ZULFICAR & PARTNERS
LAW FIRM

Informal Translation - emphasis and bracketed words added where necessary

In the Name of the People
Court of Cassation
Economic and Commercial Circuit

Presided by the Honourable Justice/ Nabil Omran Vice President of the Court

Sitting with Justices/
Mr Mahmoud Al Terkawy **Vice President of the Court**

Dr Mostafa Salman **Vice President of the Court**

Mr Yasser Bahaa Eldein **Vice President of the Court**

Mr Mohamed Ali Salama

And with the attendance of the Head of the Public Prosecution at the Court of Cassation Mr/ Amr Abo Seif.
And the Secretary [of the Court]/ Khalid Waguih.
At the hearing session held publicly at the headquarters of the Court (the High Court House) in Cairo.
On Tuesday 10 *Rabee Al Awwal* 1442 Hijri Year corresponding to 27 October 2020.

Has rendered the following judgment

In the Challenge registered in the Court's record of cases under No.18309 for the Judicial Year 89.

Filed by

Mr./ Chairman and Managing Director of [*redacted*], S.A.E in his capacity as [*redacted*].

He is to be served [notified] at his domicile of choice at the office of Mr [*redacted*] -the lawyer- located at [*redacted*] – Mohandessin – El-Dokki District – Giza Governorate.

Informal Translation - emphasis and bracketed words added where necessary

No one attended on his behalf.

Against

Mr/ Legal Representative of [*redacted*] Company S.A.E, in his capacity as [*redacted*].
He is to be served [notified] at the company's headquarters located at [*redacted*] - Giza Governorate.
No one attended on his behalf.

"The Facts"

On the day of 26/8/2019, a challenge was made by way of cassation to the judgment of the Cairo Court of Appeals rendered on 7/7/2019 in Appeal No. 57/135 JY, by a statement of claim in which the appellant sought a judgment ordering, on the formality, the admissibility of the challenge, and, on the merits, its reversal and referral.

And on the same day, the appellant deposited its case docket.

And on 10/9/2019, the appellee was notified with the challenge's statement of claim.

And on 23/9/2019, the appellee submitted it statement of defence with its supporting documents, by which it claimed the rejection of the challenge.

Thereafter, the Public Prosecution submitted a memorandum where it sought the admissibility of the challenge in form, and the rejection thereof on the merits.

And on 23/6/2020, the challenge was presented to the Court – in chambers – where it considered it worthy for review, and fixed a hearing session to hear same.

And in the hearing of 13/10/2020, the pleadings were heard before this Circuit, as evident from the minutes of the hearing, where the Public Prosecution insisted on what was provided in its memorandum, and the Court adjourned the rendering of its judgment to today's hearing session.

The Court

After reviewing the documents, hearing the report read by the rapporteur Judge/ Yasser Bahaa Eldin and the

pleadings, and after deliberations.

Whereas the challenge has satisfied its formal requirements.

Whereas the facts – as they appear from the challenged judgment and all the records of the challenge – are, in summary, that the appellant company filed against the appellee company the Case No. 57 for the 135 JY before the Cairo Court of Appeal, seeking a judgment ordering the annulment of the award rendered on 20/2/2018 in the arbitration case No. 914 for 2013 at the Cairo Regional Center for International Commercial Arbitration. In clarifying the above, it [the appellant] alleged that the appellee filed an arbitration pursuant to clause no. 16 of the subcontract for works dated 19/4/2004, by which the appellant company awarded to it [the appellee] and another [company] the project of the construction of a sewage treatment plant with a capacity of 80000 square meters daily [located] at the district of Al katameya at Cairo Governorate, which [the project] was previously awarded to the appellant from the Authority of New Cairo City as per the conditions of that contract. The appellant company failed to perform its obligations stipulated by that contract; therefore, it - the appellee - sought arbitration and the above-mentioned award has been rendered in its favour. Then, on 7/7/2019, the court rejected the annulment challenge. The appellant challenged this judgment by way of cassation, and the Public Prosecutor submitted a memorandum where it presented its opinion that the challenge is to be admissible on the formality, and is to be rejected on the merits. The challenge has been presented before this court – in chambers - where it considered it worthy for review, and fixed for it a hearing session, wherein the Prosecutor insisted on its opinion.

Whereas the challenge is based on three grounds, by virtue of which the appellant first challenges the judgment on the basis that it has violated the law and has erred in the application thereof due to the fact that it [the judgment] rejected its [the appellant's] defence that the arbitration agreement is null and void because it was concluded by the vice chairman of its [the company's] board of directors, despite the fact that the person having the capacity and legal standing to represent it is its managing director as per Article 23 of the Law No. 203 for 1991 on Public Business Sector Companies, which renders the judgment defective and necessitates its cassation.

Whereas this ground for challenge is unfounded, because while Article 11 of the Arbitration Law No. 27 for 1994 provides that "agreements to arbitrate may only be concluded by natural or juridical persons having capacity to dispose of their rights...", it is established by virtue of the judgments of this Court that, as per Article 8 of the same Law, if one of the parties to the dispute

proceeded with the arbitration proceedings despite its knowledge of a breach of a condition of the arbitration agreement or one of the non-mandatory provisions of this Law, and did not raise an objection in relation to this breach within the agreed duration or within a reasonable period in the absence of an agreement, this would be deemed a waiver of his/her right to object. This rule aims at safeguarding the arbitration proceedings from abuse by one of the parties, whom is usually the losing party, of one of the disposable rights in an attempt to nullify the arbitral award later on. That said and since the appellant did not provide evidence that it invoked, before the arbitral tribunal, the nullity of the arbitration agreement that was concluded by the vice chairman of the board of directors instead of the managing director despite its knowledge of the violation that it alleged and it continued participation in the arbitral proceedings [without objection]. Therefore, it [the appellant] is deemed to have waived its right to invoke this objection later on, especially that the nullity, subject of this objection, is a relative nullity stipulated for the benefit of the parties, which may be subject to explicit or implicit waiver. And since the challenged judgment has based its decision to reject the appellant's defense in this regard on the basis that it did not invoke this defense – despite being able to do so – before the arbitral tribunal that has jurisdiction to decide on issues of nullity of the arbitration agreement, therefore, the judgment is deemed to have correctly applied the law, which renders the challenge on that ground unfounded.

In addition, even if the appellant invoked this objection during the duration specified in Article 8 of the Arbitration Law, such invocation would not have changed the fate of this challenge [being rejected]; this is because it is established that a person cannot blame others for its own wrongdoing, be it fraud or negligence, and cannot benefit from one's wrongdoing vis-à-vis others, even if that other [person] is also at fault. Moreover, the party whose action causes a violation of the arbitration agreement or the Arbitration Law or any other law may not – after [the fact] that the other party has dealt with him/her relying on the validity of his/her action – revoke its action according to the universal maxim derived from the Roman law: *non concedit venire contra factum proprium* meaning 'prevention of contradictions prejudicial to others', which is widely known as the principle of estoppel or whomever attempts to revoke what he/she has been made, shall be barred from doing so. While there is no express legislative provision providing for this principle, the judge may apply same as per Article 1(2) of the Civil Code, which provides that "if there is no applicable legislative provision, the judge shall rule on the basis of custom, and if it does not exist, [the judge shall rule] by virtue of the principles of Islamic sharia, and if they do not exist, [then the judge shall rule] according to principles of natural law and rules of equity." The criterion for application of this principle entails two

conditions: the first condition is that a statement, an act, or an omission is made by a party and contradicts with a previous conduct by the same party; and the second condition is that this contradiction could cause damage to the other party whom has dealt with the first party in reliance on the validity of that first party's previous conduct. Taking in consideration that the principle: "prevention of contradictions prejudicial to others" is a general principle, its scope of application is not exclusive to arbitration, but extends to all other dealings. In addition, the judge has the discretion to ascertain whether the conditions of application of this principle exist in light of the circumstance of each case respectively.

Whereas the appellant company challenges, by virtue of the second ground, the judgment that it has violated the law and has erred in application thereof. In clarifying this, it [the appellant] alleges that it has invoked the nullity of the procedural structure of the arbitration proceedings because the person who have represented it before the arbitral tribunal was one of the consulting engineers and was not a lawyer pursuant to the mandatory and public policy rule enshrined in Article 3 of the Advocacy Law No. 17 of 1983, and so the arbitral tribunal should have rejected [his representation] on the basis that this represents a necessity to achieve justice. However, the challenged judgment rejected its defence on the basis that the Rules of the Cairo Regional Centre for International Commercial Arbitration allow the representation of parties by non-lawyers, which renders the judgment defective and necessitates its cassation.

Whereas this ground for challenge is unfounded, because it is established by virtue of the judgments of this court that the rules pertinent to representation of parties before arbitral tribunals do not pertain to public policy. Moreover, this is not changed by the fact that the provision of Article 3(1) of the Advocacy Law No. 17 for 1983 stipulates that 'representing parties before courts and arbitral tribunals [...]' is amongst legal activities that are exclusive to lawyers. This is because the arbitral system that existed at the time of the issuance of the Advocacy Law in 1983, which the legislator used to refer to at the time, was that which existed in part three of the third book (Articles 501-513) of the Civil and Commercial Procedures Law No. 13 for 1968. However, the current Arbitration Law enacted in 1994 – and which is totally different from the previous law in its philosophy, foundations, and concepts – does not include or provide any restraint on the parties' freedom to represent themselves before arbitral tribunals or appoint those who represent them before such tribunals, even if they were non-lawyers or foreign lawyers whom are deemed – from the perspective of the Advocacy Law – as non-lawyers. This is because the Arbitration Law of 1994 is considered a special law [*lex specialis*] regulating all matters related to arbitration, and is devoid of any provision necessitating the

appearance of agents or representatives before the arbitral tribunal. Unlike cases before national courts, it [the Arbitration Law] does not include any provision stipulating that the request for arbitration and all other documents pertinent to the procedures of arbitration be signed by a lawyer. In addition, Articles 25, 26 and 33(1) of the Arbitration Law provide for the right of the parties to agree on the arbitral procedures to be followed by the arbitral tribunal, the necessity to ensure an equal, adequate, and full opportunity to each party to present its case, and the right of each party to explain its case and to present its arguments and evidence. Moreover, if the Arbitration Law does not require choosing arbitrators from a certain gender or nationality or from a specific profession such as the legal profession (Article 16), then, a fortiori, this should not be required with respect to the representation of parties. Accordingly, the parties to an arbitration may prefer to appoint non-lawyers to represent them in disputes with complex technicalities, especially if the core of the dispute involves more technical than legal issues. The foregoing is supported by the fact that arbitration has been gradually drifting away from the concept of localization, namely: the close association of the arbitration to a specific geographical territory, after the New York Convention for 1958. Also, in light of the globalization that impacted the legal profession, it is now common place to rely on foreign lawyers to represent parties in arbitration cases having their seat of arbitration in Egypt, without necessitating any of the hearing sessions to be conducted within the Egyptian territory due to the separability of the concepts of the seat of arbitration as an abstract notion and the actual venue for the hearings, especially with the increasing reliance on modern means of communication to conduct hearings: *virtual hearings*. In addition to the foregoing, the determination of exhaustive grounds for the annulment of arbitral awards under Article 53 of the Arbitration Law means that it is not permissible to file an annulment action against an arbitration [award] on grounds other than those included in this provision, which does not include annulment for representation of a party by a non-lawyer. As a consequence of the aforementioned, there is no place for the application of Article 3 of the Advocacy Law of 1983 within the current arbitration system, be it institutional or ad-hoc, and [whether] national or international. [This also means that] the right of the parties to an arbitration to freely choose their representatives or agents is derived from the Arbitration Law itself and is not conditional upon their choice of arbitration rules that explicitly provide for the ability to appoint non-lawyers to represent them. Therefore, if they agree on procedural rules that so provide, then this would be nothing but an affirmation of what has been provided by the Arbitration Law, which is the situation in the case at hand, where the parties agreed to subject their arbitration proceedings to the rules of the Cairo Regional Centre which provide under Article 5(1) that each party may appoint a person or more to represent or to assist him/her, without stipulating that the representatives of parties to the arbitration must be lawyers registered

with the Egyptian Bar Association. That said, and whereas the challenged judgment rejected the defence of the appellant company in this respect by adhering to the same approach, and whereas it [the appellant] was the one who chose one of the consulting engineers to act on its behalf or to assist it, and produce its defence plan in accordance with what it deemed to be in its favor, [and whereas] it has also not claimed that the arbitral tribunal has deprived it from any opportunity to appoint a lawyer to present its defense, then this ground of challenge to the challenged judgment becomes unfounded.

Whereas the appellant company, by virtue of the third ground for challenge, challenges the judgment reached on the basis of perverse reasoning [because the challenged judgment] rejected its defense that the work of arbitral tribunal is void because it ruled based on the personal knowledge of one of the arbitrators – Eng. [redacted] – who only has engineering expertise and technical knowledge [with no legal knowledge] that allows him to understand the subject of the case, without real cooperation in the deliberations with the other two members [of the tribunal] who have legal expertise only [without engineering or technical expertise], and without the appointment of an engineering expert to examine the technical engineering issues prevailing in the subject matter of the dispute, then this renders the judgment defective and and necessitates its cassation.

Whereas this ground for challenge is, in its entirety, unfounded because it is established by virtue the judgments of this court that the arbitrator is appointed by the parties primarily due to his/her expertise in topics similar to that of the issue of the dispute subject of the arbitration, and naturally their expertise would be reflected in the award issued by them. Accordingly, an arbitral award shall not be characterized as void on the mere presumption that its award has been based on the personal knowledge of one of its members owing to the fact that he is the only engineer member and that the president of the arbitral tribunal and the other member are amongst the legal practitioners who do not have the engineering expertise. On one hand, this is a presumption that is not evidenced, and, [on the other hand], contradicts the default assumption that the arbitral tribunal has been constituted by the agreement of the parties and according to their free will to choose qualified and suitable arbitrators to decide the dispute. Whereas it is established from the official translation of the arbitral award that it is proven that the deliberations have taken place between the members of the arbitral tribunal and that it [the award] has been issued unanimously, and whereas the principle is that the procedures were respected, it is not permissible to refute what has been established by the award that the deliberations and the review of the documents have been made except though a challenge of forgery, which was not invoked by the appellant

company; accordingly, the point raised by it is not acceptable. Whereas it is established by virtue of the judgments of this Court that – as previously clarified – it is not permissible to file an annulment action regarding an arbitral case for reasons other than those mentioned in Article 53 of the Arbitration Law, then it is not permissible to challenge same on the basis of an error in the comprehension of facts or application of law, or the violation thereof. This is because the annulment action regarding an arbitral award is not an appeal against that award, and the judge [examining] the annulment action may not review the arbitral award to examine its adequacy [appropriateness] or to ascertain the soundness of the determinations of the arbitrators. This is on the consideration that the annulment action is different from an appeal action. That said, and whereas the challenge of the appellant company to the arbitral award in relation to the non-appointment of an engineering expert to examine the technical issues in the case is out of the scope of the grounds for the annulment that are exhaustively stipulated in Article 53 of the Arbitration Law, and whereas the challenged judgment has followed this approach, while rejecting what has been raised by the appellant company in this regard, then the challenge on the basis of that ground becomes unfounded.

On the basis of the above, the challenge shall be rejected.

For that

The Court rejects the challenge, and orders the appellant company to bear the expenses and Two Hundred pounds as attorney expenses, in addition to the confiscation of the guarantee.

Vice President of the Court **Secretary**
[Signature] [Signature]