provisions is null and void.

The intervening party said that the Claimant was one of its founders and one of its board members; it was bound by these provisions, and the contract it alleged with the intervening party was, thus, null and void.

The intervening party said also that the case was inadmissible because the managing company (Respondent) was not party to the dispute upon the reserve of replacement and innovation.

The Claimant submitted a new memo arguing that in the previous arbitration its demand for having the reserve was not dismissed, but the Tribunal found that the conditions of set-off (previously stated) were not met.

Award

The Arbitral Tribunal said that although the provisions of the procedural law were applicable to this arbitration, these provisions were cancelled by the new Arbitration Act of 1994 and the parties agreed to apply this new act.

The Tribunal dismissed the allegation of the intervening party about the nullity of the new agreement because it was contrary to the company law, as this agreement was not an onerous contract but a matter related to the implementation of an obligation resulting from a previous contract.

The Tribunal dismissed the allegation of the intervening party regarding the qualification of the case as a case of completing the price, saying that Article 434 of the Civil Code dealt with a certain case in which the price was defined by unit and this was not the case in this instance.

The Tribunal said that the management agreement was not subject to any one of the grounds of termination of contracts because of the sale of the hotel, but on the contrary it was provided in the sale contract for the continuation of this agreement, in addition to the fact that the intervening party was a particular successor of the Claimant in line with Article 146 of the Civil Code.

The Tribunal said that there was a new agreement between the Claimant and the intervening party comprising the offer of the latter accepted by the former, that it shall have the replacement reserve and that the latter shall indemnify the manager for the same amount, and this agreement was valid according to Article 55 of the Company Act which stipulated that:

all acts or disposition shall be binding upon the company if it emanates from the general shareholders meeting, from the board of directors, from one of its committees or he who replaces it in the management during the ordinary exercise of the acts of management. Third bona fide parties may uphold this against the company, even if the act was exceeding such powers and even if the prescribed legal procedures were not taken therefor.

The Tribunal found that the manager shall pay the replacement reserve to the Claimant, taking into consideration that on the date of its payment works of replacement and innovation had been carried out and contracted before and its value must be excluded from the balance of the said reserve.

The Tribunal awarded the rest of the reserve to be paid by the manager to the Respondent, that the intervening party shall pay to the manager (Respondent) the same amount, and that each party had to bear the expenses incurred by it.

Commentary

This case is the continuation of Case No. 106 between the intervening party and the Claimant, in which one of the arbitrators proposed to join the manager of the hotel and settle the matter finally among them, but the other two arbitrators did not approve his proposal and ordered the seller to return to the purchaser the amount of the reserve which it deducted from its proportion in the profits some months after sale, during which it acted as manager.

The Tribunal of Case No. 106 (with a different formation) did not wish to give a decision until the manager is heard by a new Tribunal (see Serial No. 27, page 145).

In my opinion the replacement reserve is owned by the purchaser of the hotel because it was provided for in the sale contract as one of the elements of the thing sold. In my opinion the waiver of the balance of the replacement reserve to the seller made by the managing director of the purchaser is also a sort of liberality, and is null and void for two reasons: lack of consideration (*cause*) and being *ultra vires*. The managing director and even the whole board cannot make such a liberality without a decision upon it from the extraordinary general meeting.

Insurance Cases

CASE NO. 32

Final award of 25 September 2000, case no. 110/1998

Arbitrators: Three Egyptian Arbitrators
Parties: Claimant: An African trading company
Respondent: An African export/import company
Place of Arbitration: CRCICA
Subject Matter: • acknowledgement of right should be pure and express
Applicable Law: Egyptian law
Language of Arbitration: Arabic

Held

Statements of a party before the expert may not be considered acknowledgement if it was stated by way of argument and discussion of a claimed right, because in such case the acknowledgement of such right is not pure and express.

Facts

The Claimant said that it purchased from the Respondent a quantity of white sesame of African origin mixed by 6%. The Claimant implemented all its obligations provided for in the contract of 1993, but the Respondent breached its obligations as it did not realise the agreed technical specifications. It retained amounts exceeding the price. It committed injuries to the reputation of the Claimant. The Claimant filed this case in accordance with the arbitration clause:

Any dispute that may arise out of this contract shall be subject to the jurisdiction of Cairo Regional Centre for International Commercial Arbitration provided that the Egyptian law shall be the law applicable to the dispute:

The statement of claims stated the following:

1. The claim for the amounts settled in excess of the price of the goods;
2. The claim for the value of cheques drawn by the clients of the Claimant and delivered to the Respondent, because the Respondent did not submit it for collection and the Claimant could not collect them thereafter;
3. The claim for the expenses of purging the goods from insects caused by bad storage;
4. The claim for the credit interest due upon collections and which the contract provides for payment thereof;

5. The claim for credit interest upon the value of the deposit of money made by the Claimant with the Respondent;
6. The claim for the profit lost during the period 1996 until the date of filing the arbitration case;
7. The claim for the expenses incurred by the Claimant to get its rights from the Respondent, saying that the latter used abusive methods to prevent such payment;
8. The claim for moral damage resulting from notifying the authorities of accusations against the Claimant, which were proved incorrect.

The Claimant substantiated its claims saying that the goods were received in the warehouse of the Respondent and stored there for the account of the Claimant.

Withdrawal of goods was made by delivery orders to be issued against payment of the price of each consignment either by the Claimant or by one of its clients. The payment for a consignment was sometimes effected by both the Claimant and its client, and this was the reason for the excess of price. Indeed, the amounts paid by the client were in settlement of the price and the cheques given by the Claimant for the same price were given as security, but the Respondent collected its amounts and doubled the price.

In addition, the Claimant paid an amount as security provided for in the contract for the performance of the goods. According to the contract, the Respondent ought to have opened a bank account with this amount to produce interest in favour of the Claimant, but the Respondent failed to do that.

After four consignments were withdrawn during the first month, the Claimant and its clients discovered that the goods were contaminated with damaging insects, which affected the use of the goods.

The Respondent was notified to clean the goods but it did not take any action. The Claimant took all necessary measures for cleaning and purifying the goods at its own expense in order to satisfy its obligations towards its clients, and it requested to order the Respondent to pay these expenses. The cleaning and purging took about 170 days and the Claimant requested this to be taken into consideration when estimating the amount of damages. Another event that was to be taken into consideration was that one of the clients was forced to destroy the amount it purchased in the presence of the representatives of the ministries of health and trade who drew a "proces-verbal" for this event. The price of the destroyed goods had to be recovered.

The Respondent said that the contract provided for a maximum period of 170 days for the withdrawal of goods by the Claimant. It said that the Claimant withdrew the goods over two years, it delayed in the settlement of the price, settled it partially and did not pay the fees of storage, banking expenses, guarding and insurance for the goods.

The Respondent said that the handsel (money deposit) paid by the Claimant became an acquired right of the Respondent and could not be deducted from the price of goods, because it was confiscated against breaches of the Claimant to the contract.

The Respondent said that the delivery of the goods was effected on the same day of entering into the contract, that the warehouses did not belong to the Respondent but to third parties, and that the Claimant had inspected the goods. The Respondent

said that its role was to receive the price of each consignment and to give the delivery order for it.

As to the credit interest claimed, the Respondent said that it had put the deposit of money paid by the Claimant in the account of the Respondent and it did not object to paying such interest until the last day of the 170 days.

The Respondent said that after the inspection and delivery of the goods on the same day of contracting, the Claimant became responsible for the goods if it became contaminated after clean receipt. If the Claimant had withdrawn the goods at the time fixed in the contract it would not have been affected. The Claimant also did not give any evidence for the amount of expenses it claimed.

The case was referred to an expert who submitted a report to the Arbitral Tribunal, and six other reports were submitted by experts of the two parties.

Award

The Arbitral Tribunal said that, in line with the judgments of the Court of Cassation, the expert's report is not binding on the court (or the arbitrator) since it is a mere opinion and an element of evidence to be assessed by the court (Case No. 333 of the judicial year 21, hearing of 3.6.1955). The court may uphold a part of such a report and disregard the rest (Cassation No. 41 of the judicial year 13, hearing of 9.3.1944). The court is not bound by such a report and can exclude it; it is enough to give reasons for such an exclusion (Cassation No. 240 of the judicial year 22, hearing of 15.12.1955). The statement of a party before the expert may not be considered an acknowledgement if it was stated as argument and discussion of a claimed right, because in such a case the acknowledgement of such right is not pure and express (Cassation No. 15 of the judicial year 34 hearing of 6.6.1967).

The reports of the experts were attacked by the parties saying that they missed some payments. The Tribunal said that it would investigate the matter itself.

The double settlement of the prices of the consignments was understood by the Arbitral Tribunal in a slightly different manner. The Tribunal said that the Respondent used to give the delivery order against a "cheque of guarantee" (acknowledged in that country to be lawful), which it retained as security until the price of the consignment was paid to it by the client of the Claimant, at which time the Respondent would return the "cheque of guarantee" to the Claimant. Sometimes several cheques were returned attached to one letter. The Tribunal found that eleven cheques were returned to the Claimant attached to four letters. The Tribunal considered these cheques as previously paid to the Respondent. By calculating the price of the whole quantity with the prices of the paid consignments the Tribunal found that the settlements exceeded the whole price and the Claimant deserved the difference.

The Tribunal also awarded the damages for non-opening of the current account in the bank in favour of the Claimant.

There was a dispute around the amount of 1% of the amounts settled, which was deducted by the Respondent and paid to the Taxes Administration, saying that the rules of deduction issued by the said administration provides for that. The tribunal found that, among the documents, there were correspondences exchanged between

the Respondent and the Taxes Administration requesting if this kind of good is subject to the deduction of 1%, and an answer from the administration advising that this type of good is one of the oily seeds, which was not stated in the schedule of deductions.

Accordingly, the Respondent was ordered to pay this amount of tax because it was paid by fault. This was also justified by a letter from the Taxes Administration informing the Respondent that it could recover this amount through a decrease of taxes paid for its profits in the future.

As to the handsel paid by the Claimant, the tribunal said that the contract provided that the Claimant could recover it if it had implemented all its obligations. And as the Claimant is the creditor of the Respondent for a part of the paid prices, this meant that it implemented its obligations, and the Respondent was ordered to return this amount to the Claimant. The delay after the 170 days was not ascribed to the Claimant because the contamination of goods and its cleaning was the cause of delay, and this was not a reason for confiscating the handsel.

As to the moral damage, the Tribunal refused to rule upon it because it resulted from a tortuous liability and not from the contractual liability, and thus it was not covered by the arbitration clause.

As to the counterclaim, the Respondent requested the rest of the price of the deal, but the Tribunal said that this point was settled in the claims and a surplus was found in favour of the Claimant.

The Respondent also requested the expenses of insurance, banking commissions and warehousing. The Tribunal found that the contract provided that the Claimant shall bear the expenses of guarding, transport and warehousing insurance on the goods from all risks, as well as banking commissions. The Tribunal charged the expert to report on these items and approved the report submitted by him and ordered the Claimant to pay these expenses, except the banking commissions related to a documentary credit because the goods were initially imported according to another contract with a different company.

The amounts awarded to the Claimant were awarded 5% rate of interest as of the date of the award until the final settlement. Arbitration costs were distributed equally between parties and each party had to bear the fees of its lawyer.

All other claims or counterclaims were dismissed.

CASE NO. 33

Final award of 29 November 1997 – *ad hoc* arbitration,
case no. 96/1997

Arbitrators: Three Egyptian Arbitrators
Parties: Claimant: An African (beneficiary of an insurance policy)
Respondents: An African insurance company and a defaulting debtor
Place of Arbitration: CRCICA
Subject Matter:

- insurance policy
- limits of the powers of the Arbitral Tribunal defined by the arbitration clause
- whether beneficiary can resort to arbitration
- *contra proferentum*

Applicable Law: Egyptian law
Language of Arbitration: Arabic

Held

The arbitration clause inserted among the other general conditions of the insurance document is invalid if it was not noted by the insured or by the beneficiary of such document. But where it is noted by him and he wishes to initiate an arbitration, the insurer has no right to demand the nullity of such an unapparent clause (contra proferentum).

Facts

The Claimant filed its notice of arbitration with the Cairo Regional Centre for International Commercial Arbitration saying that it entered into a contract with another trading company to supply it with electrical equipment, to be paid by twelve deferred cheques, to be paid during one year at the beginning of each month (it was a custom in that country to use deferred cheques and that the cheque could be a means of settlement as well as a means of extending commercial credit) and as a guarantee the Claimant required an insurance policy to secure the payment of cheques.

Four cheques were paid and the rest were returned for lack of provision. When the Claimant requested the insurance company (Respondent) to pay, it refused, and as a result the notice of this arbitration had been filed with CRCICA. The Claimant requested an award for the value of the remaining cheques to be passed against the insurance company in the presence of the insured trading company (the defaulting debtor).

The Respondent refused to appoint an arbitrator and the Court appointed one arbitrator for both the insurance company and the insured company.

The two arbitrators appointed the third arbitrator.

The arbitration clause in the insurance policy was drafted as follows:

It is expressly agreed that in case of differences between parties upon the value of losses and/or prejudice resulting from the event and secured by this policy, it must be evaluated by arbitrators; each party shall nominate one and these two arbitrators after their nomination and before the beginning of their work, shall appoint a third arbitrator as umpire.

If either party did not appoint an arbitrator during one month from receiving a registered letter from the other party to do so, this other party has the right to request the competent court to appoint him.

If the two arbitrators fail to appoint a third umpire, the competent court will appoint him upon request from either party.

The death of both parties or either of them during the arbitration proceedings may not amend the mission of the arbitrators. The death of an arbitrator or of the umpire or being impeached from doing his mission shall ensue appointing another, whether by the party who appointed him or by the arbitrators. If the party or the arbitrators abstain, the competent court will appoint either in line with the Arbitration Act. The arbitrators are not bound by procedures. Each party shall bear the fees of the arbitrator appointed by it, as to the umpire the insurer and the insured shall bear his fees on equal shares.

It is expressly agreed that in case of differences between the insurer and the insured on the value of losses and/or prejudice, the insured may not bring any court lawsuit against the insurer by virtue of this policy except after the arbitrators have evidenced the damage and evaluated its value as said before, or after six months from the appointment of the arbitrators if the dispute was not settled.

The Respondent said that the Claimant is not a party to the insurance policy and cannot avail of the arbitration clause. The other party is the insured one. It said also that the constitution of the Arbitral Tribunal is invalid because the arbitrator appointed by the Court represents two different parties – the insurer and the insured.

As there was conflict of interest between the two parties they could not be represented by one arbitrator. It requested to discontinue any conciliation or arbitration procedure and that it would not pay any costs or fees, and all decisions rendered shall not be opposable against it. It also said that the insured was the accused in several crimes and investigations by the Prosecutor General including the policy of insurance and the arbitral proceedings must be stayed, if not nullified.

The Respondent alleged that the insured had committed fraud during the issuance of the policy, because it gave false indications about its financial position and the insurer relied upon them. This is a cause for nullity of insurance because the insurer had the right to raise against the beneficiary all the motions it had against the insured.

It said that the case was brought before CRCICA, while the parties agreed on *ad hoc* arbitration.

The Respondent also said that there was another arbitration clause in the general conditions of the policy and such a clause was null and void in application to Article 750.4 of the Civil Code which provides that:

If the arbitration clause is stated among the general conditions, and not in a special agreement separate from the general conditions, it shall be null and void.

Accordingly the Arbitration Tribunal was not competent and the commercial court was the competent one.

At the end of its defence the Respondent said that, if it were to pay for the policy, there was a provision providing for a deduction of 20% of the policy.

This direct right is coming from the stipulation for a third party (*Stipulation pour autrui*).

The Claimant discussed Article 750.4 saying that it was legislated for the interest of the beneficiary and not the insurer, because insurers used to put the arbitration clause disguised among other clauses written in unclear terms, and the law wanted to make these clauses clear enough to be known to the other parties, if they were already known, even if not a clear enough. Then the intention of the legislator is realised and such an arbitration clause may not be null or void.

The Claimant said that the contradiction noted in the appointment of the arbitrator for the insurer and the insured was clarified, as the Claimant waived its case against the insured.

The Claimant said that the Respondent could seek information about the insured by its own means. It said that it had got all information about the insured and found that it could deal with it, and the insured paid about half the amount of the indebtedness before it became unable to continue. The Claimant said that the Respondent advised it after the issuance of the policy that the insurance was suspended and eight days later it sent another letter requesting to consider the abeyance cancelled.

As to the deduction of 20%, the Claimant said that this was one of the clauses of adhesion which could be amended by the judge (or the arbitrator) and the judge could exempt the insured from it in accordance with Article 149 of the Civil Code which provides that:

The right to procure avoidance of the contract is extinguished by an express or implied ratification of the contract. Ratification is retroactive to the date of the contract, without prejudice to the rights of third parties.

As to the abeyance of the case until the end of the investigations, the Claimant said that Article 46 of the Arbitration Act provides that the Arbitral Tribunal could continue the arbitration if the investigations were conducted about issues not necessary for the settlement of the merits of arbitration.

The Respondent requested the Tribunal to order the joining of the insured as a party for the sake of justice.

In another hearing the Claimant emphasised the waiver of its case against the insured and the Respondent said that it suspended the motion of guarantee directed to the insured for the time being.

The Tribunal then ordered in the same hearing that:

1. the arbitration is an *ad hoc* arbitration and ordered CRCICA to return to the Claimant the administrative fees it paid (the Respondent refused to pay any fees and the Claimant paid all of them).
2. All other motions were joined to the substance to issue one award upon all of them.
3. The arbitration would continue in the premises of CRCICA as the place of arbitration not contested by either party, but the regulations of the Centre would not be applied.

Award

The Arbitral Tribunal said that the Respondents' counterclaim of guarantee against the insured was not valid because it was not right to serve a writ of summons upon a party to oblige it to attend before a pre-constituted Tribunal by the other parties.

The Respondents' counterclaim was also refused because it did not pay its share in the arbitration costs.

Accordingly the sole Respondent was the insurer.

The plea of non-competence, because the Claimant was not a party to the arbitration clause, was dismissed because the Claimant was the beneficiary of the insurance policy and had a direct right against the insurer emanating from the *stipulation pour autrui* which meant that although the beneficiary was not a party, nevertheless the effects of this stipulation devolved to it protected by the right to sue.

The legal relationship was not a bilateral one here between the insurer and the insured in the sense that the insured was the person who could take the amount of insurance, but there was a direct right coming from the stipulation contract itself and which did not come from either the insurer or the insured, and the arbitration clause conferred on the Claimant the right to sue the insurer for his rights, and it was not correct to resort to the courts as the Respondent said.

As there was another arbitration clause in the general conditions, the Tribunal said that this clause was not null for this reason (being among general conditions) because nullity in this case was provided for to protect the insured and the beneficiary and they were solely the persons who could allege such nullity and not the insurer.

The Respondent could not submit any document to prove that the insurance policy was forged or that there were criminal proceedings in its respect, but just alleged that the insured had provided incorrect information about himself, and that if the correct information were given at that time it certainly would have abstained from insuring its insolvency. The incorrect information nullified the insurance policy and this motion was opposable against the Claimant and prevented it from any right to sue.

The Tribunal said that this was correct and the insurance policy was not valid, but it must be noted that the Respondent was liable for its tort, when it did not seek the right information about the insured and accepted its claims without further

investigation, while it was well known in the market that the insured was accused in several crimes and sentenced in others.

The Respondent knew about the insolvency of the insured when it did not pay the instalment of insurance and it suspended the insurance policy. When the insured delivered to the Respondent deferred cheques for the amount of the instalment, the Respondent sent to the Claimant saying that the insurance policy was no longer suspended. This fact persuaded the Claimant favourably regarding the financial position of the insured and it continued to extend commercial credit to it.

The Tribunal said that the tortious liability of the Respondent existed in conjunction with the tort of the Claimant as it too did not make sufficient enquiries, and the two parties had to bear the loss equally, however 20% from the amount shall be reduced as the insurance policy said. The instalments of insurance not paid by the insured shall be deducted and the rest was to be divided between the two parties, and as a result the Respondent was ordered to pay the Claimant one half of the said net loss.

The Tribunal awarded interest at the rate of 5% from the date of bringing the lawsuit until the final settlement and ordered each party to pay half of the costs and fees of arbitration, and each party had to bear its fees.

Commentary

We have some comments about this case:

1. The Claimant paid at the outset of the case all the costs and fees of arbitration because the Respondent refused to do so. When the Respondent said that it did not accept institutional arbitration, but *ad hoc* arbitration, the Tribunal decided to conduct an *ad hoc* arbitration and ordered CRCICA to return to the Claimant the administrative costs.

My comment is that an *ad hoc* Arbitral Tribunal cannot order an arbitration centre to return the administrative fees paid to it because this Centre was not a party to the arbitration and was not arbitrating as a party but as an administrator of arbitration. On the other hand, the services of the Centre continued for the *ad hoc* arbitration and ought to have administrative expenses for that reason.

2. The Tribunal said that the insurance policy is invalid and at the same time it applied one of its articles related to the deduction of 20%. This caused a contradiction in the award.
3. The award was appealed for nullity before the Court of appeal and nullity was upheld on the grounds that the arbitration clause (above) provided for arbitration to evaluate and define the amount to be paid by the insurer. The Tribunal erred in law when it ordered the Respondent to pay the insurance value, since this must be by a court judgment and not by an arbitration award (Judgment of the Court of appeal, the eighth commercial circuit on 23.9.98 in the appeals numbers 6, 17, 19 and 31 of the judicial year 115 not yet published).

The Court of Appeal also said that the Tribunal ought to apply the nullity of the insurance policy without any further decision, but the Arbitral Tribunal

applied the provisions of the contractual and the tortious liabilities together and it had no right to apply the rules of the tortious liability because it was not provided for in the arbitration clause.

4. The Arbitral Tribunal said that the stipulation for an apparent arbitration clause outside the general conditions was meant to protect the insured and not the insurer. This was an application of the common law idea of *contra proferentum*.

Maritime Cases

CASE NO. 34

Final award of 30 June 1999, case no. 3/1997 maritime

Arbitrators: Three Egyptian Arbitrators
Parties: Claimant: An African maritime company in bankruptcy
Respondent: An African maritime company
Place of Arbitration: CRCICA
Subject Matter: • amendment and repair of a ship
Applicable Law: The Egyptian law
Language of Arbitration: Arabic

Held

The creditor is required to give proof of damage. The existence of liquidated damages or penal clause is not proof but it transfers the burden of proof from the creditor to the debtor, this is because the penal clause is no more than a contractual estimation of the damages to be paid and is not the source of requisition of the damages. The ground is something else, it may be the contract or the tortious liability.

In a legal relationship based on a contract, the provisions of the tortious liability do not apply in order to keep the legal force of the contract and its binding effect, except in cases where there is a crime, a fraud or a gross negligence from one party as in this case the elements of the tortious liability are completed and this may affect the scope of damages as follows:

The creditor may not request the increase of damages to have the full indemnity which equals the damage unless he proves the fraud, the gross negligence of debtor, or that he has committed a crime. In such case, the debtor becomes liable for both the expected and the non-expected damage.

Facts

The Claimant demanded damages from the Respondent on the grounds that both entered into a contract in 1991 to buy from the Respondent an oil tanker at an agreed price, and the price was paid in full.

The contract of sale included that the buyer wished to make a repair and amendment in the specifications of the ship to transform it into another type of ship, to be agreed upon by a separate contract. The seller undertook to deliver the ship to the buyer in 1992 with all its equipment and accessories after removing all grease from it during six months as of the date of the contract.

The Claimant knew after signing this contract that there was a dispute related to the ownership of the ship to the Respondent, and the Respondent did not fulfil its obligations in regard to the transfer of ownership and to the removal of grease and other obstacles from the ship, and the repair and developing was not completed.

Another contract was entered into between the parties in 1992 to transform the ship into a ship for carrying bulk containers and wood under another name.

This second contract was subject to this arbitration as it contained an arbitration clause:

The two parties agreed that in case any difference arises in connection with this contract it shall be finally settled by arbitration with CRCICA in line with the rules applicable therein.

The Claimant said that its obligations were:

1. A financial obligation to pay the contract price on instalments;
2. A supply obligation to provide raw materials and equipment for the transformation operations in accordance with the programs of execution to be laid by the Respondent, but the Respondent did not lay them despite the fact that the Claimant supplied it with thousands of tons of maritime steel conforming to the standard specifications and several machines and equipment and other raw materials;
3. An obligation to submit design drawings for the repair and amendment in accordance with the programs of execution, which were never laid by the Respondent.

The Claimant said that it had fulfilled all its obligations while the Respondent did not fulfil any of its obligations.

An international body of ship registration was chosen to supervise the works and its reports proved that nothing was done. The Respondent did not remove grease, and did not “sand” the empty spaces of the ship for cleaning and for the measurement of the thickness of steel. The date of delivery agreed upon was breached by the Respondent.

The Respondent did not get certificates from the authorities that there are no gases in the ship, and that a fire could be lit inside the ship without risk.

These aspects of breach of contract caused damage to the ship as the Respondent transferred it from the dry area to salt water for a period of five consecutive years, in stagnant waters without cathodic protection, and this resulted in electric rusts, decay and erosion in the body of the ship. The machinery and equipment became less in capacity because of the long stay without use.

The Claimant explained the elements of damages required as follows:

1. The loss sustained: being the banking interest on the loan extended to it for the purchase, repair and amendment of the ship, the feasibility study made for future marketing, the contracts made with a North American company to charter the ship on a daily charter basis against an important consideration amounting to millions of dollars during the period of delay.
2. The profit lost: stating that it had been deprived of the return of chartering referred to in the previous item for four years.

3. The moral damage: saying that the Claimant was one of the companies enjoying good reputation locally and abroad in the world of carriage by sea, and the substantial breach of the delivery date caused several foreign maritime companies to cut its relations with it and blacklist it. The owner of the Claimant company was prosecuted criminally and in civil proceedings.
4. Contract fines of delay: in the contract of 1992 the Respondent agreed to bear a large daily fine for any delay after the agreed delivery date. It requested to leave seven months of extension against increasing the fine by 50% daily. The Claimant said that the period of delay was 1,580 days and this multiplied by the new daily fine rate was the contract fines to be inflicted upon the Respondent.

The Respondent submitted its counter-claim requesting:

1. to dismiss all the demands of the Claimant;
2. to say that the contract of amendment and transformation is dissolved;
3. to order the Claimant to pay to the Respondent a certain sum being its dues of the implementation of the contract in addition to the legal interest;
4. to order the Claimant to pay to the Respondent another sum as substantial and moral damage together with the legal interest;
5. to order the Claimant to pay the costs of arbitration, arbitrators fees and lawyers fees.

The Respondent substantiated its case saying that it had fulfilled its obligations but the Claimant did not provide the design drawings and the raw materials, and did not pay the amount due to the Respondent for the material supplied by it and the extra works done by it in addition to the legal interest. The Respondent demanded the last instalment to be paid as it was due upon the experiment made upon the ship in the sea. As to the substantial and moral damages, these were requested for the delay caused to the Respondent, alleging that the Claimant diffused rumours about the negligence of the Respondent and made newspaper releases about it, and these acts harmed the sound reputation of the Respondent.

The Respondent also said that it requested the Tribunal to say that the contract of amendment was dissolved in conformity with Article 157 of the Civil Code:

In bilateral contracts (contracts synallagmatiques) if one of the parties does not perform its obligation, the other party may, after serving a formal summons on the debtor, demand the performance of the contract or its rescission, with damages, if due, in either case.

The judge may grant additional time to the debtor if it is necessary as a result of the circumstances. The judge may also reject an application for restitution when the part of the contract which the debtor has failed to perform is of little importance in comparison with the obligation in its entirety.

The Arbitral Tribunal took a preliminary decision appointing an expert in maritime works to report upon the case and upon the negligence of each party (*if any*).

The expert (dean of a maritime academy) said that the negligence was common between parties, and that the Respondent bore 80% of this negligence, while the Claimant bore 20% of it.

The Respondent brought another report with comments upon the said report, made by two professors of maritime branches; one of them was previously appointed expert in this case, but it was soon discovered that he had been a board member in the Respondent company and for this reason was removed and the newly appointed expert reported on the case.

During the period between closing the pleading and issuing the award, the Claimant requested to reopen the pleading to rectify the formalities of the proceedings, because the judgment declaring the bankruptcy of the Claimant had been cancelled by the court of appeal and there was no longer a 'syndic' to represent the bankruptcy estate.

Award

The Arbitral Tribunal upheld the report of the expert as a whole and relied upon it to settle all issues raised.

The Tribunal found that the default of the Respondent was grave (*faute grave*) giving details for the periods of delay and the deficiencies of works. Two-thirds of the amendments required were not completed. The tribunal defined in figures the damage in a lengthy explanation of the circumstances. The important legal points in this explanation were:

1. This contract was a mixture of supply and enterprise, and the provisions of the two contracts apply to different issues raised herein.
2. The burden of proof of the damage: The creditor is required to give proof of damage. The existence of liquidated damages or a penal clause was not proof but it transferred the burden of proof from the creditor to the debtor; this was because the penal clause was no more than a contractual estimation of the damages to be paid and was not the source of requisition of the damages. The source was something else – it could have been the contract or the tortuous liability.

The Court of Cassation decided that:

in a legal relationship based on a contract, the provisions of the tortuous liability do not apply in order to keep the legal force of the contract and its binding effect, except in cases where there is a crime, a fraud or a gross negligence from one party as in this case the elements of the tortuous liability are completed and this may affect the scope of damages as follows:

The creditor may not request the increase of damages to have the full indemnity which equals the damage unless he proves the fraud, the gross negligence of debtor, or that he has committed a crime. In such case, the debtor becomes liable for the expected and the non-expected damage in the sense of Article 221 of the civil code (judgment of the Egyptian Court of Cassation in the appeal No. 2384 of the judicial year 54, hearing of 4.4.1990).

The gross negligence was an unintentional default and was one of the sorts of negligence characterised by gravity without caring for the prospective damage. It was distinguished from fraud by the extent to which damage was expected: in fraud it is certain that the damage shall occur as an inevitable result

of the non-fulfilment of the obligation, but in gross negligence the damage is not certain but probable. The criterion of all these sorts is inspired by the circumstances of the case.

The gross negligence and its proof are issues of fact, not of law. Gross negligence may occur through one act or through a consecutive series of acts, which sometimes may be positive or negative.

3. The Tribunal was persuaded that the Respondent had committed gross negligence for two reasons: first, it did not make a time schedule for the execution of works; second, it did not care for the requirements and instructions of the body of supervision, being the sole body of approvals for all works done. The Respondent insisted on not implementing those requirements and instructions.

For these reasons the Tribunal awarded the Claimant additional damages exceeding the amount of the penal clause. The penal clause represented the maximum of the contractual liability and it was entirely awarded; the excess was for the tortious liability, which permits the increase in cases of gross negligence and wilful misconduct.

4. The moral damage: the Tribunal said that the moral damage alleged by the Claimant in connection with the bankruptcy and the crimes of cheques without provision facing the owner of the Claimant, are neither expected nor unexpected damage, and for this reason they were dismissed.

The Tribunal turned to the counterclaim and said that the Respondent supplied about 700 tons of maritime steel, and it deserved fees for some additional works and made a set-off between these items and the damages awarded to the Claimant. The Tribunal refused to grant damages for any moral damage to the Respondent through newspaper releases.

All other claims and counterclaims were dismissed and the costs and fees of arbitration were partitioned between parties in the same proportion of negligence, that is, 80% borne by the Respondent and 20% by the Claimant, and each party had to bear the fees of its lawyers.

The Tribunal referred in the reasons to the fact that the Claimant was entitled to recover the ship in its present state, that the contract of amendment was dissolved but the parties could not be returned to their pre-contract positions because the contract was one in which time is of the essence and the dissolution takes part only for the future and not with respect to the past. But this paragraph was not provided for in the terms of enactment.

Commentary

The Arbitral Tribunal distinguished the fraud and the gross negligence saying that the former makes damage inevitable; while the latter makes it probable. As far as I know, the fraud has an element of bad intention, by which the involved party becomes mala fide; while the gross negligence has the same gravity but without bad intention which is difficult to prove in such case.

The Author.

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The Cairo Regional Centre for International Commercial Arbitration

Decision No. (1) of 2002
To amend the Arbitration Rules of the Cairo Centre

Decision of the Director of
The Cairo Regional Centre for International
Commercial Arbitration

The Director of the Centre;
After Reviewing the Rules of the Centre;

Issued the following Rules:

Article (1)

The Administrative fees of the Centre shall be reduced by 20% in international cases and by 30% in domestic cases.

Article (2)

A new paragraph No. (4) shall be added to Article (37) bis as follows:

Any documents, communications or correspondences submitted by the parties or the arbitrators to the Centre and vice versa, may be destroyed after the period of 6 months as from the date of issuing the award, unless a party requests in writing the retrieval of such documents, or any other documents related to the challenge or the enforcement of the award.

In case original copies of documents or contracts were submitted by either of the parties, the concerned party shall request in writing the retrieval of such documents and contracts within one month as from the date of issuing the award. The Centre shall not be liable for any of such documents after the said date.

Article (3)

A new paragraph shall be added to Article (40/3) concerning the Arbitrators' fees after table (2) as follows:

Without prejudice to the minimum fees of each arbitrator, if the minimum was exceeded, the fees shall be distributed as follows: 40% for the Chairman of the Arbitral Tribunal and 30% for each co-arbitrator, unless otherwise agreed upon by the members of the Arbitral Tribunal.

Article (4)

The following two Articles shall be added to the Code of Ethics of the Centre

Article (4) *bis*

An arbitrator shall not act during the proceedings as an advocate for any party and shall not advise any party on the merits or the outcome of the dispute whether before or after his appointment.

Article (4) *bis* (1)

Each nominee to act as an arbitrator – and who is not registered in the arbitrators list of the Centre – shall furnish to the Centre a written resume comprising his qualifications, expertise and his past and present professional positions, and shall agree in writing on the Centre's tables of costs and fees. In case of requesting additional fees, no arbitrator shall notify, inform or contact any party in this regard. Proposals for additional fees are to be submitted to the Director of the Centre who shall contact the parties before finally deciding on the additional fees according to Article (40) of the Centre's Rules and the relevant General Rules.

Article (5)

This decision is effective as from Thursday, November 21, 2002.

Dr. M.I.M. Aboul-Enein
Director of the Centre

ANNEX

THE CAIRO REGIONAL CENTRE FOR INTERNATIONAL COMMERCIAL ARBITRATION*

THE MEDIATION AND ADR CENTRE (A BRANCH OF THE CAIRO REGIONAL CENTRE FOR INTERNATIONAL COMMERCIAL ARBITRATION)

Established under the auspices of the
Asian African Legal Consultative Organization (AALCO)

Rules of Settlement of Commercial and Investment Disputes July 2002

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I. Objectives and Brief History of the Cairo Centre

The Cairo Regional Centre for International Commercial Arbitration (hereinafter the Cairo Centre or the Centre) is an independent non-profit international organisation. Pursuant to the Headquarters Agreement, the Cairo Centre and its branches enjoy all the privileges and immunities of independent international organizations in Egypt. The leading principle of the Cairo Centre aims at contributing to, and enriching the progress of the economic development scheme in both Asian and African Countries. In this regard, specialised services are being constantly and consistently provided to prevent or help settle trade and investment disputes, through fair operations of expeditious and economical procedures. This constitutes a wholly integral dispute resolution mechanism that employs various effective processes of arbitration. It includes also Alternative Dispute Resolution techniques (ADR) such as conciliation, mediation and technical expertise.

A Brief History

The following are the most significant dates in the history of the CRCICA:

January 1978: The decision of the 19th Session of the Asian African Legal Consultative Committee (hereinafter the “Committee” or the “AALCC”)* to establish several arbitration centres within the Afro-Asian Area.

January 1979: The signing of an agreement between the Committee and the Egyptian Government for the establishment of the Cairo Centre for an experimental period of three years.

November 1983: The conclusion of an agreement between the Committee and the Egyptian Government for the permanent functioning of the Cairo Centre.

March 1986: The agreement between the Committee and the Egyptian Government to make temporary financial and administrative arrangements for the Cairo Centre.

December 1987: The issuance of the Headquarters Agreement between the Committee and the Egyptian Government, which guarantees for the Cairo Centre all the privileges and immunities of independent international organisations in Egypt.

*Since 24 June 2001, the said Committee is called “the Asian African Legal Consultative Organization (AALCO)”. The member States of the AALCO are as follows: Arab Republic of Egypt, Bahrain, Bangladesh, People’s Republic of China, Cyprus, Gambia, Ghana, India, Indonesia, Islamic Republic of Iran, Iraq, Japan, Jordan, Kenya, Democratic People’s Republic of Korea, Republic of Korea, Kuwait, Lebanon, Libya, Malaysia, Mauritius, Mongolia, Myanmar, Nepal, Nigeria, Oman, Pakistan, Palestine, The Philippines, State of Qatar, Saudi Arabia, Senegal, Sierra Leone, Singapore, Somali Democratic Republic, Sri Lanka, Sudan, Syria, Tanzania, Thailand, Turkey, Uganda, United Arab Emirates, Republic of Yemen. Associate member: Botswana. Permanent Observers: Australia and New Zealand (for more information about the Centre and its activities, you are kindly invited to visit the Centre’s website at: www.crcica.org.eg).

July 1990: The establishment of the Institute of Arbitration and Investment under the auspices of the Cairo Centre.

January 1991: The establishment of the Institute of Arab and African Arbitrators in Egypt under the auspices of the Cairo Centre.

October 1992: The inauguration of the Centre's Maritime Arbitration Branch in Alexandria.

February 1999: The establishment of the Cairo Branch of the Chartered Institute of Arbitrators of London under the auspices of the Cairo Centre.

June 2001: The inauguration of the Alexandria Centre for International Arbitration as a branch of the Cairo Centre.

August 2001: The establishment of the Mediation and ADR Centre as a branch of the Cairo Centre.

II. The Scope of Services Offered

The scope of services offered by the Cairo Centre encompasses the following:

1. Administering domestic and international arbitrations as well as ADR Techniques under its auspices.
2. Provision of institutional arbitration services according to the UNCITRAL Rules or any other rules agreed upon by the parties.
3. Provision of advice to parties to international commercial and investment contracts with regard to drafting these contracts and also in the field of dispute prevention activities.
4. The promotion of arbitration and other ADR techniques in the Afro-Asian region through the organisation of international conferences and seminars as well as the publication of researches serving both the business and legal communities.
5. The preparation of international arbitrators and legal scholars from the Afro-Asian region by organising training programmes and seminars through the Centre's Institute for Arbitration and Investment.
6. Coordination with and provision of assistance to other arbitral institutions particularly those existing within the region.
7. Providing *ad hoc* arbitration with necessary technical and administrative assistance upon the request of the parties.
8. Rendering assistance for the enforcement of arbitral awards.
9. Conducting academic and practical researches and studies.
10. Developing a comprehensive library and data bank in Arabic, English and French addressing matters of trade, investment and commercial dispute resolution laws, rules and techniques. This service includes:
 - (a) Compilation of trade and investment laws of the countries of the region.
 - (b) Provision of information about economic development schemes in the region setting out the different investment opportunities available.
 - (c) Conducting research of both academic and practical nature in the field of trade and investment laws, as well as deriving new and alternative means of dispute resolution.
 - (d) Compiling a record of national and regional consultation firms of outstanding reputation in the field of trade, industry and investment.

III. The Alexandria Centre for International Maritime Arbitration (ACIMA)

(A branch of the Cairo Regional Centre for International Commercial Arbitration)

The Alexandria Centre for International Maritime Arbitration (ACIMA), a branch of the Cairo Regional Centre for International Commercial Arbitration, was founded in 1992 pursuant to a cooperation agreement between the Cairo Centre and the Arab Academy for Science, Technology and Maritime Transportation (an affiliate of the League of Arab States). ACIMA is meant to deal exclusively with maritime disputes. What adds to the significance of ACIMA is that it enjoys a geographically strategic status, as it is located in the heart of Alexandria, one of the most significant ports on the Mediterranean.

The Board of Directors of ACIMA launched a move towards further promotion of maritime arbitration in the region by propagating and introducing the advantages of regional maritime arbitration, providing adequate academic basis in the field to eliminate what might still seem to some as “obscurities of maritime arbitration”, and establishing a maritime information resource centre to provide a sufficient and adequate theoretical background and to help conduct relevant researches.

IV. The Alexandria Centre for International Arbitration (ACIA)

(A branch of the Cairo Regional Centre for International Commercial Arbitration)

The Alexandria Centre for International Arbitration was established in June 2001 in cooperation with Alexandria Businessmen Association as a branch of the Cairo Regional Centre for International Commercial Arbitration to administer commercial arbitration and other peaceful non-binding means of avoiding and settling trade and investment disputes. In this respect, ACIA applies the UNCITRAL Rules as adopted by the Cairo Centre.

Moreover, the Centre has the activity of conducting seminars and training programmes under the auspices of the Cairo Regional Centre for International Commercial Arbitration.

V. The Mediation and ADR Centre

(A branch of the Cairo Regional Centre for International Commercial Arbitration)

The Mediation and ADR Centre was established in August 2001 as a branch of the Cairo Regional Centre for International Commercial Arbitration to administer mediation and other peaceful non-binding means of avoiding and settling trade and investment disputes.

Upon their request, the Centre provides the parties with legal advice and recommendations. A panel of legal experts and specialists shall assist the parties, according to the Centre's rules, to avoid potential disputes whether in the stage of concluding or performing the contract.

Mediation is administered in accordance with the Rules of the Centre issued in 1990.

The Centre also administers conciliation under its auspices according to the Rules of Conciliation of 1980 issued by the United Nations Commission on International Trade Law (UNCITRAL).

The parties may amend these rules or agree on any other rules.

The Centre shall meet the requests of the Arbitral Tribunals and any other parties, to provide them with technical expertise in different fields. The Centre shall nominate specialised experts from the lists prepared for this purpose.

The Centre shall also meet the requests for administering Mini-Trials and Claim Review Board.

VI. Dispute Resolution Measures Applied by the Cairo Arbitration Centre and its Branches

1. Arbitration

Arbitration under the auspices of the Centre is of a simplified and flexible nature, allowing for expeditious and inexpensive resolution of disputes.

The Cairo Centre's Rules of arbitration are the UNCITRAL Arbitration Rules of 1976 with minor modifications. The said rules allow a great deal of flexibility in the conduct of the proceedings of the arbitration leaving a wide choice to the parties as to the selection of arbitrators, the place and the language of the arbitration as well as the applicable law.

Should the parties fail in nominating the sole arbitrator or the presiding arbitrator in the case of a three-member tribunal, the Centre makes the appointment provided that the parties have agreed upon no other appointing authority.

For this purpose, the Centre maintains a panel of international arbitrators. The panel contains the names of eminent jurists, judges and diplomats from which the parties may select the arbitrators.

Upon the parties' request, the Centre may render all necessary assistance for the enforcement of the arbitral award issued under its auspices.

Arbitration procedures

1. A written request for arbitration supported with documents should be submitted to the Cairo Centre in five copies in case of a sole arbitrator, seven copies in case of a three-member tribunal, or nine copies in case of five-member tribunal. The request should comprise the following:
 - An original or a copy of the arbitration agreement designating the Cairo Centre as the competent arbitration forum.
 - An original or a copy of the contract, out of which or in relation to which the dispute arose.
 - Legal evidence and documents enhancing the request of arbitration.
 - Names, addresses, phone and fax numbers of the parties.
 - Nature of the dispute and the amount of claim(s).
 - The Claimant's notice of arbitration.
 - The name of the Claimant's nominated arbitrator, and his view with regard to the language and place of arbitration.

- Simultaneous with the filing of the request of arbitration, the registration fee, administrative and arbitrator's fees are to be deposited, pursuant to the Rules (see the Centre's tables under the Cost of Arbitration section). If the amount of the claim is not yet determined upon filing the request, registration shall be made after the deposit of registration fees. The administrative and arbitrators' fees shall be paid once the amount of the claim is determined.
2. The Respondent is notified by a copy of the Claimant's request for arbitration, and is asked to submit his reply along with relevant documents and a written nomination of his arbitrator and his preference as to the language and place of arbitration. The Centre then communicates this information to the Claimant.
 3. The Arbitral Tribunal is formed in accordance with the Cairo Centre's Rules of Arbitration, that is, the UNCITRAL Rules, unless the parties choose otherwise.
 4. The Centre is responsible for communicating with the parties, the arbitrators and the experts. The Centre also provides suitable accommodation for the sessions of the Arbitral Tribunal, secretarial assistance and translation facilities if requested.
 5. After the commencement of the arbitration proceedings, the Centre takes heed as to procedures and time schedules and intervenes to prevent tardiness and ensure expedition.
 6. After due deliberation, an arbitral award is issued.
 7. The Centre provides any possible assistance with the enforcement of the award.

2. Alternative Dispute Resolution Measures (The Mediation and ADR Centre)

The Mediation and ADR Centre was established in August 2001 as a branch of the Cairo Regional Centre for International Commercial Arbitration to administer mediation and other peaceful non-binding means of avoiding and settling trade and investment disputes such as Mediation, Conciliation, Technical Expertise, Mini Trials, and Claim Review Board.

Mediation

The Cairo Centre's Rules of Mediation were issued in March 1990. Upon the parties' request, disputes may be settled by resorting to the Cairo Centre's Rules for Mediation (see the Centre's Mediation Rules hereinafter).

Mediation is a facultative process in which disputing parties seek the assistance of a neutral third party who acts as a mediator to settle their dispute. The mediator has no authority to make any binding decisions. He would count on some procedures, techniques and personal skills to help the parties negotiate a settlement.

Conciliation

1. The Cairo Centre adopted the UNCITRAL Conciliation Rules of 1980.
2. In accordance with these Rules, the Centre offers diverse services for the settlement of disputes through conciliation, in order to save the parties' time and efforts.

3. Should the parties fail in nominating the conciliators, appointment may be made by the Centre upon agreement of the parties and in accordance with its Rules.
4. The Centre takes all necessary measures to ensure the parties' adhesion to the settlement reached through conciliation.
5. Upon the parties' request, the Centre may intervene to reach an amicable settlement of the dispute even after resorting to arbitration but before the issuance of the award. Should the efforts of the Centre culminate in an acceptable settlement to the parties, the arbitration tribunal either suspends the arbitration proceedings or issues the said settlement in the form of an arbitral award. Failure to reach a settlement, the arbitration proceeding shall resume.

Technical Expertise

1. The Cairo Centre's Rules of Technical Expertise were issued in March 1990.
2. Pending the parties' approval, disputes may be settled by resorting to technical expertise thus saving time, efforts and expenses (see the Centre's Technical Expertise Rules hereinafter).
3. Should technical expertise fail in providing an acceptable settlement, the parties retain the right to resort to the Cairo Centre's Arbitration and Conciliation Rules.

Mini Trials

Due to the increasing complexity of international business transactions and the inevitable disputes which follow, and in order to save the parties' time and effort, The American Arbitration Association and later the Zurich Chamber of Commerce developed the method of Mini Trials to settle disputes between parties.

The objectives of the Mini Trial method are to rapidly and informally settle the disputes at minimal cost to the parties.

This procedure requires the parties to submit their dispute to a panel consisting of a neutral umpire and two associate members. The associate members are chosen from among the senior corporate officers of each party to the dispute. These associates are expected to be intimately familiar with the details of the dispute. The two associate members choose the neutral umpire. If they are unable to do so, a sanctioning body, such as the Cairo Centre, may appoint the umpire. The panel is responsible for presenting a settlement proposal to the parties. If the entire panel is unable to agree on a proposal, the umpire will present his own.

Although the parties are not obliged to accept the proposal, they waive their right to continue or institute judicial or arbitration proceedings during the progress of the mini trial.

Moreover, the parties have no right to use any information or evidences reached for during the mini trial in any subsequent judicial or arbitration proceedings.

The Claim Review Board (CRB)

This method was added to the ADR techniques in construction contracts. It is a three-member committee formed at the commencement of a construction project, one member is appointed by the employer, another by the contractor and the two appointed members select the third.

Each member of the board is provided by a complete set of contract documents, together with any critical path schedules and network diagrams, minutes of meetings and other documents such as progress reports. Recommendations issued by the Board are not binding to the parties.

This technique is characterised by the fact that it allows viewing any problem while rising, it allows the parties to efficiently resolve any problem according to the recommendation issued by the Board. The CRB technique proved to be very efficient due to the familiarity of its members with the details of the contractual relations and accordingly their ability to analyse the claims and avoid potential disputes.

VII. Panel of International Arbitrators and Experts

The panel of international arbitrators and experts maintained by the Centre includes eminent personalities from all over the world. Various specialisations are represented in the Centre's panel, which allow the parties a wide range of choices of their arbitrators or experts according to the nature of the dispute.

VIII. Arbitration Rules of the Cairo Regional Centre for International Commercial Arbitration

Foreword

The Cairo Centre applies the Arbitration Rules of the United Nations Commission on International Trade Law, approved by the General Assembly of the United Nations by resolution No. 31/98 on 15 December 1976. The Cairo Centre adopted these Rules with minor amendments to suit the institutional arbitration and to satisfy the needs of disputants.¹

In fact, after putting arbitration and other Alternative Dispute Resolution (ADR) techniques into actual practice in the years following the Centre's inception, the need to improve the Rules of the Centre was pressing. This need arose in view of the new developments of improving the laws of different states. Moreover, the worldwide acceptance of arbitration as a popular and normal means getting more momentum in settling international commercial disputes and the rapid globalisation of the world economy were important elements that pressed for adaptation of the Rules to the changing economic relations. Also, the removal of many old and traditional barriers that were set up by national systems in international trade resulted in the substantial increase and complexity of commercial disputes that required new amendments in the institutional rules.

Hence, new amendments were included in the UNCITRAL Rules applied by the Centre to guarantee rapidity, flexibility, neutrality and efficacy.

Following are the Rules of Arbitration of the Cairo Centre.

¹ These amendments were made in 1998 and 2000. They became effective as of 1 January 1998 and 1 October 2000, respectively.

SECTION I

Introductory Rules

Scope of Application

Article 1

1. Where the parties to a contract have agreed in writing² that disputes in relation to that contract shall be referred to arbitration under the Arbitration Rules of the Cairo Regional Centre for International Commercial Arbitration, then such disputes shall be settled in accordance with these Rules subject to such modifications as the parties may agree in writing.³
2. These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

Notice, Calculation of Periods of Time

Article 2

1. For the purposes of these Rules, any notice, including a notification, communication or proposal, is deemed to have been received if it is physically delivered to the addressee or if it is delivered at his habitual residence, place of business or mailing address, or, if none of these can be found after making reasonable inquiry, then at the addressee's last-known residence or place of business. Notice shall be deemed to have been received on the day it is so delivered.
2. For the purposes of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice, notification,

² Model Arbitration Clause: (UNCITRAL Model Arbitration Clause)

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the Rules of Arbitration of the Cairo Regional Centre for International Commercial Arbitration.

Note: Parties may wish to consider adding:

- (a) The appointing authority shall be _____ (Name of institution or person);
- (b) The number of arbitrators shall be _____ (One or three);
- (c) The place of arbitration shall be _____ (Town or country);
- (d) The language(s) to be used in the arbitral proceedings shall be _____;
- (e) The number and the means of appointing the arbitrators in case of multi-party arbitration, In the absence of any agreement between the parties, the Rules of Arbitration of the Cairo Centre shall apply, and the Centre will appoint all arbitrators and assign one of them to act as chairman according to Article _____ (8 bis).

³ In case the parties do not agree in writing on any modification, the Rules of Arbitration of the Cairo Centre shall apply.

communication or proposal is received. If the last day of such period is an official holiday or a non-business day at the residence or place of residence of the addressee, the period is extended until the first business day, which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

Notice of Arbitration

Article 3

1. The party initiating recourse to arbitration (hereinafter called the “Claimant”) shall give to the other party (hereinafter the “Respondent”) a notice of arbitration.
2. Arbitral proceedings shall be deemed to commence on the date on which the Respondent receives the notice of arbitration.
3. The notice of arbitration shall include the following:
 - (a) A demand that the dispute be referred to arbitration;
 - (b) The names and addresses of the parties;
 - (c) A reference to the arbitration clause or the separate arbitration agreement that is invoked;
 - (d) A reference to the contract out of or in relation to which the dispute arises;
 - (e) The general nature of the claim and an indication of the amount involved, if any;
 - (f) The relief or remedy sought;
 - (g) A proposal as to the number of arbitrators (i.e. one or three), if the parties have not previously agreed thereon.
4. The notice of arbitration may also include:
 - (a) The proposals for the appointments of a sole arbitrator and an appointing authority referred to in Article (6), paragraph 1;
 - (b) The notification of the appointment of an arbitrator referred to in Article (7);
 - (c) The statement of claim referred to in Article (18).
5. The Respondent communicates his preliminary reply in writing to the notice of arbitration within thirty days of receiving the notice of arbitration including what he might have as a preliminary defence with reference and copies of the documents that may support his views. His reply shall also include the name of the arbitrator he has nominated according to Article (7).

Representation and Assistance

Article 4

The parties may be represented or assisted by persons of their choice. The names and addresses of such persons must be communicated in writing to the other party; such communication must specify whether the appointment is being made for purposes of representation or assistance.

SECTION II

Composition of the Arbitral Tribunal

Number of Arbitrators

Article 5

If the parties have not previously agreed on the number of arbitrators (i.e. one or three), and if within fifteen days after the receipt by the Respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.

Appointment of Arbitrators (Articles 6 to 8)

Article 6

1. If a sole arbitrator is to be appointed, either party may propose to the other:
 - (a) The names of one or more persons, one of whom would serve as the sole arbitrator; and
 - (b) If no appointing authority has been agreed upon by the parties, the name or names of one or more institutions or persons, one of whom would serve as appointing authority.
2. If within thirty days after receipt by a party of a proposal made in accordance with paragraph 1 the parties have not agreed on the choice of a sole arbitrator, the sole arbitrator shall be appointed by the appointing authority agreed upon by the parties. If no appointing authority has been agreed upon by the parties, or if the appointing authority agreed upon refuses to act or fails to appoint the arbitrator within thirty days of the receipt of a party's request thereof, either party may request the Centre to make such appointment. The Centre may make such appointment according to the procedures outlined below in paragraph 3 of this Article, or designate the appointing authority.

The said period may be extended if compelling circumstances prevent from making this appointment in due time.
3. The appointing authority shall, at the request of one of the parties, appoint the sole arbitrator as promptly as possible. In making the appointment the appointing authority shall use the following list-procedure, unless both parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case:
 - (a) At the request of one of the parties the appointing authority shall communicate to both parties an identical list containing at least three names;
 - (b) Within fifteen days after the receipt of the list, each party may return the list to the appointing authority after having deleted the name or names to which

- he objects and numbered the remaining names on the list in the order of his preference;
- (c) After the expiration of the above period of time, the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;
 - (d) If for any reason the appointment cannot be made according to the procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.
4. In making the appointment, the appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.

Article 7

1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed should choose the third arbitrator who will act as the presiding arbitrator of the tribunal.
2. If within thirty days after the receipt of a party's notification of the appointment of an arbitrator, the other party has not notified the first party of the arbitrator he has appointed:
 - (a) The first party may request the appointing authority previously designated by the parties to appoint the second arbitrator; or
 - (b) If no such authority has been previously designated by the parties, or if the appointing authority previously designated refuses to act or fails to appoint the arbitrator within thirty days after the receipt of a party's request thereof, the first party may request the Director of the Centre to make such appointment. The Centre may make such appointment according to the procedures outlined in Article 6/3, or designate the appointing authority. The first party may then request the appointing authority so designated to appoint the second arbitrator. In either case, the appointing authority may exercise its discretion in appointing the arbitrator.
3. If within thirty days after the appointment of the second arbitrator, the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by an appointing authority in the same way as a sole arbitrator would be appointed under Article 6.

Article 8

1. When an appointing authority is requested to appoint an arbitrator pursuant to Article 6 or Article 7, the party which makes the request shall send to the appointing authority a copy of the notice of arbitration, a copy of the contract out of or in relation to which the dispute has arisen and a copy of the arbitration agreement if it is not contained in the contract. The appointing authority may require from either party such information, as it deems necessary to fulfill its function.
2. Where the names of one or more persons are proposed for appointment as arbitrators, their full names, addresses and nationalities shall be indicated, together with a description of their qualifications.

Article 8 (bis)

In multi-party arbitration and where there are two or more Claimants or two or more Respondents, the parties may agree on the number and the means of appointing the arbitrators. If this agreement is not realised within forty-five days from the date of notifying them by the arbitration request, the Centre shall appoint all the arbitrators upon the request of any of the parties. In this case the Centre shall also designate one of the appointed arbitrators to act as chairman.

Article 8 (bis 1)

Ex parte communications with any arbitrator or with any candidate for appointment as party appointed arbitrator shall be limited to the general nature of the dispute, the anticipated proceedings, the candidate's qualifications, availability, independence and the suitability of candidates for selection as presiding arbitrator if parties are authorised to participate in his selection.

Challenge of Arbitrators (Articles 9 to 12)

Article 9

A prospective arbitrator shall disclose to those who approach him in connection with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances.

Article 10

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.
2. A party may challenge the arbitrator appointed by him only for reasons of which he becomes aware after the appointment has been made.

Article 11

1. A party who intends to challenge an arbitrator shall send notice of his challenge within fifteen days after the appointment of the challenged arbitrator has been notified to the challenging party or within fifteen days after the circumstances mentioned in Articles 9 and 10 became known to that party.
2. The challenge shall be notified to the other party, to the arbitrator who is challenged and to the other members of the Arbitral Tribunal. The notification shall be in writing and shall state the reasons for the challenge.
3. When an arbitrator has been challenged by one party, the other party may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his office. In neither case does this imply acceptance of the validity of the grounds for the challenge. In both cases the procedure provided in Article 6 or 7 shall be used in full for the appointment of the substitute arbitrator, even if during the process of appointing the challenged arbitrator a party had failed to exercise his right to appoint or to participate in the appointment.

Article 12

1. If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge will be made:
 - (a) When the initial appointment was made by an appointing authority, by that authority;
 - (b) When the initial appointment was not made by an appointing authority, but an appointing authority has been previously designated, by that authority;
 - (c) In all other cases, by the appointing authority to be designated in accordance with the procedure for designating an appointing authority as provided for in Article 6.
2. If the appointing authority sustains the challenge, a substitute arbitrator shall be appointed or chosen pursuant to the procedure applicable to the appointment or choice of an arbitrator as provided in Articles 6 to 9 except that, when this procedure would call for the designation of an appointing authority, the appointment of the arbitrator shall be made by the appointing authority which decided on the challenge.

Replacement of an Arbitrator

Article 13

1. In the event of the death or resignation of an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in Articles 6 to 9 that was applicable to the appointment or choice of the arbitrator being replaced.
2. In the event that an arbitrator fails to act or in the event of the *de jure* or *de facto* impossibility of his performing his functions, the procedure in respect of the challenge and replacement of an arbitrator as provided in the preceding Articles shall apply.

Repetition of Hearings in the Event of the Replacement of an Arbitrator

Article 14

If under Articles 11 to 13 the sole or presiding arbitrator is replaced, any hearings held previously shall be repeated; if any other arbitrator is replaced, such prior hearings may be repeated at the discretion of the Arbitral Tribunal.

SECTION III

Arbitral Proceedings

General Provisions

Article 15

1. Subject to these rules, the Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.

The Arbitral Tribunal may request the Centre to prepare with the parties a draft of terms of reference including all the necessary details for its consideration. It may also conduct a preliminary meeting for signing the terms of reference and to organise and schedule the subsequent proceedings with a view of expediting the resolution of the dispute.

2. If either party so requests at any stage of the proceedings, the Arbitral Tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the Arbitral Tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.
3. All documents or information supplied to the Arbitral Tribunal by one party shall at the same time be communicated by that party to the other party.

Place of Arbitration

Article 16

1. Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the Arbitral Tribunal, having regard to the circumstances of the arbitration.
2. The Arbitral Tribunal may determine the locale of the arbitration within the country agreed upon by the parties. It may hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration.
3. The Arbitral Tribunal may meet at any place it deems appropriate for the inspection of goods, other property or documents. The parties shall be given sufficient notice to enable them to be present at such inspection.
4. The award shall be made at the place of arbitration.

Language

Article 17

1. Subject to an agreement by the parties, the Arbitral Tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the statement of claim, the statement of defence, and any further written statements and, if oral hearings take place, to the language or languages to be used in such hearings.
2. The Arbitral Tribunal may order that any documents annexed to the statement of claim or statement of defence, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the Arbitral Tribunal.

Statement of Claim

Article 18

1. Unless the statement of claim was contained in the notice of arbitration, within a period of time to be determined by the Arbitral Tribunal, the Claimant shall communicate his statement of claim in writing to the Respondent and to each of the arbitrators. A copy of the contract, and of the arbitration agreement if not contained in the contract, shall be annexed thereto.
2. The statement of claim shall include the following particulars:
 - (a) The names and addresses of the parties;
 - (b) A statement of the facts supporting the claim;
 - (c) The points at issue.
 - (d) The relief or remedy sought.The Claimant may annex to his statement of claim all documents he deems relevant or may add a reference to the documents or other evidence he will submit.

Statement of Defence

Article 19

1. Within a period of time to be determined by the Arbitral Tribunal, the Respondent shall communicate his statement of defence in writing to the Claimant and to each of the arbitrators.
2. The statement of defence shall reply to the particulars (b), (c) and (d) of the statement of claim (Article 18, para. 2). The Respondent may annex to his statement the documents on which he relies for his defence or may add a reference to the documents or other evidence he will submit.
3. In his statement of defence, or at a later stage in the arbitral proceedings if the Arbitral Tribunal decides that the delay was justified under the circumstances,

the Respondent may make a counterclaim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off.

4. The provisions of Article 18, paragraph 2, shall apply to a counterclaim and a claim relied on for the purpose of a set-off.

Amendments to the Claim or Defence

Article 20

During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the Arbitral Tribunal considers it inappropriate to allow such amendments having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement.

Pleas as to the Jurisdiction of the Arbitral Tribunal

Article 21

1. The Arbitral Tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.
2. The Arbitral Tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of Article 21, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the Arbitral Tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.
3. A plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counterclaim, in the reply to the counterclaim.
4. In general, the Arbitral Tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the Arbitral Tribunal may proceed with the arbitration and rule on such a plea in their final award.

Further Written Statements

Article 22

The Arbitral Tribunal shall decide which further written statements, in addition to the statement of claim and the statement of defence, shall be required from the parties or may be presented by them and shall fix the periods of time for communicating such statements.

Periods of Time

Article 23

The periods of time fixed by the Arbitral Tribunal for the communication of written statements (including the statement of claim and statement of defence) should not exceed forty-five days. However, the Arbitral Tribunal may extend the time limit if it concludes that an extension is justified.

Evidence and Hearings (Articles 24 and 25)

Article 24

1. Each party shall have the burden of proving the facts relied on to support his claim or defence.
2. The Arbitral Tribunal may, if it considers it appropriate, require a party to deliver to the tribunal and to the other party, within such a period of time as the Arbitral Tribunal shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in his statement of claim or statement of defence.
3. At any time during the arbitral proceedings the Arbitral Tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time, as the tribunal shall determine.

Article 25

1. In the event of an oral hearing, the Arbitral Tribunal shall give the parties adequate advance notice of the date, time and place thereof.
2. If witnesses are to be heard, at least fifteen days before the hearing, each party shall communicate to the Arbitral Tribunal and to the other party the names and addresses of the witnesses he intends to present, the subject upon and the languages in which such witnesses will give their testimony.
3. The Arbitral Tribunal shall make arrangements for the translation of oral statement made at a hearing and for a record of the hearing if either is deemed necessary by the tribunal under the circumstances of the case, or if the parties have agreed thereto and have communicated such agreement to the tribunal at least fifteen days before the hearing.
4. Hearings shall be held *in camera* unless the parties agree otherwise. The Arbitral Tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses. The Arbitral Tribunal is free to determine the manner in which witnesses are examined.
5. Evidence of witnesses may also be presented in the form of written statements signed by them.
6. The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

Interim Measures of Protection

Article 26

1. At the request of either party, the Arbitral Tribunal may take any interim measures it deems necessary in respect of the subject matter of the dispute, including measures for the conservation of the goods forming the subject matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.
2. Such interim measures may be established in the form of an interim award. The Arbitral Tribunal shall be entitled to require security for the costs of such measures.
3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

Experts

Article 27

1. The Arbitral Tribunal may appoint one or more experts to report to it, in writing, on specific issues to be determined by the tribunal. A copy of the expert's terms of reference, established by the Arbitral Tribunal, shall be communicated to the parties.
2. The parties shall give the expert any relevant information or produce for his inspection any relevant documents or goods that he may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the Arbitral Tribunal for decision.
3. Upon receipt of the expert's report, the Arbitral Tribunal shall communicate a copy of the report to the parties who shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his report.
4. At the request of either party, the expert, after delivery of the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. At this hearing, either party may present expert witnesses in order to testify on the points at issue. The provisions of Article 25 shall be applicable to such proceedings.

Default

Article 28

1. If, within the period of time fixed by the Arbitral Tribunal, the Claimant has failed to communicate his statement of claim without showing sufficient cause for such failure, the Arbitral Tribunal shall issue an order for the termination of the arbitral proceedings. If, within the period of time fixed by the Arbitral Tribunal, the Respondent has failed to communicate his statement of defence without

showing sufficient cause for such failure, the Arbitral Tribunal shall order that the proceedings continue.

2. If one of the parties, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the Arbitral Tribunal may proceed with the arbitration.
3. If one of the parties, duly invited to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the Arbitral Tribunal may make the award on the evidence before it.

Closure of Hearings

Article 29

1. The Arbitral Tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed.
2. The Arbitral Tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own motion or upon application of a party, to reopen the hearings at any time before the award is made.

Waiver of Rules

Article 30

A party, who knows that any provision of, or requirement under, these Rules has not been complied with and yet proceeds with the arbitration without promptly stating his objection to such non-compliance, shall be deemed to have waived his right to object.

SECTION IV

The Award

Decisions

Article 31

1. When there are three arbitrators, any order or other decision of the Arbitral Tribunal shall be made by a majority of the arbitrators.
2. In the case of questions of procedure, when there is no majority or when the Arbitral Tribunal so authorises, the presiding arbitrator may decide on his own, subject to revision, if any, by the Arbitral Tribunal.

Form and Effect of the Award

Article 32

1. In addition to making a final award, the Arbitral Tribunal shall be entitled to make interim, interlocutory, or partial awards.
2. The award shall be made in writing and shall be final and binding to the parties. The parties undertake to carry out the award without delay.
3. The Arbitral Tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.
4. An award shall be signed by the arbitrators and it shall contain the date on which and the place where the award was made. Where there are three arbitrators and one of them fails to sign, the award shall state the reason for the absence of the signature.
5. The award may be made public only with the consent of both parties.
6. Copies of the award signed by the arbitrators shall be communicated to the parties by the Arbitral Tribunal.
7. If the arbitration law of the country where the award is made requires that the award be deposited or registered by the Arbitral Tribunal, the tribunal shall comply with this requirement within the period of time required by law.

Applicable Law, *Amiable Compositeur*

Article 33

1. The Arbitral Tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the Arbitral Tribunal shall apply the law determined by the conflict of laws rules, which it considers applicable.

2. The Arbitral Tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorised the Arbitral Tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.
3. In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

Settlement or Other Grounds for Termination

Article 34

1. If, before the award is made, the parties agree on a settlement of the dispute, the Arbitral Tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by both parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms. The Arbitral Tribunal is not obliged to give reasons for such an award.
2. If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in paragraph 1, the Arbitral Tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings. The Arbitral Tribunal shall have the power to issue such an order unless a party raises justifiable grounds for objection.
3. Copies of the order for termination of the arbitral proceedings or of the arbitral award on agreed terms, signed by the arbitrators, shall be communicated by the Arbitral Tribunal to the parties. Where an arbitral award on agreed terms is made, the provisions of Article 32, paragraphs 2 and 4 to 7, shall apply.

Interpretation of the Award

Article 35

1. Within thirty days after the receipt of the award, either party, with notice to the other party, may request that the Arbitral Tribunal give an interpretation of the award.
2. The interpretation shall be given in writing within forty-five days after the receipt of the request. The interpretation shall form part of the award and the provisions of Article 32, paragraphs 2 to 7, shall apply.

Correction of the Award

Article 36

1. Within thirty days after the receipt of the award, either party, with notice to the other party, may request the Arbitral Tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors of similar nature. The Arbitral Tribunal may within thirty days after the communication of the award make such corrections on its own initiative.
2. Such corrections shall be in writing, and the provisions of Article 32, paragraphs 2 to 7 shall apply.

Additional Award

Article 37

1. Within thirty days after the receipt of the award, either party, with notice to the other party, may request the Arbitral Tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.
2. If the Arbitral Tribunal considers the request for an additional award to be justified and considers that the omission can be rectified without any further hearings or evidence, it shall complete its award within sixty days after the receipt of the request.
3. When an additional award is made, the provisions of Article 32, paragraphs 2 to 7, shall apply.

Confidentiality

Article 37 (bis)

1. Unless the parties expressly agree in writing to the contrary, the parties shall keep confidential all awards in their arbitration, together with all materials and all other documents, expert reports, witnesses testimonies in the proceedings and all other procedures produced in the arbitration proceedings.
2. The deliberations of the Arbitral Tribunal are likewise confidential to its members, except what is permitted by the applicable law or rules for the dissenting arbitrator.
3. The Centre undertakes not to publish any decision or arbitral award or any part of an award that may refer to the identity of any of the parties without the prior written consent of all parties.

Exclusion of Liability

Article 37 (bis 1)

Neither the arbitrators, nor the Centre and its members of the board nor its staff shall be liable to any person for act or omission in connection with any means of settling disputes or its procedures.

Costs (Articles 38 and 39)

Article 38

- (a) For the purpose of these rules, the term “costs” as specified in Article (38) of the UNCITRAL Arbitration Rules shall also include the expenses reasonably incurred by the Centre in connection with the arbitration as well as its administrative fees in accordance with the table (1) regarding the administrative fees.
- (b) The facilities provided by the Centre may be charged for on the basis of comparable cost.

- (c) The administrative fees of the Centre shall be estimated by the Director of the Centre according to table (1) regarding the administrative fees.
- (d) In some cases due to the complexity of the dispute, the length of hearing and/or the seniority of the arbitrators, the Director of the Centre may undertake consultation with the arbitrators and the parties to adjust the bases of the assessment of fees and expenses.
- (e) If the parties have designated an appointing authority other than the Centre, the fees and expenses of the appointing authority shall be estimated by the Director of the Centre in consultation with the appointing authority.
- (f) The travel and accommodation expenses of the hearings attended by international arbitrators shall be fixed separately according to the prevailing prices at the time.
- (g) The expenses of expertise and translation requested by either party or the Arbitral Tribunal shall be fixed separately according to its actual prices, and shall be paid according to the decision of the Arbitral Tribunal after deliberation with the Director of the Centre.

Article 39

In lieu of the provisions of Article 41 of the UNCITRAL Arbitration Rules, the following provisions shall apply:

- (a) The Director of the Centre shall prepare an estimate of the costs of arbitration and may request the parties to deposit equal advance payments.
- (b) During the course of arbitral proceedings, the Director of the Centre may request supplementary deposits from the parties.
- (c) If the required deposits are not paid in full within fifteen days after the receipt of the request, the Director of the Centre shall so inform the parties in order that one or another of them may make the required payment. If such payment is not made, the Arbitral Tribunal, after consultation with the Director of the Centre, may order the suspension or termination of the arbitral proceedings.
- (d) The Director of the Centre may redirect supplementary funds towards coverage of the costs of arbitration.
- (e) After the award has been made, the Director of the Centre shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

SECTION V

Costs of Arbitration

Article 40

1. *Registration fees*

An amount of US\$500.00 as registration fees for the international cases shall be paid by **each** of the two parties to the Cairo Regional Centre for International Commercial Arbitration upon submission of the arbitration request. The said amount shall be paid in cash or by a certified check in the name of the Centre and delivered to its address situated at 1, Al-Saleh Ayoub St., Zamalek, Cairo, Egypt.

As for the domestic cases, the registration fees shall be US\$250.00 (or equivalent in Egyptian Pounds) to be paid by **each** of the two parties to the Cairo Regional Centre for International Commercial Arbitration upon submission of the arbitration request. The said amount shall be paid in cash or by a certified check in the name of the Centre and delivered to its address situated at 1, Al-Saleh Ayoub St., Zamalek, Cairo, Egypt.

2. *Administrative fees*

The administrative fees are determined as a percentage of the subject matter. The percentages applied to each successive slice of the sum under dispute are to be accumulated. The arbitration costs are to be paid to the Cairo Centre in American Dollars after being calculated according to the values listed in table (1).

3. *Arbitrators' fees*

The arbitrators' fees are also determined as a percentage value of the sum under dispute. The percentages applied to each successive slice of the subject matter are to be accumulated. The deposit is to be paid to the Cairo Centre in American Dollars after being calculated according to the amount shown in table (2).

Table 1. Administrative fees

Sum of Dispute (in US Dollars)	Percentage	Remarks
Up to 100,000	2%	With a minimum of \$3000 and a maximum of \$25,000 for each case
100,001–500,000	00.50%	
500,001–1,000,000	00.40%	
1,000,001–2,000,000	00.20%	
2,000,001–5,000,000	00.15%	
More than 5,000,000	00.10%	

Table 2. Arbitrators' fees

Sum in Dispute (in US Dollars)	Percentage	Remarks
Up to 100,000	2%	With the minimum of \$5000 and a maximum of \$30,000 for a sole arbitrator or each member of the Arbitral Tribunal
100,001–500,000	1%	
500,001–1,000,000	00.50%	
1,000,001–2,000,000	00.40%	
2,000,001–5,000,000	00.10%	
More than 5,000,000	00.10%	

Deposit of Costs

1. The Director of the Centre and the Arbitral Tribunal after its composition may request each party to deposit an equal amount as an advance for the costs including the arbitrators' fees according to the Centre's tables.
2. During the course of the arbitral proceedings, the Arbitral Tribunal or the Director of the Centre may request supplementary deposits from the parties.
3. If the required deposits are not paid in full within fifteen days after the receipt of the request, the Director of the Centre or the Arbitral Tribunal shall so inform the parties in order that one or another of them may make the required payment. If such payment is not made, the Director of the Centre may suspend or terminate the proceedings if the Arbitral Tribunal has not yet been completely composed, or if it has not commenced the proceedings, otherwise the Director of the Centre may request the Arbitral Tribunal to make such suspension or termination of the proceedings.

Article 40 (bis)

1. The minimum of the administrative fees in domestic cases shall be US\$1500.00, and the maximum shall be US\$10000.00 or equivalent in local currency.
2. The minimum of the fees of each arbitrator in domestic cases shall be US\$3000.00, and the maximum shall be US\$25000.00 or equivalent in local currency.
3. The above mentioned rules shall not be applied on domestic cases in which the value of the case ranges between LE10,000.00 and LE300,000.00, provided that the Arbitral Tribunal is formed of a sole arbitrator, whether appointed by the parties or designated by the Centre.

The arbitration fees of these disputes shall be calculated according to the following slices:

Administrative fees	
Dispute Value	Percentage
Less than LE100,000	4%
100,000–300,000	2%

Arbitrators' fees	
Dispute Value	Percentage
Less than LE100,000	6%
100,000–300,000	3%

4. In some cases, the Director of the Centre decides the arbitrators' fees taking into consideration the complexity of the dispute, the length of the hearings and/or the seniority of the arbitrators.
5. If three arbitrators are appointed, in such cases the arbitrators' fees shall be determined solely in each case by a decision of the Director of the Centre taking into consideration the above mentioned factors and the minimum and maximum amounts of the arbitrators fees in domestic cases.
6. In all cases, the final administrative and arbitrators fees shall be defined in the first session after ultimate determination of claims, without prejudice to paragraph (4) of this Article, and rule (1) of the following general rules in case unexpected complexity or length of the hearings occur during the proceedings.

General Rules

1. The abovementioned rules regarding the estimation of administrative and arbitrators' fees shall be applied according to the dispute value without affecting the Centre's right to request from the parties additional fees or expenses due to the complexity of the dispute, the length of hearing, and/or the seniority and experience of the arbitrators.

The Director of the Centre may undertake consultations with the arbitrators and the parties to adjust the basis of the assessment of fees and expenses according to Article (38) of the Rules of the Centre.

2. Each of the parties shall deposit at the Centre the determined fees and expenses before the commencement of the arbitration proceedings.

Unless otherwise agreed upon by the disputants, the determined fees and expenses shall be equally borne by them, until the Arbitral Tribunal decides which party shall bear the fees and expenses.

3. Within the limits of the deposited sums, the Centre shall cover the administrative fees and expenses necessary to guarantee the right conduct of the arbitration proceedings, excluding the expenses or fees required for technical expertise or translation of documents presented to the Arbitral Tribunal which shall be estimated according to the Rules of the Centre and paid by the parties.

IX. Code of Ethics of the Cairo Centre

Article 1

Parties to arbitration may not be contacted in order to solicit appointment or choice as an arbitrator.

Article 2

The appointment or choice of an arbitrator should only be accepted if ability and competence for carrying out the designated duty is assured without bias and with the ability to give the necessary time and attention.

Article 3

A prospective arbitrator should disclose to those who approach him in connection with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.

An arbitrator, as soon as appointed, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances. He should in particular disclose the following:

- (a) Business and social relationships, whether direct or indirect, previous or present, with any of the parties of the arbitration, the witnesses, or the other arbitrators.
- (b) Family and marriage relationships with any of the parties, witnesses or the other arbitrators.
- (c) Previous connections with the subject of the arbitration.

This obligation shall continue as regards all such circumstances that appear after the initial proceeding of the arbitration.

Article 4

The arbitrator should maintain the necessary conditions for a just resolution of the arbitration without bias, influences by outside pressure, fear of criticism or self-interest.

The arbitrator should also devote the time and attention necessary for a speedy resolution of the arbitration taking into consideration all the circumstances of the case.

Article 5

The arbitrator should avoid unilateral communication with any party regarding the arbitration. If any such communication is made, the arbitrator shall inform the other parties and arbitrators of its substance.

Article 6

Arbitrators may not accept gifts or privileges whether directly or indirectly from any of the parties to the arbitration.

This shall apply to gifts and privileges subsequent to resolution of the arbitration as long as they are linked with the arbitration.

Article 7

The arbitrator may not use confidential information acquired during the arbitration proceedings to gain personal advantages for him or others or to affect adversely the interest of others.

Article 8

The arbitrator should be bound by utter confidentiality in all matters relating to the arbitration proceedings, including the deliberations and the arbitration award.

X. The Mediation and ADR Centre

(A branch of the Cairo Regional Centre for International
Commercial Arbitration)

Rules of Mediation, Conciliation, Technical Expertise, Mini Trials and Claims Review Board

The Mediation and ADR Centre was established as a branch of the Cairo Regional Centre for International Commercial Arbitration to administer mediation and other peaceful non-binding means of avoiding and settling trade and investment disputes. Upon their request, the Centre shall provide the parties with legal advice and recommendations. A panel of legal experts and specialists shall assist the parties, according to the Centre's rules, to avoid potential disputes whether in the stage of concluding or performing the contract.

Mediation shall be administered in accordance with the Rules of the Centre issued in 1990.

The Centre shall also administer conciliation under its auspices according to the Rules of Conciliation issued in 1980 by the United Nations Commission on International Trade Law (UNCITRAL).

The parties may amend these rules or agree on any other rules.

The Centre shall meet the requests of the Arbitral Tribunals and any other parties, to provide them with technical expertise in different fields. The Centre shall nominate specialised experts from the lists prepared for this purpose.

The Centre shall also meet the requests for administering Mini-Trials and the Claim Review Board.

1. General Rules

Article 1

The following rules are applicable on all the ADR Techniques applied by the Centre.

Article 2

Parties can agree on amending any of the rules of any of ADR Techniques applied by the Centre.

Article 3

Any party may not submit to any State court or arbitration any documents, statements or communication which is submitted by any other party or by the neutral in the ADR proceedings, unless he can produce it independently from any source other than the ADR proceedings concluded according to the Centre's Rules.

Without prejudice to the right of the parties requesting a technical report from an expert to introduce it to the court or to an Arbitral Tribunal, any party may not submit to any court or in any arbitration any proposals or views that were submitted by another party or by the neutral during the proceedings of any other ADR techniques of the Centre.

Article 4

The settlement reached between the parties through the neutral(s) and signed by them shall be binding to the parties as any contract concluded between them.

Article 5

Neither the neutral(s) nor the Centre and its employees shall be liable to any person for any act or omission in connection with the ADR proceedings.

Article 6

The parties may refer to these rules in their contracts and may provide that "Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by mediation in accordance with the Rules of Mediation or of any of the ADR Techniques applied by the Mediation and ADR Centre (a branch the Cairo Regional Centre for International Commercial Arbitration). The Centre shall be the appointing authority unless the parties made the appointment themselves or in case the appointing authority refused or failed to act.

Note: Parties may wish to consider adding:

- (a) The number of neutrals shall be —— (one or three);
- (b) The place of the proceedings shall be —— (town or country).

The applicant shall provide the Centre with the following: (1) The names of the disputed parties. (2) The addresses, phone and fax numbers and emails of the parties and their lawyers if any. (3) The nature and value of the dispute. (4) The neutral qualifications. (5) The place of the proceedings. (6) The language of the proceedings. (7) Parties may wish to consider adding: "in case of failure of ADR techniques to settle the dispute, any party may apply for arbitration according to the Rules of Arbitration of the Cairo Regional Centre for International Commercial Arbitration".

2. The Rules of Mediation

Article 1

Where parties to a contract have agreed in writing to seek an amicable settlement of disputes arising out of or relating to their contract by mediation in accordance with the Rules of Mediation of the Mediation and ADR Centre (a branch of the Cairo

Regional Centre for International Commercial Arbitration), then such mediation shall take place in accordance with such rules.

Unless the parties have agreed otherwise, the rules applicable to the mediation shall be those in force at the time of commencement of the mediation. The submission of the parties to mediation according to the Mediation Rules of the Centre implies their acceptance of the rights and obligations contained therein.

Article 2

The party initiating mediation shall provide the Centre with a request for mediation briefly identifying the subject and value of the dispute along with a copy of the agreement entered into by the parties for mediation indicating their names, addresses, phone numbers, fax numbers, emails if any, in addition to the amount of US\$500.00 in international cases and US\$250.00 or equivalent in Egyptian Pounds in domestic cases, being the administrative and registration fees, to be paid by each of the two parties in cash or by a certified check in the name of the Centre and delivered to its address situated at 1, Al-Saleh Ayoub St., Zamalek, Cairo, Egypt.

Where there is no submission to mediation or contract providing for mediation, a party may request the Centre to invite the other party to join in a submission to mediation.

The initiating party shall simultaneously file five copies of the request with the Centre.

The Centre shall send a copy of the mediation request as soon as possible to the other party or parties.

Mediation proceedings shall commence when the other party accepts in writing the invitation to mediate.

If the other party rejects the mediation request or if the Centre does not receive a reply within 15 days from the date on which the other party receives the said request or within such other period of time as specified therein, the Centre shall inform the party initiating the mediation of such a result.

Article 3

The Director of the Centre shall appoint one mediator or more if the parties fail to reach an agreement on the name or names of mediator(s).

Pursuant to these rules, where the Centre is to recommend or appoint mediators, the names of the recommended or appointed mediators shall be drawn from the panel maintained by the Centre for that purpose.

The selected mediator shall be appointed unless rejected by either party for objective reasons.

Article 4

The selected or appointed mediator should satisfy the Rules of the Code of Ethics of Arbitrators issued by the Centre.

Consequently, no person shall serve as a mediator in any dispute in which he has any financial or personal interests in the outcome of the mediation, unless otherwise agreed upon in writing by the parties.

Prior to accepting an appointment, the potential mediator shall disclose any circumstances likely to create a presumption of bias. Upon receipt of such information, the Centre shall replace the mediator unless the parties accept his appointment.

Article 5

If any mediator dies or proves unwilling or unable to serve, another mediator is to be appointed according to the same rules applied in appointing the withdrawing mediator.

Article 6

The parties may be represented by themselves, or by persons of their own choice. The names and addresses of such persons shall be communicated in writing to all parties and to the Centre.

Article 7

The mediator shall fix the date, time and location of each of the mediation sessions. The mediation shall be held at the Centre or at any other convenient location agreeable to the mediator and to the parties.

Article 8

Upon the request of the mediator or of either party, the Director of the Centre shall provide or arrange for administrative assistance or facilities in order to facilitate the conduct of the mediation proceedings.

Article 9

At least fifteen days before the first session, each party shall furnish to the Centre copies of all written statements and documents to be submitted to the mediator(s) and to the other parties. The Centre shall send copies of all written submissions to the other parties and to the mediator(s).

The parties may agree on any other means to exchange their points of view and suggestions to settle the dispute.

Article 10

At the first session, the parties shall produce all information reasonably required for the mediator to understand the issues presented. The mediator may require any party to supplement such information.

Article 11

Unlike arbitrators or conciliators, a mediator can hold private sessions or communicate separately with each party to narrow the gaps between the views of the parties.

Article 12

The expenses of witnesses and experts for either side shall be paid by the party requesting such witnesses or experts. All other expenses relating to the mediator's travel, the representatives of the Centre, the expenses of any witness and the costs of any proof or expert advice produced at the direct request of the mediator, shall be

equally borne by the parties according to the suggestion of the mediator agreed upon by the parties. In case only one of the parties agrees on the suggestion of the mediator, this party shall bear the costs.

Article 13

Mediation sessions are private. Other persons may attend only with the permission of the parties and with the consent of the mediator.

Article 14

Confidential information disclosed to the mediator by parties or witnesses in the course of mediation shall not be divulged by the mediator. All records, reports, or other documents received by the mediator while serving in that capacity shall be confidential.

The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial or other proceedings any of the following:

- (a) Views expressed or suggestions made by either party with respect to a possible settlement of the dispute;
- (b) Admissions made by another party in the course of the mediation proceedings;
- (c) Proposals made or views expressed by the mediator; or
- (d) The fact that either party had not indicated willingness to accept a proposal for settlement made by the mediator.

Article 15

Neither the Centre nor any mediator shall be a party in judicial proceedings relating to the mediation. Neither the Centre nor any mediator shall be liable to any party for any act or omission in connection with any mediation conducted under these rules.

Article 16

The mediator shall interpret and apply these rules insofar as they relate to the mediator's duties and responsibilities. All other rules shall be interpreted and applied by the Centre.

Article 17

Unless agreed otherwise, the mediators upon the conclusion of the mediation proceedings, shall furnish to the Director of the Centre the settlement agreement signed by the parties or a report of the reasons for the termination of the mediation proceedings without reaching a settlement.

Article 18

With reference to the cost of mediation, the following provisions shall apply:

- (a) For the purpose of these rules, the term "costs" shall also include the expenses reasonably incurred by the Centre in connection with the mediation as well as its administrative fees.
- (b) The facilities provided by the Centre may be charged for on the basis of comparable costs.

- (c) The mediator's fees shall be fixed by agreement between the Centre, the mediator and the parties and shall not exceed the amount calculated according to the Rules of the Cairo Regional Centre for International Commercial Arbitration for determining the arbitrator's fees.

The Director of the Centre, after consultation with the mediator and the parties, shall determine the bases of the assessment of fees and expenses. In all cases, the Director of the Centre may reduce the fees and expenses if the nature of the case so permits.

- (d) In some cases due to the complexity of the dispute or the length of hearings, the Director of the Centre may undertake consultation with the mediator and the parties to adjust the basis of the assessment of fees and expenses.

Article 19

- (a) The Director of the Centre shall prepare an estimate of the costs of mediation and request each party to deposit equal advance payments.
- (b) During the course of the mediation proceedings, the Director of the Centre may request supplementary deposits from the parties.
- (c) If the required deposits are not paid in full within thirty days after the receipt of the request, the Director of the Centre shall inform the parties in order that one or another of them may make the required payment. If such payment is not made, the mediator(s), after consultation with the Director of the Centre, may order the suspension or termination of the mediation proceedings.
- (d) Upon termination of the mediation, the Director of the Centre shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

3. The Rules of Conciliation

Article 1

Where parties to a contract have agreed in writing to seek an amicable settlement of disputes arising out of or relating to their contract by conciliation in accordance with the Rules of Conciliation of the Mediation and ADR Centre (a branch of the Cairo Regional Centre for International Commercial Arbitration), then such conciliation shall take place in accordance with the UNCITRAL Conciliation Rules subject to the modifications set forth in the present rules. The rules applicable to the conciliation shall be those in force at the time of the commencement of conciliation unless the parties have agreed otherwise.

Article 2

The party initiating conciliation shall provide the Centre with a request for conciliation briefly identifying the subject and value of the dispute along with a copy of the agreement entered into by the parties for conciliation indicating their names, addresses, phone numbers, fax numbers, emails if any, in addition to the amount of US\$500.00 in international cases and US\$250.00 or equivalent in Egyptian Pounds in domestic cases, being the administrative and registration fees. The said amount

shall be paid by each of the two parties in cash or by a certified check in the name of the Centre and delivered to its address situated at 1, Al-Saleh Ayoub St., Zamalek, Cairo, Egypt.

The Centre shall send a copy of the conciliation request as soon as possible to the other party or parties.

Conciliation proceedings shall commence when the other party accepts in writing the invitation to conciliate.

If the other party rejects the conciliation request or if the Centre does not receive a reply within fifteen days from the date on which the other party receives the said request or within such other period of time as specified therein, the Centre shall inform the party initiating conciliation of such results.

Article 3

The Director of the Centre shall assist in the appointment of conciliator(s) if the parties fail to reach an agreement on the name or names of conciliator(s). Where, pursuant to these rules and to Article 4(2) of the UNCITRAL Conciliation Rules, the Centre is to recommend or appoint conciliators, the names of the conciliators shall be drawn from the panel of international conciliators maintained by the Centre for that purpose.

Article 4

Upon the request of the parties or the conciliator(s) – with the approval of the parties – the Director of the Centre shall provide or arrange for administrative assistance or facilities that necessitate additional costs in order to facilitate the conduct of the conciliation proceedings.

Article 5

The parties shall furnish to the Director of the Centre copies of all written statements to be submitted to the conciliator(s) and to be sent to the other parties. The Centre shall send copies of all written submissions to the other parties and to the conciliator(s).

The parties may agree to exchange their points of view and suggestions to settle their disputes by other means.

Unless agreed otherwise, the conciliator(s), upon the conclusion of the conciliation proceedings, shall furnish to the Director of the Centre the settlement agreement signed by the parties or a report justifying the termination of the conciliation proceedings without reaching a settlement.

Article 6

Neither the Centre nor any conciliator shall be a party in judicial or arbitral proceedings relating to the conciliation. Neither the Centre nor any conciliator shall be liable to any party for any act or omission in connection with any conciliation conducted under these rules.

Article 7

The administrative and conciliators' fees shall be subject to the same Rules as those applied on mediation.

4. The Rules of Technical Expertise

Article 1

Any natural or juridical person may apply to appoint one or more experts to report his technical opinion of certain technical issues that cannot be examined by the applicant.

This report aims at assessing the position of the parties before filing any judicial or arbitral claims or resorting to conciliation or mediation.

Article 2

Where parties have agreed to submit their dispute to the rules of technical expertise of the Mediation and ADR Centre, they may ask the Director of the Centre to appoint one or more experts to render a technical opinion in the dispute.

An Arbitral Tribunal may apply to the Centre to appoint technical expert(s) in certain field to render his (their) report regarding technical controversy related to the case submitted before them.

Article 3

The request submitted to the Director shall include:

- (a) The names, addresses, phone numbers, fax numbers and email, if any, of the parties.
- (b) The subject and nature of the technical dispute and the type of expertise requested.
- (c) The agreement to resort to technical expertise for the settlement of the dispute according to the Centre's rules.
- (d) The number of technical experts to be appointed if not previously agreed upon.
- (e) Name or names of proposed expert(s) in case there were no previous agreement to that effect.

Article 4

The Centre shall notify the party or parties of the request to submit the dispute to technical expertise and shall receive any remarks thereon.

Article 5

The Centre shall provide to the applicant, according to Article 1 here above, the name(s) of an expert(s) from the list of experts maintained by the Centre, and receive his remarks thereon.

The appointed expert shall not be challenged unless for justified reasons.

If the parties agree to submit their dispute to technical expertise before the Centre according to its Rules, and fail to appoint the expert, the Centre shall appoint one or more experts to render the technical opinion in the dispute.

The Director of the Centre shall communicate to both parties an identical list of nominated experts, each party shall delete the name or names to which he objects and number the remaining names on the list in the order of his preference. The expert(s) shall be appointed according to the priority of the parties.

The Centre shall provide the Arbitral Tribunal requesting the appointment of expert(s) with the names of potential expert(s) from the list of international experts maintained by the Centre for that purpose.

In international cases, the expert chosen will be a national of a country other than the countries of both parties. In all cases, the expert appointed should not have any connection or relation with the parties of the dispute that may affect his opinion or raise any justifiable doubts as to his independence or impartiality.

A potential expert should not have any previous relations or connections with the parties or the subject of the dispute that may affect his opinion. He should disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.

According to Articles 1 and 2 of these Rules, the number of experts should be odd number. The report shall be rendered by majority of votes, and the minority may attach their dissenting opinion.

Article 6

The Director of the Centre shall decide, after consulting with the parties, on the replacement of an expert in the case of death or if prevented for any other reason from carrying out his responsibilities. The replacing expert(s) shall be appointed according to the same rules under which the replaced expert(s) was appointed.

Article 7

The appointed expert shall determine the requirements, time and costs of his mission before his final appointment.

Article 8

The Director of the Centre shall estimate the amount of administrative and experts' fees and the deposits to be paid in advance for the expertise, taking into consideration the nature of the expertise and the number of working hours.

The administrative and registration fees shall be US\$500.00 in international cases and US\$250.00 or equivalent in Egyptian Pounds in domestic cases.

The applicant party shall deposit the said amounts in advance, each party shall pay an equal share thereof.

The administrative fees shall be paid simultaneously with the application to appoint the expert. The expert fees shall be estimated by the Director of the Centre and shall be paid as soon as estimated by the Director.

Upon conclusion of the expert's mission, the Director of the Centre shall determine the total administrative and expert fees.

Article 9

The parties should assist the expert in implementing his terms of reference and in particular, should make available to him all documents he may consider necessary and also to grant him free access to visit and inspect any place related to the dispute. The information given to the expert shall be used only for the purpose of the expertise and shall remain confidential.

Article 10

The expert shall put forth his views in a written and signed report, within the limit set forth in the request for his appointment, after giving the parties an opportunity to submit arguments supported by documentation.

The expert must also include in his report all his findings concerning the implementation of the contract and the measure necessary to safeguard its subject matter. The expert must also attach to his report anything the parties might have agreed upon concerning the settlement of the dispute.

The expert(s) must sign the report. Where there is more than one expert and one or more fails to sign, the report shall state the reasons for the absence of the signature(s). The original report shall be delivered to the Director who shall provide each party with a copy.

Article 11

The report of the expert shall not be binding unless the parties agree otherwise.

5. The Rules of Mini Trials

Article 1

Where the parties have agreed to settle their dispute by applying the Mini Trials Rules of the Mediation and ADR Centre (a branch of the Cairo Regional Centre for International Commercial Arbitration), the procedures shall commence by filing a request to compose a panel to hear the dispute. The request shall include the subject and value of the dispute, along with the names, address, phone and fax numbers, emails, if any, of the other party (parties). The Centre shall inform the other party (parties) with this request.

Article 2

The selected panel shall be composed of a neutral umpire appointed by two associate members selected from among the senior corporate officers of each party to the dispute. These associates are expected to be intimately familiar with the details of the dispute.

If the parties do not agree on the umpire, the appointing authority designated by the parties shall perform such appointment. If the parties do not designate the said authority, the Centre shall appoint the umpire by communicating to the parties an identical list of eminent experts, each party shall delete the name or names to which he objects and number the remaining names on the list in the order of his preference. The umpire shall be appointed according to the priority of the parties.

Article 3

Before commencing his mission, the nominated umpire should disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.

Article 4

The above panel, except the umpire, shall draft a settlement after hearing the parties and reviewing their submissions. Failing to reach such settlement, the umpire

shall draft another settlement. The parties are not bound to accept any draft settlement.

Article 5

The parties undertake not to initiate any judicial or arbitral proceedings during the Mini Trials procedures.

Article 6

If no settlement is reached, the parties shall not rely on, or introduce as evidence in any arbitral, judicial or other proceeding any information disclosed during the procedures.

The umpire undertakes not to disclose any information obtained from either party during the hearings. Neither any of the parties nor the umpire shall be parties in any judicial or arbitral proceedings relating to the Mini Trial.

Article 7

Before appointing the umpire, the administrative fees and the fees of the umpire should be paid according to the estimation of the Director of the Centre. The administrative and registration fees are US\$500.00 in international cases and US\$250.00 or equivalent in Egyptian Pounds in domestic cases. The said amounts shall be paid by each of the two parties in cash or by a certified check in the name of the Centre and delivered to its address situated at 1, Al-Saleh Ayoub St., Zamalek, Cairo, Egypt. The umpire fees shall be fixed after deliberation between the Director of the Centre and the parties.

6. The Rules of the Claim Review Board (CRB)

Article 1

In construction contracts, parties may agree to form a three-member board, operational starting the commencement of the construction project till its achievement, in order to issue recommendations regarding any potential dispute between the parties.

Article 2

The Board shall be composed of three members, one appointed by the contractor, another by the employer and the two appointed members select the president of the Board.

Article 3

Each member of the Board shall be provided by a complete set of contract and project documents, together with any critical path schedule and network diagrams, minutes of meetings, progress reports, expert reports and any other documents related to the project.

Article 4

Any dispute arising between the parties shall be submitted to the Board, which shall also review any claim presented by the contractor as well as orders of amendments in order to issue its recommendations.

Article 5

Recommendations issued by the Board are not binding to the parties.

Article 6

The parties shall share the costs of the CRB.

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