EGYPT

Sally El Sawah
Dalia Hussein
a. Parties’ Right to a Physical Hearing in the Lex Arbitri

1. Does the lex arbitri of your jurisdiction expressly provide for a right to a physical hearing in arbitration? If so, what are its requirements (e.g., can witness testimony be given remotely, etc.)?

Short answer: No.

Arbitration in Egypt is governed by Law No. 27 of 1994 on Arbitration in Civil and Commercial Matters (henceforth the “27/1994 Arbitration Act” or the “Arbitration Act”).


The 27/1994 Arbitration Act governs both domestic and international arbitration. Provisions reserved to domestic arbitration mainly concern the competence of the court acting as a “supporting judge” (Juge d’appui), and of that empowered to enforce and set aside awards. Whereas the support of arbitration matters, exequatur and annulment of arbitral awards “lie[s] with the court having original jurisdiction over the dispute” in

The Authors appear in the alphabetical order of last names.

* Dr. Sally El Sawah is the Founder and Principal of El Sawah Law, Paris – France.
** Dr. Dalia Hussein is the Deputy Director of the Cairo Regional Centre for International Commercial Arbitration (“CRCICA”).


3 “Report of the Joint Committee of the Constitutional and Legislative Committee and the Bureau of the Economic Affairs Committee on the Bill on International Commercial Arbitration” in Ministry of Justice Book, fn. 1 above, p. 58 at pp. 60-62 and 64.
domestic arbitration, “in the case of international commercial arbitration, whether conducted in Egypt or abroad, jurisdiction lies with the Cairo Court of Appeal unless the parties agree on the competence of another appellate court in Egypt”. 4

The 27/1994 Arbitration Act does not expressly mention or require “physical” hearings, in the sense of presence in the same room. In addition, none of the provisions of the Arbitration Act governing the hearings expressly provide for a right to oral hearings, be it in the sense of physical hearings or remote hearings.

2. If not, can a right to a physical hearing in arbitration be inferred or excluded by way of interpretation of other procedural rules of your jurisdiction’s lex arbitri (e.g., a rule providing for the arbitration hearings to be “oral”; a rule allowing the tribunal to decide the case solely on the documents submitted by the parties)?

Short answer: It can be excluded.

Nothing in the 27/1994 Arbitration Act implies that physical hearings should be held, or expressly prohibits remote hearings, for example through electronic means.

Firstly, Article 25 of the 27/1994 Arbitration Act emphasizes the principle of party autonomy in determining the procedural rules governing the arbitration, and grants arbitral tribunals the broadest powers in the administration of the procedure. 5 It provides that:

“The parties to the arbitration may agree on the procedures to be followed by the arbitral tribunal, including the right to subject such procedures to the provisions in force in any arbitral organization or centre in Egypt or abroad. In the absence of such agreement, the Arbitral Panel may, without prejudice to the provisions of the present Law, adopt the arbitration procedures it deems suitable”.

Egyptian courts have established the concept of:

“‘[C]ore principles of arbitration’ that constitute the primary rules which shape the performance by the arbitrator of his/her mission and ascertain the fairness of the arbitral proceedings. These core arbitration principles must thus be respected by all protagonists in all cases, such as the principle of independence and impartiality of

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the arbitrator, the adversarial principle and the rights of defense in its different forms, and the principle of deliberation between arbitrators”.

It is difficult to consider that the right to a physical hearing would form part of the “core principles of arbitration”. The most prominent Egyptian scholars in arbitration and civil proceedings concur that “in arbitration proceedings, unlike before State courts, it is not necessary to conduct hearings”. Therefore, the default rule under the 27/1994 Arbitration Act is that holding oral hearings is not mandatory, unless both parties agree to the contrary. As such, the right to oral hearings does not exist per se, and that to physical hearings, even less.

Indeed, it results from Articles 33 and 36 of the Arbitration Act that, unless the parties agree otherwise, the arbitral tribunal has the discretionary power to rule on the matter based on written submissions, documents and other materials.

In particular, Article 33 of the Arbitration Act provides that “the Arbitral Tribunal shall hold pleading sessions” (Article 33(1)), that it shall “convene sufficiently in advance of the scheduled date” (Article 33(2)) and that “summary minutes of each meeting held shall be recorded in a procès-verbal, and copy thereof shall be delivered to each of the two parties” (emphasis added).

Article 36(4) of the Arbitration Act provides that the Tribunal may, either sua sponte or upon the request of either party, “convene a session to hear the expert’s testimony”. Therefore, it is not possible to infer from Articles 33 and 36 of the 27/1994 Arbitration Act that oral hearings should take place in person, and even less that parties, the tribunal and witnesses, including expert witnesses, should be present in the same room.

This is confirmed by the Joint Committee’s Report of the 27/1994 Arbitration Bill, which made it plain that the term “oral” has deliberately been deleted from Article 33(1) “as pleadings may be oral or written, and thus, pleadings has been used in general terms without specification” (emphasis added). Such deliberate omission undoubtedly reveals the Egyptian lawmaker’s intention not to limit the hearings to oral pleadings.

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8 “Report of the Joint Committee of the Constitutional and Legislative Committee and the Bureau of the Economic Affairs Committee on the Bill on International Commercial Arbitration”, fn. 3 above, p. 69. By contrast, Article 24 of the 1985 UNCITRAL Model Law expressly provides for “oral” hearings that may be replaced by a decision on the basis of documents and other written materials.
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Therefore, since it is possible under the Arbitration Act to substitute oral hearings by written pleadings,9 a fortiori, remote oral hearings conducted virtually through electronic means, could not have been excluded either.

Secondly, the 27/1994 Arbitration Act and Egyptian courts expressly adopt the distinction between the seat (understood as the “legal” seat) and the venue of arbitration (understood as the “physical” place) and allow arbitral tribunals to convene with the parties, the witnesses and/or experts, and to deliberate in a place other than the seat.10 Egyptian courts have also refused to set aside awards on the basis that the hearings were held in a venue other than the seat.11

The Cairo Court of Appeal has ruled that the fact that the hearings were held in a venue other than the seat of arbitration, notwithstanding the objection of one of the parties, is not a ground for the annulment of the award. The Court referred to Article 18 of the Rules of the Cairo Regional Centre for International Commercial Arbitration (henceforth “CRCICA”) entitling the arbitrators to hold the hearings in any appropriate venue, unless the parties agree otherwise, and emphasised that the criterion that should be taken into account is the parties’ agreement and “consent” rather than a mere “objection” by one of the parties.12

The Court of cassation went even further by stating that the conduct by the arbitral tribunal of the proceedings in a venue other than the seat of arbitration agreed by the parties or determined by the arbitrators does not result in the irregularity and voidness of the proceedings. Rather, each of the parties may seek compensation by the arbitrators for the damage it has suffered from this procedural decision, unless it is established that the choice by the arbitrators of a particular place has caused a fundamental breach of the principle of equal treatment or did not provide one of the parties of the full opportunity to defend its case.13

Accordingly, since the arbitral tribunal has the right to hold a hearing at a venue other than the seat of arbitration in accordance with Article 28 of the Arbitration Act and the constant jurisprudence of Egyptian courts, it is permissible to conclude that, by the same token, nothing prevents the arbitral tribunal from holding a hearing remotely.

Fourthly, Article 28(1) of the Arbitration Rules of the CRCICA in force as of March 1, 2011 provides that the arbitral tribunal shall give the date, time and place of the oral

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9 HAFEZ, “National Report Egypt” in Handbook, pp. 18, 19 (concerning the hearing of witnesses), 21 (concerning the hearing of experts) and 23.
12 Cairo Court of Appeal, Sect. 7, Appeals nos. 46 & 47/JY 132, 7 December 2015, fn. 11 above.
13 Court of cassation, Appeal no. 1394/JY86, 13 June 2017, fn. 11 above, p. 207.
hearings, if any.\textsuperscript{14} Additionally, Article 28(4) expressly grants the arbitral tribunal the power to direct witnesses, including expert witnesses, to be examined through video conference, without “their physical presence at the hearing”.

CRCICA has its headquarters in Cairo, Egypt, and forms the primary source of awards whose exequatur and annulment are sought before Egyptian courts. During the first wave of the Covid-19 pandemic, the CRCICA has implemented a number of urgent matters and dispatched a Note where it “strongly encouraged” “potential users, parties and arbitral tribunals in ongoing proceedings […] to […] b- Conduct meetings amongst the members of the tribunal and/or the Parties, procedural hearings or deliberations virtually”\textsuperscript{15}

In this Dispute Management Note, the CRCICA referred its users, parties and arbitrators to Article 17(3) of the Rules which grants the arbitral tribunal the power to conduct the proceedings on the basis of written documents and materials, and to the above-mentioned article 28(4) expressly providing for virtual examination of witnesses.

It would be highly implausible and impractical for the principal arbitral institution in Egypt to embrace an upfront dissonance with the Arbitration Act of the country where its headquarters are located.

Finally, the Egyptian Court of Cassation seems inclined to admit the validity of remote hearings. In an \textit{obiter dictum}, the Commercial and Economic Section of the Court of Cassation has explicitly used the English term “virtual hearings” and stated in a decision rendered on 27 October 2020, that: \textsuperscript{16}

“[…] Arbitration tends to further away from the idea of \textit{localization [sic]}, that is the close interconnection of the arbitration with a particular geographical territory after the 1958 New Convention. In the era of globalization which reached the legal profession, it has become common to instruct foreign lawyers to represent the parties in arbitration proceedings which have their legal seat in Egypt, without the requirement that the arbitral hearings take place within the Egyptian territory, due to the lack of interconnection between the concept of the legal \textit{seat of arbitration [sic]} with the effective \textit{venue [sic]} for the conduct of arbitral hearings, \textit{particularly with the increased trend towards holding arbitral hearings through modern telecommunication means – virtual hearings [sic]}” (emphasis added).

\textsuperscript{16} Court of cassation, Com. and Eco., Appeal no. 18309 /JY89, 27 October 2020, unreported (free translation by the Authors). The Judgment included the English terms in italics.
This incidental statement, which was not necessary for the decision of the case before the court, conveys clearly the message that virtual hearings will not per se constitute a ground to vacate the award. Accordingly, it is not possible to conclude by way of inference that the 27/1994 Arbitration Act guarantees a right to physical hearing, or that conducting remote hearings would per se constitute a breach thereof or, as it will be clarified in subparagraph d.9 below, give rise to a ground to challenge the award.

b. Parties’ Right to a Physical Hearing in Litigation and its Potential Application to Arbitration

3. In case the lex arbitri does not offer a conclusive answer to the question whether a right to a physical hearing in arbitration exists or can be excluded, does your jurisdiction, either expressly or by inference, provide for a right to a physical hearing in the general rules of civil procedure?

Short answer: The right to a physical hearing can be inferred from the general rules of civil procedure. However, there is a growing trend towards allowing remote hearings.

The Egyptian Code of Civil and Commercial Procedures (henceforth the “CCP”) was issued in 1968 by the Law No. 13/1968. It was amended several times, the latest being on 5 September 2020 by the Law No. 191/2020 increasing the amount of the claims determining the competence ratione materiae of certain courts.17 Remote hearings could not have been contemplated at the time when the CCP was issued. Accordingly, the CCP could not address remote hearings. It is, thus, normal not to find any provision of the CCP which expressly allows or prohibits this mode to conduct hearings either.

It is understood from scholarly writings and commentaries that followed immediately the issuance of the CCP that physical hearings are to take place before the court at the date and time specified in the notification. “Attending the hearing” before the court on the specified date is a “duty” of the parties, since such “attendance is the normal means to express the party’s statements and claims before the court”.18 In practice, Egyptian courts hold physical hearings throughout the different stages of the proceedings, and not only at the final stage. Written memorials and exhibits are submitted in person on each hearing date.

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18 Ramzy SEIF, Al-Wassit fi Sharh Qanun al-Murafa‘at al-Madaniyya wa al Tijariyya, 8th edn. (Cairo 1969) p. 525, 538 and 558 (free translation by the Authors).
Analysis of the relevant provisions shows that the CCP provides for a right to a physical public hearing, unless the court decides that the hearing should be held in camera.

Article 72 of the CCP provides that: “On the day fixed to hear the case, the parties shall attend in person or through their representatives. […]”. This Article may be interpreted as requiring the physical presence of the parties to the case, either in person or through their representatives. However, since this Article and its following provisions are included in the chapter that regulates the parties’ legal representation and the powers of their representatives, it is not entirely certain from its place in the CCP that it aims in and of itself to establish a right to a physical hearing.

The following provisions, however, may be construed as requiring the conduct of a physical hearing.

Part V of the CCP titled “Procedures and Organization of the Hearings” deals with oral hearings before courts. Part V is divided into two chapters, the first relating to procedures before the court during the hearing, and the second to the authority of judges to organize and maintain order during the oral hearing. Chapter II of Part V includes provisions which, in sum, imply that the CCP requires hearings to be physical.

On the one hand, Article 101 of the CCP provides that oral pleadings should be made in public, unless the court, ex officio or upon the request of one of the parties, decides to hold the hearing in camera (i.e., confidentially) to protect public order or to preserve morals or family issues.

On the other hand, Article 102 of the CCP provides that the court shall hear the parties’ arguments during the oral pleadings and shall not interrupt them unless they go beyond the scope of the dispute or exceed what is necessary for their defense. The respondent shall be the last to “speak”.

In explaining these provisions, scholars made it plain that holding oral public hearings that may be attended by any person without restriction is a basic principle of the Egyptian judicial system. A violation of the rule of publicity of the hearings, except where the law allows the hearings to be confidential, may result in the nullity of the judgment.

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19 R. SEIF, Al-Wassit, fn. 18 above, pp. 531-532.
20 Mohamed K. ABDEL AZIZ, Taqnin al-Murafa‘at fi Daw’al-Fiqh w-al-Qada’ (Cairo 1995) p. 515. This provision is included in Part III of the CCP titled “Attendance and Default of the Parties”, in Chapter I titled “Attendance and Representation.” The following chapter in the same Part III deals with default procedures in case one of the parties does not participate in a hearing.
21 R. SEIF, Al-Wassit, fn. 18 above, p. 558.
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The Egyptian Court of cassation has consistently held that a court shall enable the parties to present their case both orally and in writing. A court rejection of a party’s request to be heard entails the nullity of its judgement.23

Finally, Article 104 of the CCP is the clearest to show that the CCP implicitly requires hearings to be physical. It provides that the president of the court is responsible for the organization, order and integrity of the hearing, such that he may “order to remove from the courtroom any person disrupting the order and integrity of the hearing” and order to immediately keep this person in detention for 24 hours or impose a fine as a sanction.24

Although these provisions imply the right to a physical hearing, the latest court practice in Egypt is different. On 18 October 2020, the New Cairo Court initiated the first remote hearing in criminal matters, in cooperation with the Ministry of Justice and the Ministry of Communication.25 The hearings were conducted partially remotely by connecting the New Cairo Court to three prisons, to reach a decision on pre-trial detentions. It should be noted that the provisions of Article 243 of the Egyptian Code of Criminal Proceedings (as amended by Law No. 29/1982) are identical to Article 104 CCP, which entails that hearings should be physical in criminal proceedings too. The conduct of these remote hearings was criticized by human rights lawyers, namely on the

24 The Explanatory Note introducing the Law No. 23/1992 amending Article 104 CCP stated that this Article was amended to unify the rules of organization and keeping order in court hearings before civil and criminal courts. See excerpts of the Explanatory Note in M.K. ABDEL AZIZ, Taqnin al-Murafa‘at, fn. 20 above, p. 634.
25 See newspapers reports and videos of remote hearings at: <https://www.youm7.com/story/2020/10/18/%D8%A7%D9%84%D8%B9%D8%AF%D9%84-%D8%AA%D8%B7%D9%84%D9%82-%D9%86%D8%B8%D8%A7%D9%85-%D8%AA%D8%AC%D8%AF%D9%8A%D8%AF-%D8%A7%D9%84%D8%AD%D8%A8%D8%B3-%D8%A7%D9%84%D8%A5%D9%84%D9%83%D8%AA%D8%B1%D9%88%D9%86%D9%89-%D8%A8%D9%8A%D9%86-%D9%85%D8%AD%D9%83%D9%85%D8%A9-%D8%A7%D9%84%D9%82%D8%A7%D9%87%D8%B1%D8%A9-%D8%A7%D9%84%D8%AC%D8%AF%D9%8A%D8%AF>D8%A9/5026421> and <https://akhbarelyom.com/news/newdetails/3164766/1/%D9%81%D9%8A%D8%AF%D9%8A%D9%88-%D8%A8%D9%84%D8%AE%D8%A8%D8%A7%D8%B1-%D8%A7%D9%84%D9%8A%D9%88%D9%85-%D8%AF%D8%A7%D9%84%D8%AE%D9%84-%D8%AC%D9%84%D8%B3%D8%A7%D8%AA-%D8%A7%D9%84%D8%AA%D9%82> (last accessed 28 November 2020).
ground that it is impossible to avoid physical hearings without amending the relevant legal provisions.\textsuperscript{26}

It is plausible to infer from the recent practice of state courts in criminal matters that, \textit{a fortiori}, remote hearings may be allowed under the CCP.

Furthermore, on 7 August 2019, Law No. 146/2019 was issued to amend and add new provisions to the Law No. 120/2008 establishing Economic Courts.\textsuperscript{27} The amended law provides for the possibility of remote case filing and case management. According to the new provisions (Article 13 to Article 21), parties may opt to file cases before the Economic Courts remotely, using an online platform. The payment of the fees, the notification of the parties, the filing of documents, written submissions and pleadings may also be made remotely, using the same online platform. The Ministry of Justice has recently launched an online platform for e-litigation before the Economic Courts.\textsuperscript{28}

Law No.146/2019 did not, however, include specific articles on remote hearings. Article 20 of the amended law refers to Article 82 of the CCP on the consequences of a party’s failure to attend a hearing. According to an article published on the website of the Egyptian Court of cassation, this provision allows remote hearings. The article expects that this new type of remote litigation will be applied to all Egyptian courts if it proves to be successful before the Economic Courts.\textsuperscript{29}

Law No. 146/2019 on remote litigation before Economic Courts is one of many Egyptian legal reforms to keep pace with the global trend to communicate electronically in commercial, civil and administrative dealings.

For instance, Law No. 15/2004 Organizing Electronic Signature and Creating the IT Industrial Development Agency (the “ITIDA”) and its executive regulation allow electronic documents as valid and admissible evidence so long as it is possible to trace the date and time of creation of the document through independent IT systems that are beyond the control of the author of the document.

Based on Law No. 15/2004 and international conventions, the Commercial and Economic Section of the Court of cassation has recently ruled that written documents are not confined to a particular type of “support” (\textit{sic}), such that a written document should not necessarily be transcribed on paper only: “‘Electronic communication’ [sic] means information generated, sent, received or stored by electronic, optical, digital or


\textsuperscript{27} This law established new specialized courts in the Egyptian legal system to hear cases involving the majority of economic, financial and commercial activities. The law includes a list of matters falling under the jurisdiction of the new courts. The establishment of these Economic courts, which includes first instance circuits and appeal circuits, aims at providing specialized courts to hear commercial and financial disputes in an expeditious manner.

\textsuperscript{28} See the platform at <https://elec.eecourts.gov.eg/auth/home?fbcid=IwAR2lYj65LDBM5HBSp4iTDVwY1guq6_-cgMZU-AibnYMuUmR4SlLpGxX8> (last accessed 25 November 2020).

\textsuperscript{29} Available at <https://www.cc.gov.eg/?p=223> (last accessed 20 November 2020).
other similar means, with the result that the information communicated is accessible so as to be usable for subsequent reference”\(^3\). Based on this definition, the Court affirmed that electronic communication is admissible as evidence since it can be stored by the sender and recipient parties (as many as they may be) on their electronic devices, in addition to the storage on the Servers of the internet service provider.

Although the disputed issue before the Court of cassation concerned electronic emails and not electronic oral communication, it is possible to affirm that so long as oral pleadings meet the definition and conditions of electronic communication set out by the Court, such oral evidence generated electronically could, *mutatis mutandis*, likely be considered by Egyptian courts as admissible and legitimate. Therefore, in the event that remote hearings are held in an arbitration proceeding, they should, first of all, meet these requirements to safeguard the formal regularity of the hearing. This does not, however, entail that by merely fulfilling these conditions, the hearings respected the other requirements such as the rights of defense and due process.

4. *If yes, does such right extend to arbitration? To what extent (e.g., does it also bar witness testimony from being given remotely)?*

**Short answer:** No.

Egyptian courts have constantly held that arbitral tribunals are not bound by the procedural rules set-out by the CCP, unless the parties agree otherwise. Egyptian courts have also emphasized that, even in cases where the seat of arbitration is in Egypt, the parties’ agreement as to the applicable procedures, including their agreement to apply institutional arbitration rules, supersedes the provisions of the Arbitration Act that are not mandatory.\(^3\)


\(^3\) Court of cassation, Appeals Nos. 648/JY73 and 5745, 7476 and 6787/JY75, 13 December 2005, at <https://www.cc.gov.eg/i/H/111146940.pdf> (last accessed 27 November 2020); Court of cassation, Civ., Appeal no. 11248/JY65, 27 November 2006, cited in HAFEZ, “National Report Egypt” in *Handbook*, fn. 155; Court of cassation, Appeal no. 6546/JY79, 25 May 2010, at <https://www.cc.gov.eg/i/H/111131105.pdf> (last accessed 27 November 2020), where the appeal was based on the ground that the arbitral tribunal did not determine the seat of arbitration, which the Court of cassation dismissed concluding that it resulted from the minutes of the hearings – which took place at the office of the presiding arbitrator – and from the stamp affixed on the award that the seat was in Egypt, the place where the award
The Court of cassation has solemnly stressed that:

“The Arbitration Act no. 27 of the year 1994 on arbitration in civil and commercial matters has been issued including the procedural rules governing arbitration from the beginning until the full enforcement of arbitral awards. The Explanatory Note of this law has made it plain that the civil and commercial procedural rules do not achieve the purpose of arbitration which requires expeditious settlement of disputes and that its specific nature entails the facilitation of the procedures”. 32

The Cairo Court of Appeal followed the Court of cassation and confirmed that the 27/1994 Arbitration Act constitutes “the law on arbitration proceedings”, the procedural law which governs arbitration from the initial phase of consent to arbitration until the end of the process, as well as the enforcement of the award. According to the Court of Appeal, the CCP primarily concerns the proceedings before state courts. Therefore, the CCP provisions should only apply for interpretation purposes, in case of ambiguity or lacunae in the Arbitration Act (i.e., the lex specialis). The Court emphasized that given the specific nature of arbitration as compared to court proceedings, it is a primary condition that the CCP provisions referred to for interpretation purposes should concern general rules which are not specifically tailored for litigations before national courts. Accordingly, where the parties have agreed to the rules of an arbitral institution, such as the ICC or CRCICA, these rules shall apply to the procedure to the exclusion of the 27/1994 Arbitration Act, and the CCP, a fortiori. 33

c. Mandatory v. Default Rule and Inherent Powers of the Arbitral Tribunal

was rendered (yet, it would be wrong to deduce from this judgment that the court requires physical hearings to take place, since this was not a disputed issue that had been raised before the Court); Cairo Court of Appeal, Sect. 7, Appeal no. 4/JY134, 28-30 J. Arab Arb. (2017-2018) p. 220. As explained by Karim Hafez, the following provisions of the Arbitration Act are deemed mandatory: Article 10(2) (form of the arbitration agreement), Article 11 (arbitrability), Article 15(2) (odd numbers of arbitrators), Article 26 (equality between the parties and rights of defense), Article 37, Article 52(1) (recourse) and Article 58 (enforcement). See HAFEZ, “National Report Egypt” in Handbook, p. 1.


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5. *To the extent that a right to a physical hearing in arbitration does exist in your jurisdiction, could the parties waive such right (including by adopting institutional rules that allow remote hearings) and can they do so in advance of the dispute?*

Short answer: N/A

As explained above, the 27/1994 Arbitration Act does not grant a right to a physical hearing. The principle of party autonomy is the cornerstone of arbitration in Egypt. The parties can agree in advance not to hold physical hearings and to replace them by remote hearings, or to waive the hearing phase altogether.

They can also adopt institutional rules that allow arbitral tribunals to hold remote hearings or substitute them by an additional round of written pleadings, or even not to hold hearings at all and decide on the basis of the existing written documents and materials.

6. *To the extent that a right to a physical hearing in arbitration is not mandatory or does not exist in your jurisdiction, could the arbitral tribunal decide to hold a remote hearing even if the parties had agreed to a physical hearing? What would be the legal consequences of such an order?*

Short answer: No.

As mentioned in sub-paragraph a.2 above, Article 25 of the Arbitration Act provides that the parties have the right to agree on the procedures to be followed by the arbitral tribunal. The arbitral tribunal is thus bound by the parties’ agreement as to the organization of the procedure. It cannot hold remote hearings if the parties have expressly agreed to physical hearings.

Although not addressing specifically physical hearings, Egyptian scholars agree that an arbitral tribunal should comply with the parties’ agreement, expressed in the arbitration agreement or at a later stage during the proceedings, to hold oral hearings. An arbitral tribunal cannot, therefore, decide only on the basis of written submissions if the parties have expressly agreed to hold an oral hearing. 34

An order not to hold hearings in violation of the parties’ agreement, if objected to timely by any of the parties, may be a ground for a request to set aside the award. Article 53(1)(g) of the Arbitration Act provides that actions to set aside the award may be sought “if nullity occurs in the arbitral award, or if the arbitral proceedings are tainted by nullity affecting the award”. The Cairo Court of Appeal also held that a failure to comply with

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34 F. WALI, *Al-Taḥkim*, fn. 7 above, p. 429; M.S. EL SHARQAWI, *Al-Taḥkim*, fn. 7 above, p. 268.
the arbitral procedures agreed upon between the parties entails the nullity of the arbitral award.\textsuperscript{35}

Finally, the award may also be challenged for failure to conduct a physical hearing on the additional ground of violation of due process and rights of defense, in accordance with Article 53(1)(c) of the Egyptian Arbitration Act. The parties could claim that the conduct of virtual hearings against their will constituted in of itself a violation of due process as they were prevented from the full opportunity of presenting their case in the manner that they deemed the most appropriate to safeguard their rights of defense.

d. Setting Aside Proceedings

7. \textit{If a party fails to raise a breach of the abovementioned right to a physical hearing during the arbitral proceeding, does that failure prevent that party from using it as a ground for challenging the award in your jurisdiction?}

\textbf{Short answer: Yes.}

As clarified above, the right to a physical hearing does not exist under the Arbitration Act. However, if such a right existed in a particular matter, based on the parties’ agreement for instance, a breach thereof would have to be raised timely in order to be invoked as a ground for setting aside the award.

According to Article 8 of the 27/1994 of the Arbitration Act, if either party proceeds with the arbitration proceedings in spite of its knowledge that a violation of a certain procedural requirement has occurred, and does not raise an objection within the timeframe agreed upon between the parties or, absent such agreement, within a reasonable period of time, such party is deemed to have waived its right to object on this ground.\textsuperscript{36}

Egyptian courts have endorsed this rule. It is constant jurisprudence of the Court of cassation that the failure by a party to object – at the first available occasion – to a breach of a procedural rule amounts to a waiver to object to that breach. Accordingly, that breach cannot constitute a ground to vacate the award.\textsuperscript{37}

\textsuperscript{35} Cairo Court of Appeal, Sect. 8 Com., Appeal no. 47/JY 113, 22 April 1998, cited in F. WALI, \textit{Al-Taḥkim}, fn. 7 above, p. 758. The case related to the violation of the parties’ agreement to notify the respondent of the dispute by registered mail.


As from 2013, Egyptian courts have started to refer expressly to this rule as the “estoppel” principle. According to the Cairo Court of Appeal:

“In arbitration and according to the overarching principle of good faith in commercial trading, the estoppel rule has been established and consecrated, it is known in the Arabic legal jargon as the rule of prohibition of contradicting oneself to the detriment of third-persons. By virtue of this rule, it is possible to preclude someone from relying on its own contradicting behaviour, statements or legal actions in order to receive benefits to the detriment of another person. This rule – regardless of its different appellations in the different legal systems in force – has been applied expressly and directly. It has even become fundamental as it forms part of the fundamental legal principles which cannot be disregarded or denied without destroying the values of justice to which every group is aspiring and cannot give-away. Among the applications of the estoppel principle, from its procedural perspective, is that an appellant may not rely in its request for the annulment of the award on the contrary of what it has submitted or accepted during the arbitral proceedings. As such, a party may not rely or put forward before the annulment court – for the sake of annulment – breaches of the arbitration agreement or the arbitral proceedings which are subsequent to its own actions”. 38

The estoppel principle has become a core fundamental principle of arbitration constantly relied-upon by Egyptian courts39 in their decisions related to exequatur and annulment of arbitral awards, as well as by arbitral tribunals having their seat in Egypt.40

Accordingly, a party’s failure to timely object in the course of the arbitral proceedings to the conduct of the hearings remotely, precludes it from challenging the award on this ground.

38 Ahmed Bahgat and others vs. Egyptian National Bank and others, Cairo Court of Appeal, Appeals nos. 35, 41, 44 and 45, JY 129, 5 February 2013 (free translation by the Authors). The Court of cassation has confirmed the Court of Appeal’s findings. See Court of cassation, Appeal no. 5313/83JY, 28 December 2017, unreported. On a confirmation that estoppel has become a general principle of law, a rule of thumb under Egyptian law, see Mohamed S. ABDEL WAHAB, “Extension of Arbitration Agreements to Third Parties 2.0: Deconstruction, Evolution and Reconsideration” in Franco FERRARI and Stefan KRÖLL, eds., Conflict of Laws in International Arbitration (Juris 2019) p. 17 at p. 53.


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8. To the extent that your jurisdiction recognizes a right to a physical hearing, does a breach thereof constitute per se a ground for setting aside (e.g., does it constitute per se a violation of public policy or of the due process principle) or must the party prove that such breach has translated into a material violation of the public policy/due process principle, or has otherwise caused actual prejudice?

Short answer: N/A

9. In case a right to a physical hearing in arbitration is not provided for in your jurisdiction, could the failure to conduct a physical hearing by the arbitral tribunal nevertheless constitute a basis for setting aside the award?

Short answer: Conducting remote hearings would not lead to setting aside the award if the arbitral tribunal respected the principle of due process and the equality between the parties. However, if the parties have expressly agreed to hold physical hearings, a breach by the arbitral tribunal of the parties’ agreement would constitute a basis for setting aside the award.

The failure to conduct a physical hearing by the tribunal may only constitute a basis for setting aside the award if it falls within any of the grounds provided for in Article 53 of the Arbitration Act. Article 53 of the Arbitration Act provides a list of grounds for setting aside arbitral awards rendered in Egypt or in accordance with its provisions. This list is exhaustive:

“[Egyptian courts] consider the grounds of setting aside mentioned under Article 53 of the Egyptian Arbitration Law as limited exceptions to the general rule that arbitration awards are final and binding from the date of their issuance. Judicial construction of the nature and limits of Article 53 of Egyptian Arbitration Law finds direct support in the wording of the text of the said Article which in its heading states: ‘An arbitral award may be set aside only […]’. The word only in the context of Article 53 of the EAL was used by the courts to limit the accessibility to the award setting aside procedure on the basis that it denotes the exceptional nature of the grounds upon which the procedure is made available. Thus, no setting aside of awards is to be allowed based on any grounds other than those expressly provided in the Article 53 of the EAL”.

41 Accordingly, a failure by the arbitral tribunal to conduct a physical hearing is not, in and of itself, a ground for setting aside the award, unless this failure also constitutes (i) a breach of the parties’ agreement under Article 53(1)(f) and/or (g); or (ii) a breach of

the equality between the parties or due process under Article 53(1)(c) of the Arbitration Act; 42 or (iii) a procedural irregularity (“nullity in the procedures”) under Article 53(1)(g) of the Arbitration Act; or (iv) a violation of public policy under Article 53(2) of the Arbitration Act.

Therefore, the failure to conduct a physical hearing by the tribunal may be a basis for setting aside the award if the parties have expressly agreed to hold physical hearings, either directly, or by reference to the rules applicable to the arbitral procedures. In the absence of such agreement, it is unlikely that conducting a remote hearing constitutes a ground to set aside the award, unless it translates into a breach of due process or of the equality between the parties.

For instance, the Egyptian Court of cassation has held that the use by the arbitral tribunal of electronic means of communication that respect confidentiality and security and are not contrary to the parties’ specific agreement on the use of other means, does not constitute a ground to set aside an arbitral award. In that case, a party sought the setting aside of the award, contending that the arbitral procedure was tainted with a nullity that affected the award according to Article 53(1)(g) of the Arbitration Act. It argued that the arbitral tribunal did not give it a full opportunity to present its case because it held the first procedural hearing by conference call and allowed the exchange of documents and written submissions electronically by emails. The Court of Appeal dismissed the claim, and the Court of cassation endorsed its reasoning, stating that:

“The arbitral tribunal has a broad discretion and freedom in arbitration proceedings, unlike court proceedings, to conduct and organise the arbitral procedure. The tribunal may thus correctly rely on electronic means of communication and new technologies like emails to exchange correspondence and notifications, and to deposit and examine documents, while ensuring security, confidentiality and privacy, unless the parties obliged it, by their agreement, to follow specific mechanisms or deadlines, or to follow specific procedural rules, and as long as the tribunal ensures the respect of due process and the rights of defence”. 43

42 The principle of equal treatment of the parties and the obligation to provide them with a full and equal opportunity to present their cases is safeguarded by Article 26 of the 27/1994 Arbitration Act. This is a mandatory provision that cannot be overridden by the parties or the arbitral tribunal. Thus, a breach of equal treatment can constitute a ground for the annulment of the award under Article 53 of the 27/1994 Arbitration Act. See Court of cassation, Appeal no. 1394/JY86, 13 June 2017, fn. 13 above; HAFEZ, “National Report Egypt” in Handbook, pp. 17-18; F. WALI, Al-Tahkim, fn. 7 above, p. 401.
43 Free translation by the Authors.
The Court of cassation concluded that arbitral tribunals may use new technologies to conduct the proceedings, within the limits of the parties’ agreement, principles of due process and other mandatory rules provided for in the lex arbitri.44

It is noteworthy that not every procedural irregularity constitutes a ground for the annulment of an award. Egyptian courts – which do not review the merits or the appreciation of the facts and law by the arbitral tribunals45 – have constantly required that the procedural irregularity should have been decisive in rendering the award by the arbitral tribunal or have been material to its outcome.46

Egyptian courts set a high threshold: the appellant must prove that the impugned conduct (supposedly here, the remote hearings) constituted an ostensible violation of the fundamental principles of arbitration such that it manifestly offended the sense of justice and fairness.47

46 Cairo Court of Appeal, Sect. 7, Appeals nos. 46 & 47/JY 132, 7 December 2015, fn. 11 above, p. 229 and p. 234; Court of cassation, Appeal no. 1394/JY86, 13 June 2017, fn. 11 above, p. 205. The Court of cassation referred to Article 20 of the CCP which provides that “unless the provision expressly provides for the voidness as a sanction to the procedural irregularity, voidness does not apply when the purpose of the procedural requirement has been achieved notwithstanding the irregularity”. The Court has applied this procedural rule in arbitration with the following tweak: even where voidness has been expressly stipulated, this sanction shall not be pronounced when the purpose of the procedural requirement has been achieved, regardless of whether the procedural requirement has been set-out to protect private interests, or public policy in order to safeguard public interest. See also Court of cassation, Challenge No.9968/JY 81, 9 January 2018, 30-31 J. Arab Arb. (2018-2019) p. 123.
47 Cairo Court of Appeal, Sect. 7, Appeal no. 43 /JY128, 2 November 2011, fn. 6 above.
A party could claim, for instance, that the bad connectivity in the country where it was located prevented it from amply presenting its case or cross-examining witnesses, thus violating due process and the principle of equal treatment between the parties; or that it was revealed that the hearing has been subject to cyberattacks, or problems of cybersecurity have occurred at the hearing; or that it was revealed that a witness of fact has been “assisted” during his cross-examination by the party for whom he/she was giving evidence; or witnesses of fact presented by the opponent did not respect the sequestration rules which preclude witnesses from communicating until they have all given their oral testimony. In our opinion, the ostensible violation of the fundamental principles of arbitration could also be raised in case of hybrid hearings, where hearings have simultaneously been conducted in person for some of the parties, and remotely for others; or for all the parties with one or two members of the tribunal in person, and the rest of the arbitral panel remotely.\textsuperscript{48} The last scenario could raise concerns about the principle of collegiality as well, which is considered as forming part of public policy.

Regarding public policy, Egyptian Courts do not adopt a broad interpretation of procedural public policy. They have defined procedural public policy as the “fundamental rules of the society, its values and vital interests”,\textsuperscript{49} that the parties cannot agree to override. According to the Court of cassation, “public policy contains the rules seeking to achieve the general interests of the country from a political, social or economic perspective” for the organization of the society. They override individual interests and cannot be superseded by contractual arrangements. The concept of public policy is relative as it evolves with the evolution of the society:

“Article 53(2) of the 27/1994 Arbitration Act has granted the court of annulment the power to vacate the arbitral award on the ground of violation of Egyptian public policy. This may occur in case of violation of a rule governing the arbitral process or by making a decision that is contrary to [substantial] public policy, but not by a mere violation of a mandatory rule under Egyptian law.”\textsuperscript{50}

\textsuperscript{48} In our opinion, this is different from the scenario where the tribunal hears one or more witnesses of fact or expert witnesses remotely, which is possible under Article 28(4) of the CRCICA Rules. Article 28 of the Arbitration Act also allows tribunals to hear witnesses in a place other than the seat of arbitration, which should not in of itself constitute a ground to vacate the award.

\textsuperscript{49} Cairo Court of Appeal, Sect. 7, Appeals nos. 46 & 47/JY 132, 7 December 2015, fn. 11 above, p. 237. The Court adopted a similar definition of substantive public policy, emphasizing that the breach of a mandatory provision (here, on the legal interest rate) does not necessarily result in a breach of public policy taken as “fundamental rules that relate to a general and vital interest of the Egyptian society”, p. 243.

The above-mentioned examples of bad connectivity impairing a party’s effective ability to present its case in violation of due process and the equality between the parties; cyberattacks and cybersecurity; the breach of the principles of collegiality or confidentiality; the assistance of a witness or the coordination between witnesses could, in our opinion, also constitute serious grounds of violation of Egyptian public policy according to Article 53(2) of the Arbitration Act.

Furthermore, the Cairo Court of Appeal solemnly declared that protecting the rights of defense does not prevent arbitral tribunals from using their power to administer the proceedings to ensure time and cost efficiency of the arbitration process and prevent delaying or thwarting the proceedings.\(^{51}\)

In other words, striking a balance and reconciling efficiency and due process whenever they conflict is among the main duties of arbitrators which are recognised by Egyptian courts,\(^{52}\) which depends on the particular circumstances of each case.

Additionally, Egyptian courts may operate only a partial annulment of the award, “rescuing” the part of the award which does not include the violation whenever it is separable from the defective part.\(^{53}\)

To sum-up, conducting remote hearings will constitute a ground for the annulment of the award if it overrides the parties’ express agreement for a physical hearing, or absent such agreement, if it leads to a procedural irregularity that translates into a violation of the right to a fair trial, equal treatment between the parties, due process and the rights of defense.

e. Recognition/Enforcement

10. Would a breach of a right to a physical hearing (irrespective of whether the breach is assessed pursuant to the law of your jurisdiction or otherwise) constitute in your jurisdiction a ground for refusing recognition and enforcement of a foreign award under Articles V(1)(b) (right of the party to present its case), V(1)(d) (irregularity in the procedure) and/or V(2)(b)

\(^{51}\) Cairo Court of Appeal, Sect. 7, Appeals nos. 46 & 47/JY 132, 7 December 2015, fn. 11 above, p. 237.


\(^{53}\) F. WALI, Al-Taḥkim, fn. 7 above, p. 803; Article 53(1)(f) \textit{in fine} of the 27/1994 Arbitration Act. The Court of cassation made it plain that, depending on the circumstances of each case, partial annulment is applicable to all the grounds under Article 53, and not only to Article 53(1)(f). See Court of cassation, Appeal no. 9882/JY 80, 8 October 2013, 22 J. Arab Arb. (2014) p. 102. See also Court of cassation, Appeal no. 180/JY71, 25 January 2007, 11 J. Arab Arb. (2008) p. 221; Court of cassation, Appeal no. 12790/JY69, 22 March 2011, Rev. arb. (2013) p. 190 at p. 218 ff. (limiting the annulment on the ground of violation of public policy under Article 53(2) of the Arbitration Act only to the part of the award which applied usury rates of interest).
DOES A RIGHT TO A PHYSICAL HEARING EXIST IN INTERNATIONAL ARBITRATION?

(violation of public policy of the country where enforcement is sought) of the New York Convention?

Short answer: Under certain circumstances, likely yes.

To the best of our knowledge, there is no case law on this matter yet. However, it results from the Egyptian case law on the recognition and enforcement of foreign awards, that the existence of a right to a physical hearing under the lex arbitri, or under the arbitration rules agreed upon between the parties or determined by the tribunal, may constitute a ground to refuse recognition or enforcement of a foreign award.

The recognition and enforcement of foreign awards is not regulated by the EAL. According to its Article 1, the EAL only applies to awards rendered in Egypt or when the parties had agreed to apply it to their proceedings. As for the grounds to deny enforcement under the EAL, only three grounds for refusal are provided for in Article 58: (i) the award is contrary to a decision issued previously by Egyptian courts; (ii) the award is contrary to Egyptian public policy; and (iii) the award was not properly notified to the party.

In turn, the recognition and enforcement of foreign awards is regulated by the CCP. According to the Court of cassation’s application of Article 301 of the CCP, foreign awards are enforced in accordance with the New York Convention, which supersedes the provisions of the CCP.\(^54\) However, still according to the Court of cassation, the procedures to be followed before Egyptian courts to request exequatur of foreign awards are those provided for in Article 56 of the EAL, which are more favourable and easier than the procedures under the CCP.\(^55\)

Under Article V(1)(b) of the New York Convention, Egyptian courts examine the law of the seat or the applicable arbitration rules to determine whether the impugned conduct constitutes a ground for the annulment of the award under the lex arbitri. If so, Egyptian courts will not grant the exequatur.

For instance, the Egyptian Court of cassation has held that the failure to properly notify a party, invoked as a ground to deny the exequatur according to Article V(1)(b) of the New York Convention, should be assessed based on the law of the seat. It thus rejected the appeal of the Court of Appeal’s judgment which granted the exequatur of an award rendered in Sweden and dismissed the ground that a party was not duly notified.

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\(^54\) Court of cassation, Appeal No 10350 /JY65, 1 March 1999, at <https://www.cc.gov.eg/judgment_single?id=11174903&&ja=62748> (last accessed 13 March 2021).

\(^55\) Court of cassation, Appeal No. 966 /JY73, 10 January 2005, at <https://www.cc.gov.eg/judgment_single?id=11146528&&ja=46759 > (last accessed 13 March 2021).
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notified. The Court ensured that the notification was validly made under the applicable Swedish law, and confirmed the exequatur of the foreign award accordingly.56

In addition, according to leading Egyptian scholars commenting on Article V(1)(d), a State court should deny recognition or enforcement only in case of a significant material breach of the parties’ agreement or of the applicable law that amounts to a violation of the rights of defense. The parties’ agreement supersedes the law of the seat. The party should also have timely objected to that breach according to the applicable law.57

As for Article V(2)(b), despite the fact that Egyptian law and courts rarely mention the term “international public policy”,58 a number of Egyptian scholars consider that

56 Court of cassation, Com., Appeal no. 2660/JY 59, 27 March 1996, at <https://www.cc.gov.eg/judgment_single?id=111123717&&ja=27007> (last accessed 21 November 2020). For the sake of completeness of this report, reference ought to be made to a recent judgment of the Court of cassation, Com. and Eco., Appeal no. 5000/JY78, 28 April 2015, 25 J. Arab Arb. (2015) p. 216. The appellant argued before the Court of cassation that the arbitral award was rendered in violation of its rights of defense and the adversarial principle as it relied on export reports and witness statements which were presented in its absence before another arbitral panel which has been revoked later on. The Court of cassation dismissed the appeal, ruling that the violation of due process and the rights of defense does not constitute a ground to deny the recognition and enforcement of the award under Article V of the New York Convention. Such affirmation seems at odds with the letter of the New York Convention and the well-established principles of the Court of cassation. Yet, it may be explained by the fact that the award has already been recognized by the courts of the seat of arbitration (the Kingdom of Saudi Arabia) where the award has become final and definitive. In fact, the Court of cassation has emphasized that Article I of the New Convention gives a determining weight to the law of the seat of arbitration which governs the conditions of existence, validity and consequences of the arbitration agreement (except for the issue of capacity). It stated that the Court of Appeal has correctly referred to the law of the seat to examine the validity of the arbitration agreement and the regularity of the arbitration proceedings and emphasized that the provisions of that Saudi law did not violate Egyptian public policy. In other words, a challenge to the recognition of the award before Egyptian courts on the ground of due process and rights of defense is doomed to fail, where the award has been rendered in conformity with the law of the seat of arbitration and has all the more been recognized by the courts of the seat which did not identify any procedural irregularity thereto, without resulting in any violation whatsoever of Egyptian public policy. In light of the specificities of the facts and circumstances of this judgment and its dissonance with the well-established Egyptian case law on the recognition and enforcement of foreign awards, it seems quite unlikely that it sets a new precedent that will be followed by Egyptian courts in the future. It would therefore be inappropriate and premature to draw a general conclusion therefrom.

57 F. WALI, Al-Tahkim fn. 7 above, p. 642.

58 One unreported decision of the Cairo Court of Appeal rendered on 7 April 2013 was indicated as expressly making reference to international public policy. See Ismail SELIM,
Egyptian courts do make that distinction, considering that only international public policy is considered when deciding on recognition or enforcement of foreign arbitral awards. On the other hand, other scholars interpret the wording of Article V(2)(b) “public policy of that country” (emphasis added) to mean the Egyptian public policy rather than international public policy. However, they observe that for the denial of recognition or enforcement of foreign arbitral awards, public policy should be interpreted narrowly.

In any event, Egyptian courts expressly distinguish between mandatory legal provisions and public policy. The Egyptian Court of cassation has recognized a foreign award which calculated interests starting from a date different than the date provided for in Article 226 of the Egyptian Civil Code. The Court stated clearly that Article 226 “is merely a mandatory rule not related to the public policy that would prevent recognition of the award in accordance with Article V(2)(b) of the New York Convention”.

In conclusion, if the parties’ agreement, the lex arbitri or the applicable rules provide for a right to a physical hearing, Egyptian courts will most likely refuse the recognition and enforcement of the foreign award according to Article V(1)(b) or V(1)(d) of the New York Convention. If such a right does not exist under the applicable arbitration rules, the applicable law to the procedure or the law of the seat of arbitration, the failure to conduct a physical hearing will not per se constitute a ground to refuse recognition or enforcement of foreign awards by Egyptian courts.

f. COVID-Specific Initiatives

11. To the extent not otherwise addressed above, how has your jurisdiction addressed the challenges presented to holding physical hearings during the


59 For instance: “Egyptian courts have expressly distinguished between ‘domestic’ and ‘international’ public policy and have held that refusal to recognise and/or enforce foreign arbitral awards can only be possible in cases of violation of ‘international’ public policy”, Samaa A.F. HARIDI and Mohamed S. ABDEL WAHAB, “Public Policy: Can the Unruly Horse be Tamed?” 83 Arb. (2017) p. 35 at p. 37. Also, “[...] the Egyptian Arbitration Law does not explicitly embrace the dichotomy between domestic and international public policy. Yet Egyptian courts have adopted the well-known distinction between domestic and international public policy with respect to conflict of laws, including, mutatis mutandis, recognition and enforcement of foreign judgments and foreign and international arbitral awards”, I. SELIM, “Egyptian Public Policy”, fn. 58 above, at p. 65.

60 F. WALL, Al-Tahkim fn. 7 above, pp. 648-649.

COVID pandemic? Are there any interesting initiatives or innovations in the legal order that stand out?

Short answer: Yes.

There were many initiatives to digitize court services before the COVID pandemic. As mentioned earlier, on 7 August 2019, Law No. 146/2019 amended Law No. 120/2008 establishing Economic Courts to add new provisions which provide for the possibility of e-litigation, including remote case filing and case management.

In the aftermath of the Covid-19 first wave, the Ministry of Justice launched in November 2020, an online platform for e-litigation before the Economic Courts. The platform allows for remote making of Power of Attorneys and electronic filing of all forms of documents and written submissions.

Additionally, the New Cairo Court initiated on 18 October 2020 the first remote hearing in criminal matters, in cooperation with the Ministry of Justice and the Ministry of Communication.

Finally, the CRCICA circulated many Notes to the parties, arbitrators and users of the Centre encouraging the conduct of the entire proceedings electronically, including remote evidentiary hearings.

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62 See fn. 28 above.