SHEHATA & PARTNERS

English Translation Prepared by Shehata & Partners Law Firm

In the Name of the People
Court of Cassation
Commercial and Economic Circuit
Chaired by Judge Mr. Nabil Omran
The Vice-President of the Court
And Deputy Chairpersons of the Court
Judges/

Mahmoud El-Turkawi **Dr. Mustafa Salmane**
Yasser Baha El-Dein **Mohamed Aly Salama**

In the presence of the Chief of the Public Prosecution's Office at the Court of Cassation, Amr Abu Seif.
And Mr. Secretary-General/Khaled Wajih
In the public session held in the court headquarters in the High Court in Cairo on Tuesday, Rabie 10, 1442 AH, 27 October 2020.
The following judgment was handed down in the registered appeal of the court's docket case no. 18309 of JY89.

Brought by

Mr. Chairman of the Board of Directors and Managing Director of M.M Company in his capacity.
Notified at his chosen location, the office of Mr./ The Lawyer
El-Mohandesen, Dokki, Giza Governorate.
No one attended.

Against

Mr./ Legal Representative of the Real Estate Company S. M. M. in his capacity.
Notified at the headquarters of the Company in Giza Governorate.
No one attended.

Statement of Facts

On the 26th of August 2019, the judgment of the Cairo Court of Appeal issued on the 7th of July 2019 in case No. 57 of 195 JY was appealed by way of cassation. The appellant which requested the acceptance the appeal in form, in the matter and to annul the appealed judgment and the referral.

On the same day, the appellant submitted a memorandum along with the appeal documents.
On 10 September 2019, the appellee was notified with the appeal documents.

On the 23rd of September 2020, the appellee submitted a memorandum of defense together with the supporting documents, in which he requested that rejection of the appeal.

Then, the Public Prosecution submitted a memorandum requesting that the appeal to be accepted in form and the rejection of its merits.

In the session held on the 23rd of June 2020, the appeal was presented to the court in a deliberation room, which it deemed worthy of consideration and set it a session for the pleadings.

In the session held on the 13th of October 2020, the pleading before this circuit was made as indicated in the minutes of the session whereby the Public Prosecution office rested on its submission according to its memorandum, and the court postponed issuing the verdict to today's session.

The Verdict

After reviewing the papers and hearing the report read by judge Yasser Bahaa El-Din and the pleading and after deliberations.

Whereas the appeal meets the formal conditions.

Whereas the facts, as apparent from the appealed ruling and all the appeal documents, it is decided that the appellant instituted against the appellee Case No. 57 of 135 before the Cairo Court of Appeal requesting the nullity of the arbitral award issued on the 20th of February 2018 in the arbitration registered under No. 914 of 2013 at the Cairo Regional Center for International Commercial Arbitration ("**CRCICA**").

Accordingly, the appellant stated that the appellee resorted to arbitration pursuant to the condition contained under clause (16) of the subcontracting contract dated the 19th of April 2004 according to which the appellant assigned to the appellee and another company a project to establish a sewage treatment plant with a capacity of 2,000 cubic meters per day in the Katameya area within the Cairo Governorate, previously assigned to the appellant by the New Cairo City Authority in accordance with the conditions contained in that contract, and that the appellant failed to perform its obligations under that contract. Therefore, the appellee resorted to arbitration and the aforementioned judgment was issued in its favor and on the date 7 July 2019 whereby the Cairo Court of Appeal has rejected the nullity claim. The appellant appealed this ruling by way of cassation, and the Public Prosecution submitted a memorandum in which it expressed its opinion accepting the appeal in form and rejecting the matter and purpose of the appeal.

The appeal was presented to this court in the deliberation room and it was decided that it is worth considering. The court set a session for the appeal's consideration in which the Public Prosecution rested on its submission.

Whereas the appeal was based on three reasons, the first reason is the violation of the law and a mistake in its application since the appellant requested the nullity of the arbitration agreement because it was concluded by the vice-chairman of its board of directors even though the person who has the capacity to represent it is a member of the board of directors delegated pursuant to Article 2 of Law No. 203 of 1991 regarding public-sector companies, which flaws the ruling and requires its revocation.

In light of this argument, the first reasoning is invalid because while the text in Article 11 of the Arbitration Law No. 27 of 1994 states that "it is not permissible to agree on arbitration except for a natural or legal person who has the right to waive his rights." This court, pursuant to Article 8 of the same law, sees that if one of the parties to the dispute continues the arbitration procedures with knowledge of a violation of a condition in the arbitration agreement or a provision of this law, then it is permissible to agree to violate it since such a party did not submit an objection to this violation on the agreed time or on a reasonable time upon disagreement, this was taken as a waiver of his right to object. As this rule is biased towards protecting the arbitration procedures from the misuse of one of the parties to the dispute, which is usually the losing party, a right that may be waived with the aim of nullifying the arbitral award later on.

Therefore, given that the appellant did not provide evidence of his adherence before the arbitral tribunal to invalidate the arbitration agreement for being concluded by the vice-chairman of its board of directors instead of the managing director, knowing the existence of the violation that he alleges and him continuing in the arbitration procedures in spite of that, therefore, he has waived his right to raise this objection later, especially since the nullity related to this case is a relative nullity decided in the interest of the parties, which may be waived either explicitly or implicitly. If the appealed judgment has established its judiciary to refuse the appellant's request in this regard on a basis of not requesting this, with its ability to do so, before the arbitral tribunal competent to decide on the requests of the invalidity of the arbitration agreement then the judgment has applied the law correctly, and the request is clearly unfounded.

Moreover, assuming the appellant raised this objection within the time indicated in Article 8 of the arbitration law, his adherence would not have changed the fate of this request. That is because it is established that it is not for the mistaken party to cast the responsibility for his mistake, whether due to fraud or negligence, on anyone else, or to benefit from his mistake in confronting others, even if this third party was at fault. Likewise, after the other party dealt with him based on the validity of the action performed, the party who by its act causes a violation of the arbitration agreement, the arbitration law, or any other law, cannot abrogate what was done by it in application of the universal rule derived from the Roman law *non concedit venire contrafactum proprium*,[1] meaning to prevent contradiction to the detriment of others. This is known as the rule that precludes a person from asserting something that was previously done by that person, or *estoppel*.[2] Despite the absence of an explicit legislative text establishing this rule, the judge may apply it under Article 1 (2) of the Civil Code, which states that "If there is no legislative text that can be applied, then the judge's ruling is based on custom, and if it does not exist, then according to the principles of Islamic law, and if it does not exist, then according to the principles of natural law and the rules of justice."

The standard for applying this rule requires the fulfillment of two conditions:

1- If a party makes a statement or an act or omission that conflicts with the previous behavior of the same party;
2- If that conflict would harm the other party, who dealt with the first party, depending on the validity of his previous behavior.

[1] This is the exact wording of the Court in English Language.
[2] This is the exact wording of the Court in English Language.

Considering that a rule for preventing conflict to the detriment of others is a general rule, the scope of its application is not limited to the field of arbitration, it may extend to all other transactions.
Whereas, the appellant submits as a second reason for the appealed ruling, the violation of the law and the error in its application and states that it has requested the invalidity of the procedural structure of the arbitral proceedings since its representative before the arbitral tribunal was one of the consultant engineers and was not a lawyer pursuant to the peremptory rule related to public order as stipulated in Article 3 of the Lawyer Law No. 17 of 1983. Therefore, the arbitral tribunal had to reject his appointment as it is necessary to achieve justice, but the contested judgment refused this request on the basis that the arbitration rules of the Cairo Regional Center for International Commercial Arbitration ("CRCICA) allow the representation of parties without lawyers, which defects the judgment and requires its nullity.

Whereas, this reasoning is not valid, since the decision in the judiciary of this court is that the rules for the representation of the parties before the arbitration tribunals are not related to public order. This does not change what article 3(1) of the Bar Association Law No. 17 of 1983 regarding the consideration of "attending the concerned parties before the courts and arbitral tribunals..." among the legal acts that are limited to lawyers, since the existing arbitration system at the time of the issuance of the Bar Association Law in 1983, which the legislator was referring to at the time, it was mentioned in Chapter Three of Book Three (Articles 201-2015) of the Civil and Commercial Procedure Law No. 13 of 1968.

As for the current arbitration law issued in 1994, it is completely different from the previous law in its philosophy, foundations and concepts as it did not contain any restriction in it or in relation to it on the freedom of the parties to represent themselves before the arbitral tribunals or to delegate those who represent them before them even if they are not lawyers, or foreign lawyers who are not considered qualified lawyers in the view of the Egyptian Bar Association Law.

This indicates that the Arbitration Law of 1994 is a special law regarding everything related to arbitration, and this law does not stipulate that agents or representatives of the parties must appear before the arbitration tribunals, as well as the requirement that the request for arbitration and all papers related to arbitral procedures be signed by a lawyer, contrary to what is in force before the state judiciary. Articles 25, 26, and 33 (1) of the Arbitration Law also stipulate the right of the parties to agree upon the procedures to be followed by the arbitral tribunal, the necessity of creating an equal and complete opportunity for each of them to present his claim, and the right of each party to explain the subject matter of the lawsuit and present its arguments and evidence.

If the arbitration law does not stipulate the selection of arbitrators from a gender, nationality, or from a specific profession such as the lawyer (Article 16), then it is more appropriate not to stipulate this in the right of the representatives of the parties. Therefore, the arbitrators may choose to appoint non-lawyers to represent them in disputes with complex technical aspects, especially if the section of the dispute involves more technical than legal issues. The foregoing review confirms that after the 1958 New York Convention, as arbitration has gradually moved away from the idea of *localization*,[3] meaning that arbitration is closely linked to a specific geographical region.

In light of the globalization that has affected the field of law, it has become common to rely on foreign lawyers to represent the parties in arbitration cases whose legal headquarters are in Egypt, without this

[3] This is the exact wording of the Court in English Language.

necessitating the holding of any arbitration sessions within the Egyptian region, because the concept of the legal headquarters as an abstract idea of *seat of arbitration*[4] is not connected to the *venue*[5] where actual sessions are held, especially with the increasing demand for holding the arbitration sessions, by means of modern *virtual hearings*.[6] In addition to the foregoing, determining the reasons for invalidity of arbitral awards and being limited to Article 53 of the Arbitration Law, means that it is not permissible to appeal the nullity of the arbitration award for a reason other than the reasons mentioned in this article, which does not include the nullity for the representation by a party other than lawyers. The result of what was preceded and necessary is that Article 3 of the Bar Association Law of 1983 is not applicable within the framework of the current arbitration system, whether institutional or non-institutional, whether national or international.

The right of the parties to freely choose their representative or representatives stems from the arbitration law itself, and does not depend on their choice of arbitration rules that explicitly state the possibility of appointing non-lawyers as their representatives. If the parties agree upon procedural rules that allow this, then their agreement is only a confirmation of what was stated in the arbitration law, as it is in the present case where the two parties agreed to subject the arbitration procedures to the rules of the Cairo Regional Center for International Commercial Arbitration ("CRCICA"), which stipulates in Article 5 (1) thereof that each party may choose one or more persons to act on his behalf or to assist him, without requiring that the representatives of the arbitrators to be among the lawyers enrolled to the Egyptian Bar.

Whereas the appealed ruling has refused the reasoning of the appellant in this regard based on the same considerations and it was the appellant who chose one of the consulting engineers to act on her behalf and assist her and present her defense plan according to her ability as the most appropriate for her, and she did not claim that the arbitral tribunal denied her the opportunity to appoint a lawyer to present her defense, the request to annul the contested judgment on this reason is rejected.

Whereas, the appellant claims mistake in inference in the third reason for the appealed ruling , because it rejected the appellant's request to invalidate the deliberation of the arbitral tribunal for its judgment since it was on the personal knowledge of one of the arbitrators - the engineer ... - who alone possesses the engineering experience and technical know-how that enables him to understand the subject matter of the case, without real participation in the deliberation by the other two members with legal experience and without assigning an engineering expert to find out the engineering technical issues that prevail over the subject of the dispute, which invalidates the judgment and requires its nullification.

It is decided in the judgment of this court that the arbitrator is chosen by the parties initially because of his expertise regarding the subject matter of the dispute. It is natural for the arbitrators' knowledge to be reflected in the arbitral award issued by them. Thus, it is unreasonable to request the invalidation of the award based on the assumption that it was issued based on the personal expertise of one of the members of the arbitral tribunal, considering that such an arbitrator alone possesses the engineering experience and technical know-how whereas the presiding arbitrator and the third arbitrator are judges and lack the engineering experience. This reasoning contradicts the assumption that the formation of the arbitral tribunal was made through the agreement of the two parties and according to their free will to choose

[4] This is the exact wording of the Court in English Language.
[5] This is the exact wording of the Court in English Language.
[6] This is the exact wording of the Court in English Language.

qualified and appropriate arbitrators to settle the dispute. Moreover, it was proven from the official translation provided by the arbitral award that it has proven in its records the conclusion of the deliberation between the members of the arbitral tribunal and its issuance by consensus of the members of the tribunal. Originally, contesting the deliberation process and the documents presented in the judgment can only be done by pleading forgery, which the appellant did not do. Therefore, what it raises in this regard is not accepted. The decisions of the judiciary of this court - and what was previously stated - is that it is not permissible to appeal the nullity of the arbitration case for a reason other than what is stated in the text of Article 53 of the Arbitration Law since the nullity of the arbitral award does not entail appealing the award, and therefore, it does not allow for a review of the subject-matter of the arbitral dispute and the defect of such a judgment. The judge of the nullity lawsuit does not have the right to review the arbitration award to assess its suitability or to monitor the arbitrators 'good judgment, given that the annulment lawsuit differs from the appeal case.

Whereas the failure of the appellant to delegate an engineering expert to discuss the technical issues in the case falls outside the nullity cases stipulated exclusively in Article 53 of the Arbitration Law and the contested judgment committed itself to this consideration in the light of its rejection of what was raised by the appellant in this regard, then the appeal for what was stated in this judgment is rejected and is deemed baseless.

Based on the aforementioned, the appeal should be dismissed.

Holding

The Court rejected the appeal and required the appellant company to pay the fees and an amount of two hundred pounds in exchange for the lawyer's fees with the confiscation of bail.