

**THE ARBITRATOR'S ERROR EFFECT IN APPLICATION THE APPLICABLE  
LAW ON THE ARBITRAL AWARD ACCORDING TO THE JORDANIAN  
ARBITRATION LAW NO. 31/2001 AND ITS AMENDMENTS.**

**Dr. Ali Kh. Kh. Alshara'h**

**Dr. Raja qablan alshraah**

**Abstract**

This research deals with what is known as the arbitrators' errors in applying the agreed law upon by the arbitration parties and the extent to which it is considered an exclusion from it, and then it is permissible to claim the invalidity of the arbitral award, as the predominant form of appealing the arbitration rulings before the courts appear about the error in the application of the law.

The study concluded that some of the jurisprudence and rulings of the foreign judiciary consider that a serious error or clear neglect of the law is equivalent to its exclusion. Because it is contrary to the will of the parties to the arbitration, in contrast to the position of the Jordanian judiciary, which sees that the error in the law application is a discretionary matter that is not answered by nullity, but rather by appeal, and this is what the arbitration law does not allow, as the study concluded with some results and recommendations.

**Introduction:**

Most legislations are keen that the arbitration ruling is not subject to the methods of appeal that are given to judicial rulings to respect the principle of the authority of the will, and so that the arbitration does not lose its purpose in speedy settlement of the dispute, and on the other hand, not to neglect the considerations of achieving justice by imposing judicial oversight on the arbitrators' rulings In narrow pictures.

The invalidity claim is one of the forms of judicial control over arbitration rulings in most international and national laws according to specific cases exclusively, including those related to the eligibility of the arbitration parties, incorrect notification, the formation of the arbitral tribunal and the exclusion of the agreed upon applicable law, and this research deals with The error in applying the law, which is close to the case of excluding the law.

**The problem of the study:**

The problem of the study lies in the following question:

Is the arbitrator's error in applying the agreed-upon law a form of excluding him, and does it entail the nullity of the arbitration award?

And it is left with several questions, the most important of which are: -

- 1- Is the arbitrator's error in applying the law equivalent to excluding the law of will?
- 2- Is the arbitrator's error in applying the law a reason to file a nullity claim?

**The importance of the study:**

The importance of the study highlights the scarcity of legal studies about the arbitrator's error in applying the law of will and the convergence between the exclusion of the law and the error in its application.

This study constitutes an enrichment of legal knowledge through establishing an integrated regulation for the nullity of the arbitral award, The benefit of the study is reflected on those working in arbitration, the judiciary, and lawyers in the cases presented to them, most of which revolve around violating the law and enabling the legislator to introduce appropriate amendments when opportunities are provided to him.

#### **Previous studies:**

1- A study entitled “annulment of the arbitral award to exclude the substantive law” (2016) by Dr. Ali Abu Attia Haikal, dealt with cases of exclusion of the applicable law using the descriptive-analytical method and concluded that the error in applying the law does not fall within the cases of invalidity, as the latter was mentioned exclusively.

2- A study entitled “Judicial Control of Judicial Judgments” (2010) by Dr. Mosleh Al-Tarawneh, in which he addressed the nature of the arbitration ruling, its nullity and its implementation by adopting the comparative analytical descriptive approach, and it concluded that the reasons for the nullity of the arbitral ruling were mentioned exclusively And the error in applying the law is one of the issues of miscalculation, and the way to fix it is by appeal not by invalidity.

My study is distinguished from previous studies in that it sheds light on the legal and practical justifications, which necessitate the introduction of error through applying law within the cases of its exclusion, and in this aspect, it is not considered a repetition of it.

#### **Methodology:**

This study relies on the marriage between the descriptive and analytical approach to legal texts, judicial rulings and the opinions of jurists, with the help of comparative legislation whenever necessary in order to reach the goal which is to answer the questions of the study.

#### **Based on the above, the study was divided into two sections:**

The first dealt with the trend in favor of nullifying the arbitration ruling, as for the second topic it deals with the trend of rejecting the nullity of the arbitration award.

The study ends with a conclusion that includes results, recommendations and a list of sources and references.

### **The first topic**

#### **The trend in favor of annulment of the arbitral award**

The Jordanian legislator was keen that the arbitration rulings should not be subject to the methods of appealing the judicial rulings stipulated in the Code of Civil Procedure (ordinary and extraordinary), but It is permissible to file for an annulment according to certain cases, including if the arbitration ruling excludes the law application chosen by the parties. **(1)**

This trend was based on several justifications and arguments that fall under two ideas: the idea of a grave error and the will of the parties, and we will treat each of them in a demand.

#### **The first demand: the idea of a grave error**

Exclusion of the law means the exclusion of the law of a particular country or part of this law or a particular system,**(2)** meaning that the arbitrators separate the subject matter of the dispute under a law that is different from the agreed law and has a clear impact on the judicial outcome.

**(1) Article 49/4 of the Jordanian Arbitration Law 31/2001 and its amendments: “A claim**

for the nullity of the arbitral award shall not be accepted except in any of the following cases: 1...2...3..4 if the arbitral award excludes the application of the law.” Which the parties agreed to apply to the subject of the dispute “corresponding to Article 53/4 of the Egyptian Arbitration Law 27/1994.”

**(2) Fathi Wali, Arbitration Law in Theory and Practice, Al Maaref, Alexandria 2007, p. 586.**

As for the error in applying the law, it is the application of a legal rule to the dispute that does not apply to it at all, or its application is contrary to what the legislator wants **(3)**.

It is clear from the foregoing that the concept of error in the application of the law comes at a later stage after the selection of the state law that the parties agreed upon, and the error occurs within the legal texts in that law due to a misunderstanding of the facts and the interpretation of the texts.

And part of the jurisprudence goes to the fact that the grave error is an exclusion of that law because it distorted the texts of that law and was applied formally without its content. **(4)**

And that the error is serious when the arbitrator changes the clear and specific meaning to another meaning that leads to the illogicality of the result **(5)**

Some jurisprudence considers that the serious error in the application of the chosen law falls within the case of excluding that law, because it was excluded in an indirect way, and its danger and effects are equivalent to the direct exclusion of that law **(6)**.

The US Supreme Court has addressed the apparent neglect of the law, which is a ground for appeal in the case of "Wilko v. Swan" 1961**(7)**

It goes beyond a mere error in the application of the law on the part of the arbitrators, but is achieved in the case in which the arbitrators mention the law and show their understanding of it and then ignore it afterwards.

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**(3) Awad Al-Zoubi, Al-Wajeez in the Principles of Civil Trials, Dar Wael, Amman, 2020, pg. 410**

**(4) Ali Nasser Al-Ahbabi, Invalidity of the Arbitration Ruling, Abu Dhabi, 2012, p. 136**

**(5) Ali Abu Attia Heikal, Invalidity of the Arbitration Ruling, Journal of the Faculty of Law for Legal and Economic Research, Alexandria University, Vol. 2\_ 2016, p. 862.**

**(6) Abdul Hamid Al-Ahdab, The Arbitration Institution in the Arab Countries, Part One, Dar Al-Maaref 1998, p. 776.**

**(7) Atef Muhammad Al-Fiqi, Arbitration in Maritime Disputes, Dar Al-Nahda, 1996, p. 682**

Some of the jurisprudence was based on the report of the Joint Committee on the 1994 Egyptian Arbitration Law, which stated, “It comes within the concept of the scope of excluding the applicable law that is wrong in its application to the point of deforming it.” **(8)**

The Cassation Court went in its decision, **(9)** “And since the plaintiff gave reasons for nullifying the arbitral award, including that the arbitrators excluded in their decision the application of the Jordanian law agreed upon to be applied, this requires the Court of Appeal to determine the extent to which the texts contained in the special civil law are applied to the contract of

enterprise ..... And since the Court of Appeal has concluded that the arbitral tribunal, although ostensibly following the provisions of the Jordanian Civil Code after contracting, but in a practical sense, excluded those texts... So what I went to does not constitute a departure from the provisions of Article 49/A/4 of Arbitration Law, but pursuant to this Article.”

This decision has been reversed in recent decisions of the Court of Cassation and will be referred to in the second section of this study, but it was mentioned in order to determine how the judiciary deals with arbitration rulings tainted by the defect of violating the law.

The second demand: is the idea of violating the will of the arbitration parties.

Recourse to arbitration is only with the agreement of the parties, and the arbitral tribunal derives its authority to decide the dispute before it from this agreement which determines the scope of the arbitral tribunal’s authority and is obligated to apply the substantive law agreed upon by the parties and its violation leads to the nullity of the arbitral award.

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**(8) Mahmoud Mukhtar Bariri, International Commercial Arbitration, Dar Al-Nahda, 2007, p. 210**

**(9) Discrimination of Rights No. 1352/2006 dated 16/1/2007 your decision**

Some jurisprudence sees **(10)** when the arbitrator distorts the chosen substantive law or interprets it in a different way from the will of the legislator; this is an exclusion of the agreed law because it goes beyond the will of the arbitration parties, which is the source of his authority to settle the dispute.

The opinion of some **(11)** is that the arbitrators’ error in applying the chosen law is equivalent to excluding the law and is considered arbitrary by the arbitrator in justifying the invalidity, and saying otherwise makes the judiciary’s control over the arbitrators’ commitment to the implementation of the agreed law useless, in addition to the fact that the immunity of The arbitration ruling from controlling the error in applying the law increases the arbitrator’s overstepping the limits of his powers in applying the law.

The case for the nullity of the arbitral award is a comprehensive method that includes the reasons for the appeal and is appropriate to the nature of the arbitration and aims to correct the arbitrator’s mistake, whether it is a case for nullity or an appeal, the goal is the same, which is to cancel the arbitral award. **(12)**

If the arbitrator’s application of legal rules within the framework of the agreed-upon law were not compatible with the facts of the dispute according to the proper adaptation, then this is an exclusion that requires invalidity; Because it violates the law of the will of the parties, which were inclined when choosing a particular law to be applied in a sound and logical manner, otherwise the purpose of that would be negated. **(13)**

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**(10) Mahmoud Bariri, previous reference, p. 225**

**(11) Ali Abu Attia Heikal, previous reference, pg. 849.**

**(12) Ali Abu Attia, previous reference, p. 850.**

**(13) Previous reference, p. 865.**

And it was stated in a decision of the Cairo Court of Appeal that **(14)** “mere agreement on arbitration means the desire of its parties to stay away from the state’s judiciary and achieve flexible justice, considering that this matter is more suitable for their interests, and it is a legal system independent of the judiciary that does not branch from it and is not an exception from it.”

It is clear from the aforementioned ruling that arbitration is based on a special idea that is based primarily on the agreement, and has subjective characteristics that must be governed by rules that are compatible with the environment in which it operates.

**Based on the foregoing, the following observations can be made:**

1 - The source of the arbitrator’s authority is the arbitration agreement, and if the legislator’s goal of arbitration is to ensure speedy litigation **(15)** it should not be at the expense of achieving justice, which is what the arbitration parties seek, as the common intention of the parties is to implement Rules specific to that dispute in the proper application and not general rules within the framework of the chosen law, otherwise the arbitrator would be authorized to conciliate and not be bound by specific legal rules.

Therefore, the researcher believes that the introduction of error in the application of the law is among the cases of exclusion of the law.

And confirms the foregoing, the text of Article 36/b **(16)** of the Jordanian Arbitration Law: If the two parties do not agree on the legal rules applicable to the subject matter of the dispute, the arbitral tribunal shall apply the substantive rules in the law that it considers to be the most relevant in the dispute.

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**(14) Cairo No. 48/130 dated 9/4/2014, Journal of Arbitration, p. 23, p. 347.**

**(15) Article 239/2 of the Civil Code: “But if there is a place to interpret the contract, the joint intention of the contracting parties must be searched without stopping at the literal meaning of the words..”**

**(16) Article 36/b of the Jordanian Arbitration Law 31/2001 and its amendments**

If the legislator obliges the arbitral tribunal to apply the rules most relevant to the dispute in the event of disagreement, it is a fortiori for the arbitral tribunal to apply the special rules related to the dispute when the parties choose to apply the law of a particular country.

2- To limit the serious error in the application of the law to include it within the cases of excluding the applicable law under consideration, where the arbitrator sometimes excludes legal rules and applies legal rules to another system, and although it is a serious mistake, it can be the applied rules and the rules that They were excluded the same provisions and no harm is caused.

On the other hand, there can be a simple error in the adjustment within the same system and cause harm to one of the parties, and accordingly, the researcher believes that it is at liberty for the Jordanian legislator to amend the text of Article / 49 of the Arbitration Law so that it is a special appeal due to the availability of a case of invalidity or a case of re-constitution The trial or due to a violation of the law or a mistake in its application because maintaining the absolute immunity of the arbitral rulings in it is considered a challenge to the legal logic when one of

the previous cases is available.

3- The need to introduce error in the application of the law increases within the exclusion of the applicable law,(17) because the legislator in the arbitration law did not require the arbitrator to be a man of law, and therefore the error in the application or interpretation of the law is widely available.

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### **(17) Article (15) of the Jordanian Arbitration Law 31/2001**

#### **The second topic**

##### **The trend of rejecting the annulment of the arbitral award**

Opponents of considering the arbitrator's error in applying the law within the concept of excluding the applicable law and thus being subject to the annulment of the arbitral award Claim go to two ideas: the nature of the Claim for the invalidity of the arbitration award and legal justifications adopted by jurisprudence and the judiciary.

##### **The first demand: the nature of the nullity of the arbitral award Claim**

Arbitration rulings are not subject to appeal by the methods of appeal established in accordance with the Code of Civil Procedure, (18) but it is permissible to file a Claim for the nullity of the arbitral award in accordance with the cases mentioned exclusively in the Arbitration Law. (19)

The first requirement: the nature of the nullity of the arbitral award Claim

Arbitration rulings are not subject to appeal by the methods of appeal established in accordance with the Code of Civil Procedure, but it is permissible to file a Claim for the nullity of the arbitral award in accordance with the cases mentioned exclusively in the Arbitration Law.

Since arbitration is a judicial act, it must be subject to certain formal procedures. If the arbitral tribunal issues an error in the procedure, it is supposed to lead to the annulment of the arbitral award, as is the case with the judicial ruling. On the other hand, if the arbitrator erred in applying or interpreting the law, this Error in assessment, no matter how serious it is, does not lead to invalidity, but rather the judgment is considered defective, and the way to fix it is to appeal.

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**(18) Article 48 of the Jordanian Arbitration Law 31/2001 and its amendments, corresponds to Article 52 of the 1994 Egyptian Arbitration Law.**

**(19) Musleh Ahmed Al-Tarawneh, Judicial Monitoring of Arbitral Awards, Dar Wael, Amman, 2010, p. 167**

**(20) Nariman Abdel Qader, Arbitration Agreement, Dar Al-Nahda Cairo, 2016, p. 551**

The Jordanian legislator did not allow an appeal against the arbitration award except by filing an annulment claim.

Accordingly, the judiciary may not substitute itself for the arbitrator to consider the elements of the substantive dispute or to reform the arbitral award from errors or shortcomings. (21)

The invalidity claim is private litigation and is not an extension of arbitration, but rather it is litigation against the arbitration award due to its violation of specific procedural aspects exclusively, It is a separate original claim to nullify the arbitration.(22)

(23) The decision of the Egyptian Court of Cassation stated, (24) "It is not for the judge of the



nullity case to review the arbitral award to assess its suitability or to monitor the good judgment of the arbitrators, It is equal in that if the arbitrators were right or wrong because their mistake is not a reason to nullify their judgment because the case for annulment differs On the appeal case.”

The Jordanian judiciary popularized its Egyptian counterpart, (25) as it was stated in the Court of Cassation’s decision that “the lawsuit for nullifying the arbitral award is not an appeal, so it does not expand to reconsider the subject matter of the dispute and discredits the court’s ruling in it... and that the oversight provided for in Article No. 49 of the Law Arbitration has a formal nature so that it does not penetrate to the origin of the dispute, and the court does not control how the arbitral tribunal interprets and interprets the law and how it is applied.

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**(21) Nariman Abdel Qader, previous reference, p. 552**

**(22) Musleh Al-Tarawneh, previous reference, 174**

**(23)**

**(24) Commercial Cassation 16789/ for the year 79 dated May 14, 2017, Qastas Center, and Commercial Cassation Resolution No. 10370/83 dated 3/10/2015**

**(25) Discrimination of Rights 1879/2018, Qestas Center.**

The invalidity claim is characterized by the fact that it addresses the judgment as a legal act, regardless of the miscalculation that the judgment may contain.

Therefore, the defects that may be adhered to in the annulment claim must be a mistake in the procedure, (26) but the error in the assessment does not lead to the nullity of the judgment and therefore it is not permissible to file a claim to nullify it.

It is clear from the foregoing that jurisprudence and the judiciary rule out considering the arbitrator’s error in applying the law as a reason for the invalidity of the arbitral award, by analogy with the invalidity in judicial procedures without error in the application or interpretation of the law. What is taken in this direction is that the legislator did not immunize judicial judgments and are subject to appeal in different ways, while arbitration is of a special nature it may not be appealed except in the case of invalidity according to specific cases.

The second demand: Are the reasons for not considering the error in the application of the law as a reason for the invalidity of the arbitral award.

Some jurisprudence considers that the reasons that permit the filing of a claim for the nullity of the arbitral award were mentioned exclusively,(27) and this is supported by the fact that the annulment claim is an exception to the rule that the arbitral award is not subject to appeal, and this is what was disclosed by the Jordanian accelerator in Article 48 of the Arbitration Law, This results in the existence of a narrow interpretation of the text, and that the general principle is that there is no invalidity except with a text. (28)

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**(26) Abdul Hamid Al-Ahdab, previous reference, p. 774**

**(27) Fathi Wali, Arbitration Law, previous reference, p. 571**

**(28) Article 48 of the Jordanian Arbitration Law: “Arbitration rulings issued in accordance with the provisions of this law are not subject to appeal by any of the means of appeal stipulated in the Civil Procedure Code.....) Corresponding to Article 52 of the**

## **Egyptian Arbitration Law.**

Some jurisprudence is based on the report of the joint committee of the draft Egyptian Arbitration Law, which stated, **(29)** “It enters into the concept of excluding the applicable law that is wrong in its application to the point of distorting it, but this phrase does not change the clear will of the legislator in the text and cannot be relied upon due to its conflict with the law. The explicit text and the lesson is the will declared by the legislation, not the will of the author of the text, and caution must be taken when referring to the preparatory works in order to interpret the text, because these actions may express the opinion of a person for one of the participants.

Assuming that the text is ambiguous in pronunciation, **(30)** the validity of the work must prevail over its invalidity, because the principle in business is health and the New York agreement 1958 and The United Nations Commission on International Trade Law (UNCITRAL) were devoid of considering the error in the application of the law as a reason for the invalidity of the arbitral award, **(31)** which is the historical source for Egyptian and Jordanian Arbitration Law. The case of excluding the law was added to the reasons for the invalidity of the arbitration award in the Egyptian Arbitration Law, for fear of the refusal of some foreign arbitrators to apply Islamic law, meaning that it goes back to historical reasons represented in the case of the English Petroleum Development Company against the Sheikh of Abu Dhabi in 1951, **(32)** where the arbitrators came out The agreement of the two parties to apply a specific law. The term (mutilation) was used by the provisions of cassation when it was monitored by the subject court in the interpretation of contracts when an editor interpreted phrases that do not need interpretation because they are clear in meaning, and the mutilations relate to the content of evidence presented to the court.

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**(29) Ali Abu Aita Heikal, previous reference, 872. ?**

**(30) Fathi Wali, Arbitration Law, previous reference, p. 583**

**(31) Nariman Abdul Qadir, previous reference, p. 569**

**(32) Musleh Al-Tarawneh, previous reference, p. 219.**

If the arbitral tribunal erred in applying the applicable law, it will not have mutilated the agreement of the parties. **(33)**

The text of Article 49/A/4 of the Arbitration Law was clear, conclusive and speaks of the exclusion of the application of the law and not of the error in the application of the law, and the rule says that there is no diligence in the source of the text, **(34)** according to the rules of interpretation that the legislator expresses his will in the words of the text If the word does not reach the meaning, then the judiciary derives this meaning from the content of the text.

The court’s oversight of the validity of the application of the law by the arbitral tribunal necessarily leads to a readjustment of reality and a consideration of the subject of the dispute anew, and this action contradicts the nature of the invalidity case, but it is included in the appeal, which is not permitted by the arbitration law. **(35)**

It is recognized in most legislations is the finality of the arbitration ruling, and it is issued and has the power of the res judicata and other things subject to the methods of appeal, and the role



of the judiciary is to monitor its validity in terms of form and in the narrowest limits in order to preserve its nature and not to transfer it to another stage of the stages Litigation, and allowing the judiciary to review the arbitration ruling in terms of fact or law adds a new stage in the stages of litigation before the courts. **(36)**

In its decision, the Egyptian Court of Cassation went “to fault the arbitral tribunal’s judiciary on the subject of the dispute and to challenge its proper understanding of the reality of the case and to reject it by its mistake in interpreting and applying the law does not extend to the scope of the invalidity claim,

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**(33) Fathi Wali, Arbitration Law, previous reference, p. 585**

**(34) Musleh al-Tarawneh, previous reference, text 222.**

**(35) Article 48 of the Jordanian Arbitration Law 31/2001 and its amendments**

**(36) Ali Abu Aita, previous reference, pg. 782.**

Because it is established that the lawsuit for the invalidity of a judgment.” Arbitration is not an appeal, so it is not possible to reconsider the issue of the dispute, and the fault of the judiciary of that judgment is that the judge of nullity does not have the right to review a judgment to assess its suitability or to monitor the good judgment of the arbitrators.**(37)**

The judiciary of the Jordanian Court of Cassation affirmed **(38)** that the arbitration ruling’s violation of a legal rule or a mistake in applying the correct applicable rule or its interpretation is not considered to have excluded the applicable law in accordance with the provisions of Article 49/A/4 of the Arbitration Law, and that what is meant by the required legal rules Implementation are certain special rules that the two parties agreed to subject the contract to its rule, in accordance with the principle of willpower.

And that the application of the law, its interpretation, or the interpretation of the conditions contained in the contract falls within the jurisdiction of the arbitral tribunal, and it was stated in the decision of the Court of Cassation, **(39)** “Among the accepted legal principles is that defects in judicial rulings are divided into two types: A- defect in procedure / B- defect in judgment, If the judgment is flawed in the procedure, then this defect may lead to its invalidity, but if the judgment is as a legal act that is not defective but marred by a defect in assessment, then it is valid but not fair.

After reviewing the views of jurisprudence and the rulings of the judiciary, it is possible to make the following observations:

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**(37) Commercial revocation 14429/86, dated 12/14/2017. Qastas**

**(38) Resolution of Cassation of Rights 3848/2021 dated 9/20/2021 Your decision**

**(39) Discrimination of rights 2400/2021 The date of 9/19/2021 Your decision**

1 - Adhering to the letter of the text related to the exclusion of the application of the law that the parties agreed upon without error in the application of the law, is a fallacy, as the error in the application of the law will result in the exclusion of legal texts that should have been implemented in accordance with sound legal logic.

2- The arbitral award must not be in a better position than the judicial ruling, as it is not

permissible for the arbitral ruling to transcend the ruling of the judiciary and to be safe from the methods of appeal established for judicial rulings in the event that it is proven that some of the documents submitted in the case are forged Or it was proven that the testimony presented in the lawsuit was perjury, or fraud was proven by one of the litigants, Therefore, it is better to amend the arbitration law so that it becomes a claim to cancel the arbitration rulings instead of a case for annulment. In addition to the reasons for annulment, it includes a violation of the law to prevent controversy and the inclusion of reasons for retrial.

### **Conclusion**

This study dealt with the issue of the arbitrators' error in the application of the law of will, and the extent to which it is considered within the scope of the case of exclusion of the law agreed upon by the parties to the arbitration, and thus the permissibility of invalidating the arbitral award. The researcher reached a set of results and recommendations.

#### **First: the results**

1- Some jurisprudence and the rulings of the American judiciary are based on considering the serious arbitration error in the application of the applicable law equivalent to excluding it, because it is a clear neglect of the law and contrary to the will of the arbitration parties.

2- The Jordanian judiciary and its Egyptian counterpart have settled that the arbitrator's error in applying the law of will is not a reason for the annulment of the arbitral award; Because the cases of annulment were mentioned exclusively, and the exclusion of the law differs from the error in the application, so this is one of the issues of assessment that invalidity does not respond to, but rather the appeal, and this is not permitted by the legislator.

#### **Second: Recommendations**

1- The Jordanian legislator should amend the text of Article 49 of the Arbitration Law so that the invalidity lawsuit is replaced by the cancellation lawsuit to include cases of cancellation in addition to the reasons for annulment such as cases of violation of the law and cases of retrial in order to fill the legislative shortcomings.

2- The Jordanian judiciary requires a broad interpretation of the term exclusion of the law, so as to accommodate the case of error in applying the law when it causes serious harm to one of the parties.

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