



**IBA TOOLKIT ON INSOLVENCY AND ARBITRATION**  
**QUESTIONNAIRE**  
**NATIONAL REPORT OF EGYPT**

**Dr. Ingy Badawy**

Founding Partner, Head of Corporate M&A Group  
and Member in the Arbitration Group,  
Zulficar & Partners

[imb@zulficarpartners.com](mailto:imb@zulficarpartners.com)\*

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\* For the avoidance of doubt, this report is not intended to provide legal advice applicable to specific fact situations.

## IMPACT OF NATIONAL INSOLVENCY ON DOMESTIC OR FOREIGN ARBITRATION

[These questions relate to the effects that insolvency proceedings initiated in Egypt produce on arbitration commitments (foreign as well as national/local) involving the insolvent party.]

### Part I: Impact of Insolvency Proceedings on Ability to Commence or Continue Arbitration

**1. Does the law of Egypt contain any provision on the effect that the opening of insolvency proceedings produces on arbitration? If so, what is the source of the provision or provisions providing for the effects? That is, are the effects provided by the insolvency legislation as part of the consequences produced by the opening of insolvency proceedings? Or, are they provided by the arbitration legislation or law as a matter concerning the arbitrability of disputes, the capacity of the parties to arbitrate, the validity and effectiveness of arbitration agreements, or any other arbitration-specific category?**

1. Egypt enacted Law No. 11 in the year 2018 regulating restructuring, preventive reconciliation, and bankruptcy (“Bankruptcy Law”).<sup>1</sup> The Bankruptcy Law repealed and replaced Chapter 5 of the Trade Law No. 17, enacted in 1999 (“Code of Commerce”), which previously governed bankruptcy proceedings in Egypt. The Bankruptcy Law entered into force on 22 March 2018 and applies to traders,<sup>2</sup> while non-traders and civil companies continue to be subject to the insolvency provisions under the Civil Code.<sup>3</sup> The Bankruptcy Law also excludes from its scope of application state-owned companies that remain subject to the provisions of the Public Business Sector Law No. 203, enacted in 1991.
2. According to the Bankruptcy Law, bankruptcy is declared by virtue of a court judgement by the competent economic court (“Bankruptcy Court”) upon the request of a creditor, the debtor itself, the public prosecution, or pronounced by the court at its own initiative.<sup>4</sup> A debtor will be declared bankrupt (“Bankrupt”) by a judgment issued by the Bankruptcy Court (“Bankruptcy Judgment”) in the event the Bankruptcy Court ascertains that the following

<sup>1</sup> For full text of the section, please click the link here:

<https://www.gafi.gov.eg/Arabic/MediaCenter/News/SiteAssets/Pages/APRIL/Law%20regulating%20the%20Restructuring,%20Preventive%20Composition%20and%20Bankruptcy%20.pdf>.

<sup>2</sup> Pursuant to Article 1 of the Bankruptcy Law, it applies only to traders, as defined under article (10) of the Commercial Code. For full text of the section, please click the link here: <https://www.wipo.int/edocs/lexdocs/laws/en/eg/eg053en.pdf>. Pursuant to Article 10 of the Commercial Code, “a trader is (1) any person that exercises a commercial activity as a profession in his name and for his account and (2) any company that takes any of the forms provided for under companies law regardless of the object for which it was established”. It is worth mentioning that although a bank established in Egypt would qualify as a “trader” pursuant the above definition, Article 149 of the New Banking Law No. 194 enacted in the year 2020 (“New Banking Law”) has explicitly excluded banks registered with the Central Bank of Egypt (“CBE”) from the application of the Bankruptcy Law. Any bank in financial distress is subject to the CBE’s supervision, as a resolution authority, pursuant to the provisions of the New Banking Law.

<sup>3</sup> Unlike bankruptcy, civil insolvency does not prohibit the debtor from managing his assets, nor does it preclude creditors from initiating individual proceedings to enforce their rights. For more details, please refer to the Civil Code, arts 249 through 264.

<sup>4</sup> Bankruptcy Law, art 76.

conditions set forth under Article 75 of the Bankruptcy Law have been satisfied: (i) debtor ceases to pay its commercial debts when they fall due,<sup>5</sup> and (ii) such cessation is due to financial distress.

3. The Bankruptcy Law provides that as of the date of issuance of the Bankruptcy Judgement:
  - a. the Bankrupt is precluded (barred) from: (i) managing the business and/or disposing of any properties and/or assets<sup>6</sup> that it owns on the date of the Bankruptcy Judgement or that becomes his following the Bankruptcy Judgement,<sup>7</sup> and (ii) paying any financial obligations or directly receiving any financial dues;<sup>8</sup>
  - b. the Bankrupt loses its capacity to litigate. No legal action or claim may be brought by or against the Bankrupt or any ongoing actions continued against the Bankrupt with certain exceptions;<sup>9</sup>
  - c. all unsecured creditors are barred from initiating any individual claims and/or proceedings against the Bankruptcy Estate or undertaking any other judicial proceedings in that regard. Any ongoing individual proceedings yet to be adjudicated or any execution proceedings by the said creditors shall be suspended;<sup>10</sup> and
  - d. only the secured creditors can initiate or continue individual proceedings; however, such proceedings must be initiated against the Bankruptcy Trustee. In case of execution proceedings by the secured creditors, the latter must notify the Bankruptcy Judge of such execution, and the proceeding should be against the Bankruptcy Trustee.<sup>11</sup>
4. The Bankruptcy Trustee<sup>12</sup> shall, as of the date of the Bankruptcy Judgement, manage and act as the legal representative of the Bankruptcy Estate (whether as claimant or respondent) in all lawsuits and actions necessary to manage the Bankruptcy Estate. A judgement rendered

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<sup>5</sup> Commercial debt must be due, of a known value, and undisputed. The court shall ascertain and satisfy itself of the existence of these conditions before ruling a debtor bankrupt. Cassation No. 354 of JY 72 dated 9 December 2003. See also Samiha El Kalyoubi, *Legal principles regulating restructuring, preventive reconciliation, and bankruptcy* (2019 edn, Dar El Nahda Al Arabia Publishing 2019) 119 para 65.

<sup>6</sup> Bankruptcy Law, art 112. The said preclusion does not restrict the Bankrupt from taking any action necessary to protect and preserve his rights which is also in the interest of the creditors, including, for example, actions to interrupt limitation periods and appealing a judgement rendered against him or her.

<sup>7</sup> Pursuant to Article 115 of the Bankruptcy Law, the restriction on disposal of property or assets does not apply to property or assets owned by third parties, assets and or properties that may not be subject to sequestration pursuant to the law, rights that are personal to the Bankrupt or arising from personal status laws, or any compensation that is due to a beneficiary under any insurance policy that was validly entered into by the debtor prior to the Bankruptcy Judgement.

<sup>8</sup> Bankruptcy Law, art 113.

<sup>9</sup> Article 117 of the Bankruptcy Law lists the following exceptions: (i) actions relating to property, assets and or transactions that do not form part of the Bankruptcy Estate and are not subject to non-disposal restriction; (ii) actions and claims relating to the bankruptcy proceedings that the law permits the Bankrupt to pursue directly; and (iii) criminal proceedings.

<sup>10</sup> Bankruptcy Law, art 128.

<sup>11</sup> *ibid.*

<sup>12</sup> The Bankruptcy Judgement appoints a Bankruptcy Judge and a Bankruptcy Trustee.

in an action related to bankruptcy without notifying the Bankruptcy Trustee would not be enforceable vis a vis the creditors' association.<sup>13</sup>

5. Finally, the Bankruptcy Law provides that the Bankruptcy Court retains exclusive jurisdiction to adjudicate all matters arising out of the bankruptcy and matters relating to bankruptcy are, according to the Egyptian Court of Cassation, matters of public order.<sup>14</sup>
6. The Arbitration Law No. 27, enacted in 1994 ("Arbitration Law"),<sup>15</sup> governs any arbitration proceedings taking place in Egypt or taking place abroad if the parties agreed to subject such foreign arbitration proceedings to the provisions of the Arbitration Law. The Arbitration Law does not include any explicit provisions regulating the effect of bankruptcy proceedings on the arbitration process. However, Article 11 of the Arbitration Law provides that "Arbitration agreements may only be concluded by natural or judicial persons having capacity to dispose of their rights."<sup>16</sup> Furthermore, pursuant to Article 11 of the Arbitration Law, arbitration is not permitted in matters that cannot be subject to a compromise/settlement, which includes matters of public order.<sup>17</sup>
7. As above mentioned pursuant to the Bankruptcy Law, following the issuance of a Bankruptcy Judgement, the Bankrupt loses capacity to dispose of its rights and consequently does not have capacity to enter into a contract or an arbitration agreement. Furthermore, as further detailed under Question 2, the Bankruptcy Court retains, as a matter of public order, exclusive jurisdiction to adjudicate all matters relating to bankruptcy.<sup>18</sup> Consequently, in application of Article 11 of the Arbitration Law, matters relating to bankruptcy or that require application of the Bankruptcy Law are matters of public order that may not be subject to arbitration unless such recourse was approved by the Bankruptcy Court, as further detailed in the answer to Question 2.
8. In addition to the foregoing, pursuant to Article 38 of the Arbitration Law, the proceedings before an arbitral tribunal shall be interrupted for any of the reasons for interruption set forth under the Code of Civil and Commercial Procedures, and such interruption shall have the same effects prescribed thereunder. Pursuant to Article 130 of the Code of Civil and Commercial Procedures, legal proceedings shall be interrupted by force of law in specific cases, including if a party loses its capacity to litigate,<sup>19</sup> unless the case at hand was ready for judgement on

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<sup>13</sup> Cassation No. 908 of JY 51 dated 13 July 1992; No. 695 of JY 56 dated 12 July 1990; No. 592 of JY 72 dated 10 April 2007.

<sup>14</sup> Cassation No. 3125 of JY 58 dated 6 May 1996. See also Samiha El Kalyoubi, *Legal Principles regulating restructuring, preventive reconciliation, and bankruptcy* (2019 edn, Dar El Nahda Al Arabia Publishing 2019) 15 para 3.

<sup>15</sup> For full text of the section, please click the link here:

[https://crica.org/FilesEnglish/ArbitrationReference\\_2016-11-01\\_09-12-31-298431.pdf](https://crica.org/FilesEnglish/ArbitrationReference_2016-11-01_09-12-31-298431.pdf).

<sup>16</sup> Emphasis added.

<sup>17</sup> Pursuant to Article 551 of the Civil Code, matters that relate to personal status and/or public order may not be subject to compromise/settlement and thus may not be subject to arbitration.

<sup>18</sup> Cassation No. 3125 of JY 58 dated 6 May 1996.

<sup>19</sup> Pursuant to Article 130 of the Code of Civil and Commercial Procedures, the court may, prior to ordering interruption and upon the request of a party in dispute, grant the latter a determined period of time to notify the relevant person that replaced the one that lost capacity. The court shall pronounce the interruption of proceedings in the event said party fails to proceed with notification within the determined period of time. Pursuant to Article 133, the court proceedings shall resume following notification of the claim to the relevant

substance.<sup>20</sup> The interplay before an arbitral tribunal between Article 38 of the Arbitration Law (pertaining to interruption of proceedings when a party loses capacity to litigate) and Article 128 of the Bankruptcy Law (stating that following issuance of a Bankruptcy Judgement, all ongoing individual proceedings by creditors, whether ordinary or secured, against the Bankrupt are suspended) remains untested.

9. In light of the foregoing, it could be argued that an arbitral tribunal applying the Arbitration Law shall be bound to order interruption of the proceedings in case of issuance of a Bankruptcy Judgement, since the Bankrupt loses capacity to litigate as of the date of issuance of the Bankruptcy Judgement. The arbitral tribunal may also, in application of the Arbitration Law, at the request of either party, grant a period of time to give notice to the party who replaces the incapacitated party (here, the Bankruptcy Trustee).<sup>21</sup> If the Bankruptcy Trustee elects to show up and participate in the arbitration proceedings, they may continue. In practice, this is likely to happen only in the circumstances described in the answer to Question 2 below, in which the Bankruptcy Judge approves the participation in the arbitration. Otherwise, the arbitral tribunal, in application of Article 128 of the Bankruptcy Law,<sup>22</sup> shall suspend the arbitral proceedings.
10. In summary, the issuance of a Bankruptcy Judgement should, unless the Bankruptcy Judge approves recourse to arbitration pursuant to Article 162 of the Bankruptcy Law as further detailed in the answer to Question 2 below, have as its effect the inability to commence any arbitral proceedings and/or, absent the approval of the Bankruptcy Judge, the suspension of any ongoing arbitration proceedings. Such inability to proceed with arbitration ensues from application of the Bankruptcy Law provisions mandating, as a matter of public order, concentration of all disputes related to the Bankruptcy Estate before the Bankruptcy Court and provisions of the Arbitration Law that relate to the capacity of a party to arbitrate; the existence and/or validity of the arbitration agreement; and the arbitrability of the subject matter in dispute.

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person replacing the one that lost capacity to litigate or following attendance by that person of an upcoming session.

<sup>20</sup> Pursuant to Article 131 of the Code of Civil and Commercial Procedures, a case is ready for judgement on substance if the parties in dispute have presented their case and final claims in a final hearing that took place prior to loss of capacity to litigate.

<sup>21</sup> Code of Civil and Commercial Procedures, art 130.

<sup>22</sup> Bankruptcy Law, art 128.

- 2. Does the insolvency legislation in Egypt provide for the concentration of disputes concerning the insolvent debtor before the insolvency court (*vis attractiva concursus*)? If so,**
- a. Which disputes fall under the rules on *vis attractiva concursus*?**
  - b. Are disputes in arbitration or subject to an arbitration agreement covered by the *vis attractiva concursus*?**

11. Bankruptcy Law provides for the exclusive jurisdiction of the Bankruptcy Court for all claims arising out of the bankruptcy and any claims filed by the Bankruptcy Estate against third parties or by third parties against the Bankruptcy Estate. A claim or action is considered arising out of bankruptcy if it specifically relates to the Bankruptcy Estate’s funds, its management, its assets, or if adjudicating such claims requires the application of the provisions of the Bankruptcy Law.<sup>23</sup>
12. The Court of Cassation<sup>24</sup> has confirmed that rules of bankruptcy are of public policy nature and that the Bankruptcy Court retains jurisdiction to decide all disputes arising out of bankruptcy and shall supervise and scrutinise all its issues.
13. As an exception to the above principle, pursuant to Article 162 of the Bankruptcy Law, “the Bankruptcy Judge may, after consulting with the supervisor and considering the bankrupt’s opinion or notifying the bankrupt, authorise the Bankruptcy Trustee to proceed with conciliation or arbitration with respect to any dispute related to bankruptcy even if it was related to rights or actions in rem. If the dispute cannot be quantified, or its value exceeds EGP 20,000, then conciliation or acceptance of arbitration cannot come into force without the approval of the Bankruptcy Judge and subject to the conditions approved thereby. The Bankrupt shall be invited to attend the session where approval is to be considered, the Bankruptcy Judge shall consider the Bankrupt’s opinion if in attendance however, the bankrupt’s objection shall be of no value. An appeal is allowed against the Bankruptcy Judge’s decision rejecting the ratification of the conditions of conciliation or arbitration. The Bankruptcy Trustee shall not waive a right of the Bankrupt or acknowledge a third party’s right against the Bankrupt except as prescribed in the procedures of this Article.”
14. In light of the foregoing, and in application of the principle of equal treatment of creditors, all claims arising out of the bankruptcy, as detailed above, must, in principle, be decided under the same procedure before the Bankruptcy Court. Exceptionally, a derogation from the exclusive jurisdiction of the Bankruptcy Court may be granted by the Bankruptcy Judge through authorizing the Bankruptcy Trustee to proceed with arbitration in any of the bankruptcy-related disputes pursuant to the procedure set forth under Article 162 (described in the above paragraph). The request to derogate from the exclusive jurisdiction of the Bankruptcy Court may be initiated by a creditor, party to a contract with an arbitration clause, or a creditor or party to an ongoing arbitral proceeding that was interrupted due to the lack

<sup>23</sup> *ibid*, art 83.

<sup>24</sup> Cassation No. 3125 of JY 58 dated 6 May 1996. See also Samiha El Kalyoubi, *Legal Principles regulating restructuring, preventive reconciliation, and bankruptcy* (2019 edn, Dar El Nahda Al Arabia Publishing 2019) 15 para 3.

of capacity to litigate of the Bankrupt. It may also be initiated by the Bankruptcy Trustee who is responsible to manage the Bankruptcy Estate on behalf of the Bankrupt.

15. In practice, application of Article 162 may amount to negotiating and agreeing new terms governing the arbitral proceedings between the Bankruptcy Trustee as the legal representative of the Bankrupt/Bankruptcy Estate and the counterparty to the arbitration. Such amendments to an arbitral agreement will, if accepted by the Bankruptcy Judge, govern the arbitral proceedings going forward. In such a case, any actions taken by the Bankruptcy Trustee in the arbitral proceedings and the arbitral award to be issued thereafter shall be effective vis a vis the creditors. Unfortunately, the Bankruptcy Law does not include any further details as to the process nor the conditions for granting the requisite approval. There are so far no precedents that could help delineate how the process would play out in practice.
16. In light of the foregoing, if the debtor validly concluded a contract prior to the issuance of the Bankruptcy Judgement in which arbitration was agreed between the parties, following issuance of a Bankruptcy Judgement, the Bankrupt loses capacity to arbitrate pursuant to the mandatory provisions of the Bankruptcy Law, no new individual claims may be initiated against the Bankrupt, and all individual ongoing claims against the Bankruptcy Estate are suspended. The Bankruptcy Trustee may only assist in any ongoing arbitral proceedings or initiate arbitration proceedings on behalf of the Bankruptcy Estate if the approval of the Bankruptcy Judge is obtained in accordance with the procedure set forth under Article 162 of the Bankruptcy Law.

**3. What are the effects (if any) of the opening of insolvency proceedings in Egypt on the possibility to commence or continue arbitration proceedings?**

17. In principle, the mere initiation of insolvency proceedings in Egypt does not affect the debtor's capacity to manage its business or its capacity to litigate. Only the issuance of a Bankruptcy Judgement should (unless the Bankruptcy Judge approves recourse to arbitration pursuant to Article 162 of the Bankruptcy Law) result in the inability to commence or continue arbitration proceedings. Such inability to proceed with arbitration ensues from application of the Bankruptcy Law provisions mandating, as a matter of public order, concentration of all disputes related to the Bankruptcy Estate before the Bankruptcy Court, the Bankrupt losing capacity to manage its business and capacity to litigate, and the provisions of the Arbitration Law that relate to the capacity of the parties to arbitrate; the existence and/or validity of the arbitration agreement; and the arbitrability of the subject matter in dispute.
18. In the event an arbitration is commenced or proceeds against the Bankrupt despite the above, any award issued by an arbitral tribunal to the detriment of the Bankrupt will not be enforceable vis a vis the creditors of the Bankruptcy Estate.

**In answering this question, please address separately each of the following points:**

**a. Does the law draw any distinction between arbitration proceedings where the insolvent party acts as defendant and as claimant?**

19. The effects of the issuance of a Bankruptcy Judgement are the same on all arbitral proceedings regardless of whether the Bankrupt is acting as claimant or respondent.

**b. Does the law draw any distinction between insolvency proceedings aimed at the liquidation of the company and proceedings aimed at the financial restructuring or rehabilitation of the company?**

20. As previously stated for bankruptcy proceedings, the effects apply as of the date of issuance of the Bankruptcy Judgement and not simply at the initiation of the Bankruptcy proceedings. The Bankruptcy Law also includes independent proceedings that may be initiated by a debtor facing financial difficulties provided certain conditions set forth under the Bankruptcy Law are met. Such proceedings include: (i) restructuring proceedings<sup>25</sup> that can be initiated by the debtor prior to the issuance of a Bankruptcy Judgement or a judgement ordering commencement of preventive reconciliation proceedings; and (ii) preventive reconciliation.<sup>26</sup>

**c. Does the law draw any distinction based on the subject matter or relief sought in the arbitration?**

21. No.

**d. Do these effects (if any) also extend to pre-insolvency proceedings or restructuring proceedings which do not require a declaration of insolvency?**

22. Prior to the issuance of a Bankruptcy Judgement, there are, in principle, no restrictions that apply to the debtor's right to manage its business and dispose of its properties or its capacity to litigate. However, the Bankruptcy Law permits a debtor facing financial difficulty and fulfilling certain conditions<sup>27</sup> to apply to the court requesting restructuring. Submitting an application for restructuring would entail suspension of any applications to declare bankruptcy or preventive reconciliation until a decision is taken by the competent court in relation to the restructuring application.
23. Following ratification of a restructuring plan:<sup>28</sup>

<sup>25</sup> Bankruptcy Law, arts 15 through 29.

<sup>26</sup> *ibid*, arts 30 through 74.

<sup>27</sup> *ibid*, art 15.

<sup>28</sup> Pursuant to Articles 20 and 21 of the Bankruptcy Law, the restructuring committee prepares a report with its assessment of the restructuring plan submitted by the debtor and including its recommendation in relation



- a. the debtor shall continue managing its business and being liable for any transactions and contracts entered into prior to or following the ratification by the Bankruptcy Judge of such restructuring plan and in accordance with its terms;<sup>29</sup>
  - b. certain transactions that negatively affect the creditors are not permitted, including any disposal of assets not related to the business, loans, donations, or any other actions in breach of the restructuring plan;<sup>30</sup> and
  - c. no claims whether relating to the plan, its execution, or any individual claims or judicial proceedings may be initiated between the debtor and any of the creditors that have signed and approved the restructuring plan. Prescription periods pertaining to such individual claims and debts are suspended until completion of the restructuring plan.<sup>31</sup>
24. The Bankruptcy Judge may terminate the restructuring plan upon its execution, failure to complete or breach of its terms based on an application by a party thereto.<sup>32</sup> In light of the foregoing, during the restructuring phase, any creditors that were signatories to the ratified restructuring plan will not be able to initiate arbitration proceedings in relation to their individual claims until the restructuring plan is completed or terminated in accordance with the above.
25. The Bankruptcy Law also grants the debtor, fulfilling certain conditions,<sup>33</sup> the right to file an application requesting preventive reconciliation. In the event such application is approved by the court, it shall issue a judgement ordering the commencement of the preventive reconciliation proceedings (“Preventive Reconciliation Opening of Proceedings Judgement”) and appointing a preventive reconciliation judge (“Reconciliation Judge”) and a preventive reconciliation trustee (“Reconciliation Trustee”).
26. Upon the issuance of the Preventive Reconciliation Opening of Proceedings Judgement:
- a. the debtor retains the right to manage his business under the supervision of the Reconciliation Trustee and may undertake all actions necessary to operate in the normal course of business;<sup>34</sup>
  - b. the debtor is prohibited from concluding certain transactions that are not considered in the normal course of business without the prior approval of the Reconciliation Judge including entering into a settlement, concluding any

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thereto. The Bankruptcy Judge ratifies the restructuring plan that is submitted by the restructuring committee following signature and approvals of its parties, and in such a case the restructuring plan is considered binding on all signatory parties.

<sup>29</sup> Bankruptcy Law, art 24.

<sup>30</sup> *ibid*, art 25.

<sup>31</sup> *ibid*, art 29.

<sup>32</sup> *ibid*, art 28.

<sup>33</sup> *ibid*, art 30.

<sup>34</sup> *ibid*, art 46.

mortgage or pledge, and disposing of any of its assets. Any actions undertaken in breach of the foregoing shall not be enforceable vis a vis the creditors;<sup>35</sup> and

- c. all claims and enforcement proceedings against the debtor are suspended. However, all claims as well as enforcement proceedings initiated by the debtor shall continue and shall not be subject to any suspension after introducing the Reconciliation Trustee in the relevant proceeding.<sup>36</sup>

27. The Bankruptcy Law provides for a detailed process similar in some aspects to the bankruptcy proceedings regulating the verification of debts and disputing any debts. Once agreement is reached between the creditors and the debtor on the terms of reconciliation and the creditors' approval is obtained, the court shall issue a judgement ratifying the terms of the preventive reconciliation ("Preventive Reconciliation Judgement"). Following issuance of the Preventive Reconciliation Judgement, it shall be published and its provisions become applicable to all creditors that are considered normal creditors pursuant to the provisions of the Bankruptcy Law, despite such creditors not being parties to the Preventive Reconciliation proceedings and not having approved the preventive reconciliation agreement's terms.

**e. Does the law draw any distinction between arbitration proceedings which are pending at the time of the opening of insolvency proceedings and arbitration proceedings which commence after the opening of insolvency proceedings?**

28. No. In both cases, pursuant to the Bankruptcy Law, upon issuance of the Bankruptcy Judgement, the Bankrupt loses capacity to litigate and to dispose of and/or manage its business and properties and is replaced by the Bankruptcy Trustee. In both cases, following the issuance of a Bankruptcy judgement, recourse to arbitration is only permitted subject to the approval of the Bankruptcy Judge in accordance with Article 162 of the Bankruptcy Law, as detailed under Question 2 above.

**f. Does the law regulating the effect of insolvency on arbitration make any distinction between voluntary and compulsory insolvency proceedings?**

29. No. The Bankruptcy Law makes no distinction, and effects apply as of the date of the Bankruptcy Judgment regardless of whether insolvency proceedings were initiated by the debtor or by any of the creditors, the public prosecution, or the court at its own initiative.

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<sup>35</sup> *ibid.*

<sup>36</sup> *ibid*, art 47.

**g. Do those effects intend to apply extraterritorially, ie to every arbitration regardless of the location of the seat in Egypt or abroad?**

30. Yes, as further detailed in the answer to Question 2, Article 83 of the Bankruptcy Law provides for the exclusive jurisdiction of the Bankruptcy Court to adjudicate all matters relating to bankruptcy. This is a rule of public order that may not be derogated from.<sup>37</sup>

**h. When do the effects (if any) of insolvency on arbitration become operative (eg, from the time of the opening of insolvency proceedings, the declaration by the court, its publication or service of process through other means on the affected parties or even the arbitrators, etc.)?**

31. In principle, the effects of insolvency on arbitration are operative as of the date of issuance of a Bankruptcy Judgement.

**4. Does the law of the jurisdiction permit relief from the effects above? If so, what procedures must be followed in order to proceed with an arbitration?**

- a. Can an interested party seek to intervene in the insolvency proceeding in order to proceed with arbitration?**
- b. What considerations will the insolvency court take into account in making the decision of whether to send the matter to arbitration?**

32. As previously discussed, the Bankruptcy Law provides that the Bankruptcy Judge may allow the Bankruptcy Trustee to proceed with arbitration. A request to derogate from the exclusive jurisdiction of the Bankruptcy Court may be initiated by a creditor that is party to a contract with an arbitration clause or a creditor that is party to an ongoing arbitral proceeding that was interrupted due to the lack of capacity to litigate of the Bankrupt. For an ongoing arbitration, the creditor may notify the Bankruptcy Trustee, with the statement of claim, requesting that the latter replaces the Bankrupt in the ongoing arbitral proceedings as the legal representative of the Bankrupt.
33. For the Bankruptcy Trustee to be able to accept arbitration or to assist in any ongoing arbitral proceedings, the approval of the Bankruptcy Judge is required. In the event the dispute is of an undetermined value or has a value that exceeds EGP 20,000, not only would the Bankruptcy Judge's prior approval be required, but the latter should also approve the terms of the arbitration in writing.

<sup>37</sup> Cassation No. 3125 of JY 58 dated 6 May 1996.

34. Unfortunately, due to the novelty of the Bankruptcy Law, to our knowledge there are no judicial precedents testing the application of the foregoing article.<sup>38</sup> Furthermore, doctrine is extremely scarce on the subject matter.
35. Because the decision of the Bankruptcy Judge to accept recourse to arbitration would mean that any arbitration award would be effective and enforceable against the Bankruptcy Estate, it is reasonable to deduce that the Bankruptcy Judge, when making a decision as to whether or not to proceed with arbitration, would generally be guided by upholding the best interest of the creditors. The Bankruptcy Judge may thus consider any of the following when making a decision:
- a. timing of entry into the contract including the arbitration clause. If the said contract was entered into following the Bankruptcy Judgement, the Bankrupt at that time lacked capacity, and the contract as a whole is thus unenforceable vis a vis the creditors;
  - b. if the contract was entered into in the Suspect Period<sup>39</sup> and was to the detriment of the creditors and there is evidence that the counterparty knew, at the time of entry into the contract, that the debtor had stopped payment of its debts; and
  - c. in case of a valid contract with a valid arbitration clause that was entered into prior to the Bankruptcy Judgement, whether or not the Bankrupt has a strong claim and/or counterclaim in the arbitration. The Bankruptcy Trustee is under a general obligation to preserve the rights of the Bankruptcy Estate, and accepting recourse to arbitration may be the appropriate route to safeguard the Bankruptcy Estate rights under a contract that was validly entered into by the Bankrupt.
36. The decision of the Bankruptcy Judge rejecting ratification of the terms of recourse to arbitration is subject to appeal before the Bankruptcy Court.

**5. Can the insolvency courts give an order to stop arbitration proceedings (eg, an anti-arbitration injunction)? If so, does it depend on the seat of the arbitration being in the jurisdiction or abroad?**

37. Pursuant to Article 101 of the Bankruptcy Law, the Bankruptcy Judge may order any conservatory measures to protect the Bankruptcy Estate, including instructing the Bankruptcy Trustee to initiate any claims or legal proceedings or to execute any specific procedural acts. Those may include instructing the Bankruptcy Trustee to request suspension of arbitral proceedings against the Bankrupt or to terminate arbitral proceedings due to any of the reasons previously discussed, including the nonexistence of a valid arbitration agreement and the exclusive jurisdiction of the Bankruptcy Court to adjudicate matters relating to the bankruptcy as a rule of public order that may not be derogated from.

<sup>38</sup> Chapter 5 of the Commercial Code that was repealed and replaced by the Bankruptcy Law also included a similar provision. No precedents pertaining to the application of the said article exist either.

<sup>39</sup> See paragraph 45 below for the definition of the Suspect Period.

38. Furthermore, it could be argued that the Bankruptcy Judge, by rejecting to authorize the Bankruptcy Trustee to accept arbitration or refusing to ratify the terms of an arbitration agreement in a bankruptcy dispute, is in practice issuing an order to suspend the arbitral proceedings. Such prerogative stems from his application of the Bankruptcy Law provisions that are rules of public order.
39. According to the overarching principle that the capacity of a party to arbitrate is governed by the *lex patriae*, Egyptian law governs the capacity of Egyptian parties, irrespective of the *lex loci arbitri* (law governing the seat of arbitration) and/or the *lex causae* (law governing the merits). Thus, if the arbitral tribunal fails to apply the Bankruptcy Law provisions relating to the capacity of the Egyptian Bankrupt, its award would be denied recognition/enforcement in Egypt on grounds of public order.

**6. Can the insolvency administrator or the insolvency court terminate or suspend the effectiveness of contracts that contain arbitration agreements concluded by the insolvent party before the opening of insolvency proceedings? If so, on what basis?**

40. According to the Bankruptcy Law, the Bankruptcy Trustee is in charge of managing the business, the financial affairs, and interests of the Bankrupt and shall represent the Bankruptcy Estate and the Bankrupt in all claims, legal proceedings, and decisions following the issuance of the Bankruptcy Judgement. The Bankruptcy Trustee should also take all actions required to protect the Bankrupt's rights vis a vis third parties including initiating any proceedings and/or claims to retrieve such rights.
41. Furthermore, pursuant to the Bankruptcy Law, a Bankruptcy Judgement does not entail termination of a valid contract with reciprocal obligations that was entered into by the debtor with a third party. However, in the event such contract requires specific or personal performance by the debtor "intuitus personae," such contract may be terminated by either party.<sup>40</sup>
42. Every decision taken by the Bankruptcy Trustee in relation to the contract has to be approved by the Bankruptcy Judge. In the event of a valid contract, if the Bankruptcy Trustee does not execute the contract or has not continued its execution, the counterparty may request termination for breach and compensation. The counterparty may also grant the Bankruptcy Trustee a grace period to decide its position in relation to the contract and may decide to join the Bankruptcy proceedings as a creditor for compensation due for unlawful termination.
43. In the event the Bankruptcy Trustee decides not to execute a contract that was entered into by the debtor, and such contract includes an arbitration clause, the counterparty may either choose to: (i) join other creditors before the Bankruptcy Court and request compensation for unlawful termination of the contract by the Bankruptcy Trustee; or (ii) attempt to initiate arbitration proceedings against the Bankruptcy Trustee, acting as the legal representative of

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<sup>40</sup> Bankruptcy Law, art 142.

the Bankrupt and the Bankruptcy Estate, requesting that the arbitral tribunal confirm the unlawful termination of the contract and award compensation for non-execution.<sup>41</sup>

44. In the latter case, the Bankruptcy Trustee may either: (i) participate in the arbitral proceedings, provided that the Bankruptcy Judge approves the terms of the arbitration pursuant to Article 162; or (ii) in the absence of requisite approval, invoke the absence of a valid arbitration agreement pursuant to the Bankruptcy Law and/or the exclusive jurisdiction of the Bankruptcy Court to adjudicate matters relating to the bankruptcy as a rule of public order that may not be derogated from; or (iii) simply initiate a non-enforceability claim before the Bankruptcy Court as detailed in the below paragraphs.
45. Pursuant to the Bankruptcy Law article 121, the Bankruptcy Court will decide the date on which the Bankrupt stopped meeting its financial obligations (“Cessation Date”). Generally, unless explicitly provided otherwise, the cessation of payment does not in itself produce any effect on actions taken prior to the declaration of bankruptcy in the Bankruptcy Judgement. Pursuant to the Bankruptcy Law, during the period from the Cessation Date until the date of the Bankruptcy Judgement (“Suspect Period”), certain specific transactions/contracts shall be inoperative/unenforceable by force of law vis a vis the creditors in the Bankruptcy Estate. Those include: donations, settlement of debts before their due date or in a different manner other than as originally agreed, and creation of a pledge or any other security or guarantee for a pre-existing debt.<sup>42</sup> The Bankruptcy Court shall thus issue a judgement pronouncing any such contracts/actions unenforceable vis a vis the creditors.
46. In addition to the foregoing, the Bankruptcy Law provides that, during the Suspect Period, the Bankruptcy Court **may** also declare an action/contract (other than those listed under the above paragraph that are unenforceable by force of law) unenforceable vis a vis the creditors, provided that: (i) such an action/contract was to the detriment of the creditors; and (ii) the counterparty knew that the debtor had at the time stopped payment of his commercial debts. The Bankruptcy Trustee may use all means of evidence to prove the knowledge of the third party.<sup>43</sup>
47. Only the Bankruptcy Trustee, at his own initiative or upon the request of the Bankruptcy Judge, can initiate a claim of non-enforceability of a transaction/contract that was entered by the debtor prior to the issuance of the Bankruptcy Judgement vis a vis the creditors.<sup>44</sup>
48. A court judgement endorsing the above claim would result in the non-enforceability of the contract as a whole vis a vis the creditors, including its arbitration clause. Such a judgement

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<sup>41</sup> Any debts that are acknowledged pursuant to judgements issued following the Bankruptcy Judgement are in principle inoperative and non-enforceable vis a vis the creditors. Article 118 of the Bankruptcy Law provides for an exception to the principle set in Article 121 pertaining to non-enforceability of any judgements issued following a Bankruptcy Judgement. Such an exception pertains to any judgement declared after a Bankruptcy Judgement but which awarded compensation for a damage caused to a third party by the debtor prior to submitting the request for declaration of bankruptcy. In such a case, the said party shall be permitted to join the creditors in the Bankruptcy for the damages awarded, provided that there was no evidence of any collusion with the debtor.

<sup>42</sup> Bankruptcy Law, art 121.

<sup>43</sup> Cassation No. 556 of JY 75 dated 09 June 2009.

<sup>44</sup> Bankruptcy Law, art 125.

would benefit all creditors whether their debts were established prior to or following the date of the relevant action/contract. Following such a court judgement, the counterparty shall be obliged to return to the Bankruptcy Estate what he had acquired as a result of such a transaction or its value and interest thereupon. The counterparty has the right to collect the consideration it had provided to the debtor if it was included in the Bankruptcy Estate, in the absence of which the counterparty may claim against the Bankruptcy Estate the value or benefit resulting from such a transaction and may become a creditor in the bankruptcy with its value.<sup>45</sup>

49. The effect of a judgement from the Bankruptcy Court upholding the non-enforceability of the contract or transaction vis a vis the creditors is solely to the benefit of the creditors represented by the Bankruptcy Trustee.
50. The judgement does not, however, affect the contractual relationship between the Bankrupt and the counterparty. In the event an arbitral award is issued (in an arbitration wherein the Bankrupt participated in person in breach of the Bankruptcy Law provisions and the arbitral tribunal has not suspended the proceedings) awarding payment of compensation, such an award may be executed against the Bankrupt on any assets that do not form part of the Bankruptcy Estate or that remain following closure of the Bankruptcy procedures. If to the contrary, the arbitral award issued in breach of the Bankruptcy Law has awarded compensation to the Bankrupt, the Bankruptcy Trustee, in such a case, is entitled to forgo its right to invoke on behalf of the creditors the non-enforceability, and the amount awarded to the Bankrupt will form part of the Bankruptcy Estate.<sup>46</sup>

**7. What is the effect (if any) on the arbitration agreement of the decision of the insolvency administrator or insolvency court to terminate/disclaim the contract that contains such arbitration agreement?**

51. Please see the answer to Question 6 above. In brief, if the Bankruptcy Trustee does not execute a contract that was validly entered into by the Bankrupt prior to the Bankruptcy Judgement that contains an arbitration agreement, the counterparty may attempt to initiate arbitration against the Bankruptcy Trustee as the legal representative under the contract, but the Bankruptcy Trustee, subject to the Bankruptcy Court's approval, will retain the option to participate in the arbitration or decline to do so. If the Bankruptcy Trustee objects to or does not participate in arbitration, any arbitral award rendered in Egypt may risk being set aside, and any arbitral award rendered abroad (in arbitrations not seated in Egypt) may risk refusal of recognition or enforcement. In case of a contract entered into by the Bankrupt during the Suspect Period that is judged unenforceable vis a vis the creditors by the Bankruptcy Court, the arbitration clause—an integral part of the contract—will also be unenforceable vis a vis the creditors. As detailed under paragraph 50, the judgement is to the benefit of creditors

<sup>45</sup> *ibid*, art 126.

<sup>46</sup> See Ali Gamal El Din Awad, *Bankruptcy in the New Commercial Code* (2nd edn, Dar El Nahda Publishing 2010) 261 para 265.

and will not necessarily affect the contractual relationship between the Bankrupt and the counterparty.

**8. Can the insolvency administrator or the insolvency court terminate or suspend the effectiveness of arbitration agreements themselves? If so, on what basis? What is the effect of such decision on pending arbitration proceedings derived from the arbitration agreement in question?**

52. As previously stated, following the issuance of a Bankruptcy Judgement, the Bankrupt loses capacity to dispose of its rights and consequently does not have capacity to enter into a contract or an arbitration agreement. Consequently, any agreement to arbitrate entered into by the Bankrupt following the Bankruptcy Judgement is, in principle, unenforceable vis a vis the creditors of the Bankruptcy Estate.
53. Furthermore, as further detailed under Question 2, the Bankruptcy Court retains, as a matter of public order, exclusive jurisdiction to adjudicate all matters relating to bankruptcy.<sup>47</sup> Consequently, in application of Article 11 of the Arbitration Law, matters relating to bankruptcy or that require application of the Bankruptcy Law are matters of public order that may not be subject to arbitration unless such recourse was approved by the Bankruptcy Court (as further detailed under Question 2).
54. In light of the foregoing, the Bankruptcy Trustee may challenge recourse to arbitration on the above-mentioned grounds, including: (i) lack of capacity of the Bankrupt to arbitrate in case such agreement was entered into following issuance of the Bankruptcy Judgement, and (ii) inarbitrability of the subject matter in dispute since it relates to Bankruptcy Law, which falls within the exclusive jurisdiction of the Bankruptcy Court.

**9. Does the insolvency regime require the alleged creditor to take any step in the insolvency process to be able to commence or continue with the arbitration (eg, file the claim within the insolvency proceedings for verification/registration/ proof)?**

- a. If an alleged creditor files its claim with the insolvency proceedings and the claim is refused, does the existence of an arbitration agreement mean that an arbitral tribunal would have jurisdiction to decide on the existence and amount of the claim, so that it can be eventually submitted to the insolvency proceedings?**
- b. Does the filing of the claim with the insolvency proceedings amount to a submission of the jurisdiction of the insolvency court and a waiver of the arbitration agreement?**

55. Following the issuance of a Bankruptcy Judgement, commencing and/or continuing an arbitration as an exception to the exclusive jurisdiction of the Bankruptcy court can only be undertaken against the Bankruptcy Trustee and provided the approval of the Bankruptcy

<sup>47</sup> Cassation No. 3125 of JY 58 dated 6 May 1996.



Judge has been obtained in accordance with the procedure set forth under Article 162 of the Bankruptcy Law. For more details, please refer to the answers to Questions 2 and 3.

56. Following the Bankruptcy Judgement, both secured and unsecured creditors are required to record their debts and deliver to the Bankruptcy Trustee all debt-related documents evidencing such debts in order to be listed on the record of creditors entitled to the proceeds of the Bankruptcy Estate. The Bankruptcy Trustee will then examine and verify the validity and quantum of the creditor's claims and any security interests and notify the relevant creditor of its remarks or objections (if any), and the creditor should reply to such clarifications.
57. The Bankruptcy Trustee, following the verification process, deposits with the Bankruptcy Court a list of all debts, documents evidencing same, disputed debts and reasons for such dispute, and whether such debts should be accepted or rejected, as well as a list of securities for any such debts. Any creditor included in the list or the Bankrupt may challenge any of the debts included in the list and the decision made by the Bankruptcy Trustee in relation thereto during a determined period of time. Thereafter, a final list of the undisputed debts is prepared by the Bankruptcy Judge.
58. The decisions made by the Bankruptcy Trustee or the Bankruptcy Judge to accept or reject a debt may be challenged before the Bankruptcy Court. The Bankruptcy Court retains the prerogative of determining whether (or not) to stay the bankruptcy proceedings until a ruling on the challenge is made. The Bankruptcy Court's ruling on whether to accept or reject a debt is final and not subject to appeal. All the above actions should be completed within the predetermined time limits prescribed under the Bankruptcy Law provisions.
59. As described above, the Bankruptcy Law provides for a procedure to be strictly followed by all creditors that wish to be considered as creditors of record and participate in the distribution of the proceeds of the Bankruptcy Estate. During the said process, a creditor that wishes to have the arbitration clause upheld must explicitly state that submission of debt for verification does not entail a waiver of the arbitration agreement.
60. If the debt is rejected because it relates to a contract that the Bankruptcy Trustee has challenged or is challenging as unenforceable against the Bankruptcy Estate, then in the event a ruling is issued to that effect, the counterparty, following issuance of an arbitration award in his favour, will not be entitled to enforce such award against the Bankruptcy Estate's assets and properties in Egypt.

**10. In the event of a contract concluded by the insolvent party and a creditor prior to the opening of the insolvency proceedings, is an arbitration agreement contained in that contract enforceable in relation to an action commenced by the insolvency administrator to avoid that transaction based on grounds provided by insolvency law (insolvency *actio pauliana* or setting aside action)?**

61. As previously stated, the Bankruptcy Court has exclusive jurisdiction to consider any claims by the Bankruptcy Trustee challenging any contract/transaction entered into by the debtor that

occurred during the Suspect Period and claiming their non-enforceability vis a vis the creditors.

62. In the event the Bankruptcy Trustee decides to initiate such a claim before the Bankruptcy Court, then the position it has adopted is not to consider such a contract enforceable vis a vis the creditors, including its arbitration clause. In such a case, any arguments relating to jurisdiction including validity, existence, or capacity of the debtor to arbitrate may be brought before the Bankruptcy Court that will be looking into the challenge and issuing its ruling.
63. The situation may be different in case of an ongoing arbitral proceeding wherein the Bankruptcy Trustee receives from the claimant notification of the existence of an arbitration and a request that it replaces the Bankrupt as the representative of the Bankruptcy Estate. In such a case, the Bankruptcy Trustee would consider the matter of whether or not to participate in the arbitral proceedings, taking into consideration the best interest of the creditors and the Bankruptcy Estate. The Bankruptcy Trustee may either (i) initiate the procedure pursuant to Article 162 to obtain the Bankruptcy Judge's approval to assist in the arbitration and ratify the terms of such arbitration; (ii) attend the arbitral proceedings and request that the arbitral tribunal terminate the proceedings for absence of a valid arbitral agreement and non-arbitrability of the subject matter of the dispute; (iii) decide not to participate in the arbitral proceedings and initiate a claim before the Bankruptcy Court against the claimant challenging the contract; or (iv) decide not to participate on the basis that a nullity action against the award may be filed (if the arbitration is seated in Egypt) or that enforcement may be denied on grounds of public order.

**11. Can the insolvency administrator conclude new arbitration agreements after the opening of insolvency proceedings?**

64. The Bankruptcy Trustee can conclude arbitration agreements after the issuance of a Bankruptcy Judgement, subject to securing the approval of the Bankruptcy Judge. As previously noted, the Bankruptcy Trustee may request the Bankruptcy Judge's authorization to have recourse to arbitration in any dispute regarding the bankruptcy, even if it involves rights or claims pertaining to real estate in accordance with the procedure set forth under Article 162 of the Bankruptcy Law.<sup>48</sup> If the dispute has an undetermined value, or its value exceeds EGP 20,000, the acceptance of the arbitration shall not be effective unless the Bankruptcy Judge has ratified its terms. The Bankrupt is notified to attend the session of ratification and can be heard if the Bankrupt attends, but the Bankrupt's objections shall be of no effect.

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<sup>48</sup> Bankruptcy Law, art 162.

**12. Do the effects of insolvency on arbitration (if any) operate after a creditors' arrangement has been agreed and approved by the competent authority?**

65. Pursuant to the Bankruptcy Law, the Bankruptcy Court may, at any point in time following the Bankruptcy Judgement based on the request of any interested party, mediate between the debtor and the creditors to reach a settlement.<sup>49</sup> The settlement will only be effective if approved by all the creditors.<sup>50</sup> Following the said approval, the terms of the settlement are ratified by the Bankruptcy Judge and published in the newspapers. Following ratification of the settlement, all bankruptcy effects previously outlined in the answer to Question 1 under paragraph 3 are lifted, and the debtor regains its right to manage its affairs provided the terms of settlement are upheld. Consequently, all bankruptcy effects on initiation or continuation of arbitral proceedings are lifted, as the debtor has regained capacity to litigate.

**13. Are any or all the rules regulating the effects of insolvency on arbitration mandatory? That is, can an agreement between the insolvent party and one or more of its creditors (eg, the parties to the arbitration) exclude the application of those rules?**

66. Bankruptcy Law provisions relating to the effects of insolvency on arbitration are mandatory and may not be derogated from by agreement of the parties.

**14. Are arbitrators seated in the jurisdiction bound by the rules discussed above in considering whether to proceed with an arbitration?**

67. Arbitrators seated in Egypt should take the above rules into consideration in order to avoid rendering an award that risks being set aside on the grounds of Article 53 of the Arbitration Law or risks being denied enforcement for any of the reasons set forth under Article 58 of the Arbitration Law.

68. Pursuant to Article 53 of the Arbitration Law, an award rendered in Egypt may be set aside or annulled on certain grounds, amongst which are: (i) the arbitration agreement was not valid, had expired, or is otherwise inoperative; (ii) the arbitral tribunal has excluded the application of the law governing the merits; (iii) the proceedings are tainted with a procedural irregularity that impacts the arbitration or the award; or (iv) the award contravenes public order. These grounds are pertinent to arbitration proceedings that are commenced or continued without securing the approval of the Bankruptcy Judge. Following a Bankruptcy Judgement, the Bankrupt is prohibited from taking any legal actions and loses its capacity to litigate/arbitrate. The Bankruptcy Trustee may only replace the Bankrupt in an arbitration as the legal representative of the Bankruptcy Estate, provided that the Bankruptcy Judge authorizes such recourse to arbitration and approves its terms.

<sup>49</sup> *ibid*, art 178.

<sup>50</sup> Pursuant to Article 179 of the Bankruptcy Law, secured creditors are not allowed to vote on the decision of settlement unless they forgo their security and become ordinary creditors.

69. Even if not considered during the proceedings, the effect of such decision will ultimately catch up with the parties at the time of setting aside or enforcement. A party seeking enforcement of an arbitral award will not obtain an exequatur if the award has violated rules of public order; if it contradicts with a prior judgment rendered by the Egyptian courts on the merits; if the parties have not been validly represented; or if the award has not been validly notified to the concerned party. More specifically, if an arbitral award is rendered against the Bankrupt, despite the Bankruptcy Trustee's objection to the arbitration, it may be set aside (if the arbitration is seated in Egypt) on the basis that the Bankrupt lacks capacity, the arbitration agreement expired, and/or the award contravenes Egyptian public order. If the proceedings are seated abroad, the arbitral award would be refused recognition/enforcement on the very same basis referred to above.

**15. Does the court's personal jurisdiction over the party to the arbitration that is *not* in insolvency make any difference with respect to the effectiveness of the insolvency court's position on the arbitration?**

70. No.

## **Part II: Considerations with Respect to the Arbitration Proceeding Where a Party Is Subject to Insolvency Proceedings**

**16. Will the insolvency administrator take part in the arbitration exclusively or will the insolvent party in some instances continue to have procedural capacity to participate in the arbitration in its own name (debtor in possession)?**

**a. If the insolvency administrator takes part in the arbitration, does she step into the shoes of (ie, replace) the insolvent party or can the insolvent party continue to appear in its own name? [in the latter option, what are the roles of the insolvency administrator and the insolvent debtor?]**

71. As previously stated, immediately upon issuance of a Bankruptcy Judgement, the Bankrupt loses legal capacity to manage its business or dispose of its assets, is prevented from paying or receiving any financial dues, and may not be a claimant or a respondent or take part or continue any legal proceedings with certain exceptions.<sup>51</sup> The Bankrupt loses capacity to arbitrate, and only the Bankruptcy Trustee is entitled to proceed with arbitration, provided that it is authorized to do so by the Bankruptcy Judge in accordance with the terms the latter has approved. The Bankruptcy Trustee in that case acts as the legal representative of the Bankrupt.
72. Furthermore, although Article 117 of the Bankruptcy Law confirms the principle that the Bankrupt may not be a party in any legal proceedings following the issuance of a Bankruptcy Judgement, it nevertheless grants the Bankruptcy Court the prerogative of permitting either

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<sup>51</sup> Bankruptcy Law, art 117.

the Bankrupt or a creditor with special interest upon request to assist in any of the proceedings pertaining to the bankruptcy. It could be argued that the Bankruptcy Judge, using his prerogatives under Articles 117 and 162, may include in the terms applicable to the arbitration that the Bankrupt assist in the arbitration proceedings together with the Bankruptcy Trustee. Such assistance will not grant the Bankrupt any legal status or capacity to litigate or take decisions regarding the proceedings, but he/she may assist with documentation, may provide views regarding the case, and may even serve as a witness of fact, to the extent this is authorised by the Bankruptcy Trustee after being approved by the Bankruptcy Judge.

**17. Do the considerations of confidentiality that apply in a non-insolvency scenario vary as a consequence of the opening of insolvency proceedings against one of the parties to the arbitration? For instance, are there any restrictions on the information that the insolvency administrator can share with the insolvency court or with the creditors in the insolvency concerning the conduct, status or content of the arbitration? Or can the creditors appear in the arbitration as parties interested in the outcome of the proceedings?**

73. There are no explicit provisions that specifically deal with restrictions that apply to the Bankruptcy Trustee in relation to disclosure of information pertaining to an ongoing arbitration. The Bankruptcy Trustee is under a general obligation of keeping the Bankruptcy Judge informed of all that happens in the arbitration and may not take any decision that disposes of any right of the Bankrupt or grants a third party any right except after obtaining the approval of the Bankruptcy Judge. Other creditors may not appear as parties in the arbitration, unless the Bankruptcy Judge has authorised arbitration with an express condition of participation by some creditors.

**18. Does the name of a party change as a consequence of the opening of insolvency proceedings over it?**

74. Yes. Following the issuance of a Bankruptcy Judgement, the Bankrupt loses its capacity to litigate or participate in any legal proceedings with certain exceptions.<sup>52</sup> Any action taken against the Bankrupt as of the date of the Bankruptcy Judgement has to be initiated against the Bankruptcy Trustee in his capacity as the legal representative of the Bankruptcy Estate. Any actions initiated against the Bankrupt and not the Bankruptcy Trustee shall be unenforceable vis a vis the creditors and the Bankruptcy Estate.

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<sup>52</sup> Article 117 of the Bankruptcy Law lists the following exceptions: (i) proceedings that relate to assets and transactions that are not part of the Bankruptcy Estate and thus not subject to the restriction on disposal; (ii) proceedings relating to the bankruptcy that the Bankrupt is permitted to undertake; and (iii) criminal proceedings.

**19. Is the insolvency administrator (or the debtor in possession) empowered to reach a settlement in the arbitration, or is the insolvency court required to authorise any settlement for it to be effective?**

75. Pursuant to the Bankruptcy Law, the Bankruptcy Trustee is not empowered to reach settlement, forgo any of the rights of the Bankrupt, or grant any right to a third party without obtaining the Bankruptcy Judge's approval in accordance with the provisions of Article 162 of the Bankruptcy Law.

**20. Can an arbitral tribunal adopt interim measures concerning a party subject to insolvency proceedings?**

76. Pursuant to the Arbitration Law, for the arbitral tribunal to be able to order one of the parties to execute interim measures, it has to be explicitly permitted to do so by the parties. In the event of ongoing arbitral proceedings that comply with the requisite conditions of Article 162, and where both the Bankruptcy Trustee (as approved by the Bankruptcy Judge) and the counterparty agree to grant the arbitral tribunal such powers, or where the arbitral tribunal was already granted such powers under an arbitration clause that was accepted by the Bankruptcy Judge, the arbitral tribunal may adopt interim measures that would be executed by the Bankruptcy Trustee.

77. Interim measures ordered by an arbitral tribunal that proceeded against the Bankrupt in breach of the provisions of the Bankruptcy Law would not be enforceable vis a vis the Bankruptcy Trustee or the creditors.

**21. Does the opening of insolvency proceedings in Egypt affect the validity of interim measures adopted against the insolvent party by an arbitral tribunal prior to the opening of the insolvency proceedings?**

78. Pursuant to the Arbitration Law, for the arbitral tribunal to be able to adopt interim measures, it has to be explicitly permitted to do so by the parties. The interim measures adopted against the debtor prior to the Bankruptcy Judgement may be subject to challenge before the Bankruptcy Court by the Bankruptcy Trustee. The Bankruptcy Trustee may claim that the transactions to which such interim measures relate are unenforceable vis a vis the creditors if the actions taken by the Bankrupt to execute such interim measures were taken during the Suspect Period and were to the detriment of the creditors. The contract that includes the arbitration clause could itself be subject to the same challenge by the Bankruptcy Trustee. If a judgement ruling that such contract is unenforceable vis a vis the creditors and the Bankruptcy Estate is issued, it would also entail that all actions taken in implementation of the contract provisions or any measures ordered by the arbitral tribunal shall be unenforceable vis a vis the creditors.

**22. Is the capacity of the insolvent party to settle the dispute in the arbitration affected by the opening of insolvency proceedings in the jurisdiction?**

79. Yes, the Bankrupt loses its legal capacity to litigate, including capacity to settle the dispute in arbitration. However, as previously stated, this occurs upon the issuance of the Bankruptcy Judgement and not by the opening of the insolvency proceedings.

**Part III: Ability to Enforce an Arbitration Award in Insolvency Proceedings**

**23. Does the opening of insolvency trigger a general prohibition of individual enforcement actions by creditors against the insolvent estate?**

80. As of the date of issuance of a Bankruptcy Judgement, individual enforcement actions by ordinary creditors are prohibited; only individual actions by secured creditors are permitted provided they are initiated against the Bankruptcy Trustee. Please see the answer to Question 1.

**24. What is the status of a claim that is being pursued in arbitration but has not yet reached a final award? Will that claim be converted to a different status once the arbitration award has been rendered and/or becomes enforceable?**

81. Only creditors with verified undisputed debts are included in the final list of creditors that are entitled to rights in the distributions to be made from the Bankruptcy Estate during the Bankruptcy Proceedings. Creditors with debts that were disputed may, following determination of such debt in a final arbitral award that is enforceable vis a vis the creditors, claim their due from the Bankruptcy Estate as creditors based on the final arbitral award so long as the Bankruptcy Proceedings are still ongoing and the Bankruptcy Estate still has funds. In such a case, the creditor will claim its dues from any future distributions that are to be made by the Bankruptcy Trustee and is not entitled to claim any amounts from distributions that were already made prior to the debt becoming undisputed.
82. Pursuant to the Bankruptcy Law, in case of liquidation of the Bankruptcy Estate, any disputed debt amounts shall be retained and kept until a final ruling is issued in relation to such debt (confirming its acceptance as a debt vis a vis the Bankruptcy Estate or its rejection).<sup>53</sup>
83. Consequently, if the arbitration is ongoing and has been approved by the Bankruptcy Judge, then the amount in dispute shall be considered a disputed debt and shall in the event of liquidation of the Bankruptcy Estate be retained in trust until a final arbitral award is issued in that respect.

<sup>53</sup> Bankruptcy Law, art 235.

**25. Is a credit contained in an arbitration award a valid proof of credit (ie, valid title) for the purposes of the insolvency proceedings? If it is a foreign award, will it need to be recognised under the New York Convention for it to be accepted or is there any other requirement that needs to be satisfied?**

84. Pursuant to the Arbitration Law, an arbitral award rendered in Egypt or abroad in an arbitration that is subject to the application of the Arbitration Law has a *res judicata* effect,<sup>54</sup> and the filing of an action for annulment of the arbitral award does not suspend its enforcement. Enforcement may only be suspended by court order based on the request of the applicant and provided that such request is based on serious grounds.<sup>55</sup>
85. The above *res judicata* effect would also apply to a foreign arbitral award seeking recognition and enforcement in Egypt, insofar as the said award enjoys such effect under the relevant *lex loci arbitri*.
86. In principle, an arbitral award, like a final judgement, should serve as evidence of debt owed to the creditors by the Bankrupt during the verification process undertaken with the Bankruptcy Trustee. The Bankruptcy Trustee would nevertheless be entitled to dispute enforceability of such debt vis a vis the Bankruptcy Estate and the creditors based on grounds available under the Bankruptcy Law. The Bankruptcy Trustee may also initiate an action for nullity against the arbitral award rendered in Egypt based on any of the grounds listed under Article 53 of the Arbitration Law.

**26. Are any or all the rules regulating the effect of insolvency on arbitration considered part of public policy?**

87. All the rules regulating the effect of bankruptcy on arbitration are considered part of public policy.<sup>56</sup>

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<sup>54</sup> Arbitration Law, art 55.

<sup>55</sup> *ibid*, art 57.

<sup>56</sup> See Ali Gamal El Din Awad, *Bankruptcy in the New Commercial Code* (2nd edn, Dar El Nahda Publishing 2010) 13 para 7. See also Samiha El Kalyoubi, *Legal Principles regulating restructuring, preventive reconciliation, and bankruptcy* (2019 edn, Dar El Nahda Al Arabia Publishing 2019) 15 para 3.



**27. Is the principle of *par conditio creditorum* part of public policy? If so, is public policy linked to the equal treatment of creditors from a substantive point of view (ie, proportion of their credit that is satisfied in the insolvency process) or does it extend to the equal treatment of creditors from a procedural point of view (eg, prohibiting individual proceedings [eg, arbitration] outside the insolvency process)?**

88. The principle of equal treatment of the creditors of the same category is one of the fundamental principles that the Bankruptcy Law seeks to safeguard, guarantee, and enforce<sup>57</sup>. Such principle, as reflected under the Bankruptcy Law, extends to cover equal treatment of creditors from both the substantive and the procedural perspectives.

**28. Are there any other provisions or case law of Egypt concerning the effect of national insolvency on arbitration that have not been mentioned in the previous answers?**

89. None to the author's knowledge.

## **IMPACT OF FOREIGN INSOLVENCY ON ARBITRATION SEATED IN NATIONAL JURISDICTION**

**[These questions focus on the effects that foreign insolvency proceedings produce on arbitration seated in Egypt concerning the insolvent party.]**

**29. Do foreign insolvency proceedings need to be recognised under any formal procedure to produce effects in Egypt?**

90. The Bankruptcy Law has recognized in part the theory of universality of bankruptcy but only within the specific scope of bilateral treaties or multilateral conventions with other states party to the said treaties and/or conventions. Pursuant to Article 2 of the Bankruptcy Law, “[. . .] without prejudice to the international conventions in force in Egypt, a trader having a branch or agency in Egypt may be ruled bankrupt, even if he/she is not ruled bankrupt in a foreign state. In this case the court having jurisdiction to rule bankruptcy in Egypt is the court in whose circuit the branch or agency is located.”

91. Egypt has concluded various international conventions for the purpose of recognising foreign judgements. Among the said international conventions that provide for simplified procedures of recognition and enforcement are those providing for complete cooperation in the enforcement of all kinds of foreign judgements, including bankruptcy judgements<sup>58</sup> and others

<sup>57</sup> Samiha El Kalyoubi, *Legal Principles regulating restructuring, preventive reconciliation, and bankruptcy* (2019 edn, Dar El Nahda Al Arabia Publishing 2019) 14 para 2.

<sup>58</sup> Among the conventions that provide for simplified procedures for recognition and enforcement are: the Convention of the Arab League on the Enforcement of Judgements and Arbitral Awards 1953, the Egyptian Algerian Convention of 1964, the Egyptian Iraqi Convention of 1964, and the Egyptian Moroccan Convention of 1989.

aiming to realise cooperation in the enforcement of foreign judgements while explicitly excluding from their scope of application bankruptcy-related matters.<sup>59</sup>

92. The Egyptian Court of Cassation, in application of the Arab League Convention, has refused to review bankruptcy judgements rendered in Lebanon or any other contracting state to the Arab League Convention on the merits and has thus applied the theory of universality of bankruptcy within the scope of the Arab League Convention of 1953.<sup>60</sup>
93. The Bankruptcy Law does not specifically provide for a mechanism of recognition and enforcement of foreign bankruptcy judgements. Thus, in the absence of any international conventions governing the recognition and enforcement of foreign judgements, including bankruptcy judgements, the general rules regulating enforcement of foreign judgements in Egypt shall apply.
94. In principle, recognition and enforcement of foreign judgements in Egypt are subject to the following conditions:
  - a. the principle of reciprocity;
  - b. the foreign court rendering the judgement has jurisdiction according to its own law;
  - c. the dispute does not fall within the exclusive jurisdiction of the Egyptian courts;<sup>61</sup>
  - d. observing due process;
  - e. the foreign judgement is final and enjoys *res judicata* effect;
  - f. the judgement does not contradict with a prior judgement rendered by the Egyptian courts; and
  - g. the judgement does not contravene with the Egyptian public policy.
95. Finally, the Egyptian Court of Cassation<sup>62</sup> ruled that a trader who is declared bankrupt in a foreign country and has an activity in Egypt is not deemed bankrupt in the latter, and its assets shall not be liquidated, as long as he/she was not declared bankrupt in Egypt or the foreign judgement was not granted an *exequatur* in Egypt, or there was no treaty between Egypt and the foreign country for reciprocal recognition of bankruptcy judgements. However, a foreign

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<sup>59</sup> Among the conventions that explicitly exclude the application of judgements on bankruptcy are: the Egyptian-Tunisian Convention of 1976, the Egyptian-Romanian Convention of 1976, the Egyptian-Kuwaiti Convention of 1977, the Egyptian-Italian Convention of 1977, the Egyptian-French Convention of 1982, the Egyptian-Jordanian Convention of 1986, and the Egyptian-Bahraini Convention of 1989.

<sup>60</sup> Challenge No. 558 of JY 52, Hearing session of 9 March 1987. The Court of Cassation ruled, “whereas a judgement was passed by Shebeen El Kom First Instance Court issuing an *exequatur* for a bankruptcy judgement issued by the Beirut Court of First Instance according to the Convention of the Arab League, this foreign bankruptcy judgement has become final and enjoys a *res judicata* effect and no other court may reconsider it so far as it has satisfied its fundamental pillars and is not deemed null and void. The appellate court contravened this principle as it reconsidered the validity of the foreign judgement and held it unenforceable although it has an *exequatur*”.

<sup>61</sup> Those include disputes related to a right in rem over immovable property situated in Egypt, disputes related to provisional or interim measures to be taken in Egypt, disputes involving the State as a sovereign power, and disputes where the parties have agreed to the exclusive jurisdiction of the Egyptian courts.

<sup>62</sup> Cassation No. 1137 of JY 65 dated 11 March 2008.

trustee/administrator may make a claim in Egypt and may represent the bankruptcy estate in the claims related to it or brought against it in Egypt, even if the debtor is not declared bankrupt in Egypt.

**30. Has the jurisdiction adopted legislation implementing the UNCITRAL Model Law on Cross-Border Insolvency? If so, does that legislation adopt the Model Law in full, or does it amend any provision of the Model Law related to the effect of insolvency on arbitration?**

96. To date, Egypt has not adopted any legislation implementing the UNICITRAL Model Law on Cross Border Insolvency.

**31. Does the opening of insolvency proceedings outside of the territory of Egypt produce any effect on arbitrations seated in the jurisdiction? What is the source of the rule or legislation providing for such effects?**

97. Pursuant to the Arbitration Law, “arbitration agreements may only be concluded by a natural or juridical person having capacity to dispose of its rights.”<sup>63</sup> Furthermore, as previously stated, in application of Article 38 of the Arbitration Law, an arbitral tribunal would have to interrupt an arbitral proceeding in the event a party to the arbitration loses its capacity to litigate.

98. Pursuant to the Egyptian conflict of law rules, generally, the capacity of a foreign natural person to be a party to arbitration is assessed based on the law of his/her nationality, while the capacity of a juristic person is assessed based on the law where the actual principal place of business is situated. Consequently, an arbitral tribunal seated in Egypt having an insolvent party would have to apply the law governing the capacity of the Bankrupt in order to decide whether the said party has capacity to arbitrate.

99. Furthermore, pursuant to the Arbitration Law, arbitration is not permitted in matters that are not capable of a compromise, including matters of public order. Matters of public order are determined pursuant to the law provisions and jurisprudence.

100. Pursuant to the Arbitration Law,<sup>64</sup> an award rendered in Egypt or abroad that was made subject to the Arbitration Law may be set aside or annulled in certain cases including: (i) if the arbitration agreement did not exist, was not valid, or if a party to the arbitration agreement was under some incapacity at the time of concluding the arbitration agreement in accordance with the law governing such person’s capacity; (ii) if the award ruled on issues falling outside the scope of the arbitration agreement; or (iii) if the award contains issues violating public order.

101. In light of the foregoing, an arbitral tribunal seated in Egypt that has a foreign bankrupt party would have to, in application of the Arbitration Law, consider: (i) any limitations on the

<sup>63</sup> Arbitration Law, art 11/1.

<sup>64</sup> *ibid*, art 53.

debtor's capacity caused by the insolvency proceedings and which might suspend or terminate arbitral proceedings in the event the bankrupt party is deprived of the capacity to proceed with the arbitral proceedings, or the arbitration agreement is affected or is considered invalid pursuant the law applicable to it; and (ii) the question of arbitrability of the subject matter in dispute and possible recourse for nullity against the award rendered in Egypt or refusal of exequatur for violation of public policy.

**32. Are arbitrators seated in the jurisdiction required to take into account the rules on recognition of foreign insolvencies (if any) to evaluate the effects of such insolvencies in the arbitration, as described in the previous question?**

102. Arbitrators keen on issuing an arbitral award that is enforceable in Egypt should take into consideration public policy rules of relevance in Egypt. However, there is no mandatory rule requiring arbitrators to take into account the rules on recognition of foreign insolvencies (if any), unless such rules are part of the applicable law governing the merits or part of any treaty between Egypt and a state in which the foreign bankruptcy proceedings are taking place.

**33. Are the rules that regulate the effects on arbitration of foreign insolvency proceedings of mandatory application for arbitral tribunals seated in the jurisdiction?**

103. There is no express provision under Egyptian law regarding the nature of the rules that regulate the effects on arbitration of foreign insolvency proceedings. Thus, the principles set out above regarding the capacity of the Bankrupt remain applicable. However, with respect to objective arbitrability, this will be subject to the *lex loci arbitri* for the purpose of any setting aside action and subject to the *lex loci executionis* for the purpose of any enforcement actions.

**34. Will an award which does not respect the effects of insolvency provided by the relevant regime in the jurisdiction be set aside?**

104. As previously stated, awards issued in Egypt are final and not subject to an appeal. The only form of recourse is a nullity action. The Arbitration Law provides for an exhaustive list where an arbitral award subject to the said Law may be set aside.<sup>65</sup>

105. Nothing prevents a party invoking nullity of the arbitral award from challenging the award in Egypt for any of the reasons set forth under the Arbitration Law, including the invalidity of the arbitration agreement, or lack of jurisdiction of the arbitral tribunal due to non-arbitrability of the subject matter of the dispute. Exequatur may also be rejected based on public policy grounds (including inarbitrability).

<sup>65</sup> For more details, please refer to paragraph 100.

**35. Are there any other provisions or case law concerning the effect of foreign insolvency on arbitration seated that have not been mentioned in the previous answers?**

106. None to the author's knowledge.