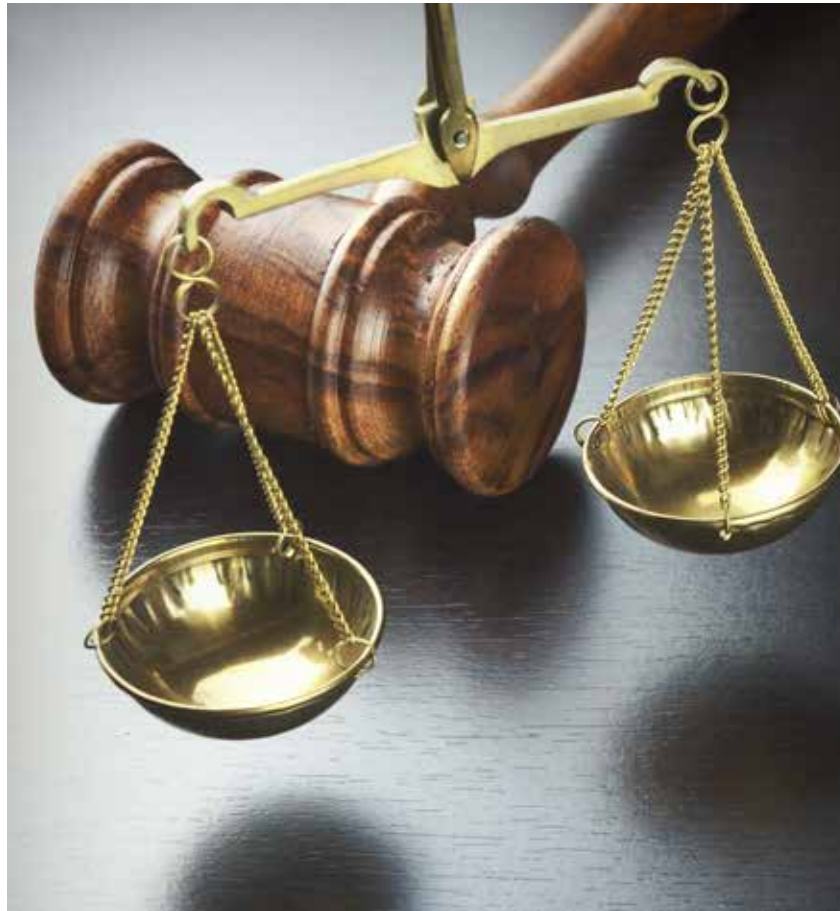




Arbitration in Egypt: Myth or Reality?

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The Egyptian Judicial System has traditionally been regarded as the primary and sometimes exclusive forum for the settlement of legal disputes in Egypt. The country's judicial system has, however, become increasingly overloaded, timely and notoriously procedurally complex over the past few decades, rendering it incapable of keeping up with the swift pace of modern business transactions.

In addition, the judges may not have the experience relevant to the disputed matters, in particular in regards to business transactions disputes, or the time to undertake an in-depth review of any material dispute.

The evolvement of the arbitration as an alternative mechanism for dispute settlement was, therefore, eminent for the stability of businesses, especially when a dispute required an in-depth study and technical expertise.

Commercial arbitration in Egypt is more commonly used in large transactions involving foreign parties. These include major construction contracts, hotel management agreements, oil and gas transactions, and IP contracts.

Arbitration and the Egyptian Legal System

Arbitration is a private means of dispute settlement. Arbitration is defined in Black's Law Dictionary as "a process of dispute resolution in which a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard. Where arbitration is voluntary, the disputing parties select the arbitrator who has the power to render a binding decision."

Egypt is a civil law country and most of its laws are influenced by the French codes. The Egyptian legal system is hierarchal, with the constitution at the

top of this hierarchy and followed by the laws and codes which are drafted in compliance with the provision of the constitution. Finally there are the executives by laws and ordinances.

The primary source of legal rules is the laws and codes. The three main codes in the Egyptian Legal system are: 1) Civil Code, 2) Penal Code, and 3) Law of Procedure.

Article 2 of the Egyptian Civil Code, promulgated by Law No. 131/1948, sets out the sources of the rules of law. "In absence of a provision of law that is applicable, the judge shall decide according to custom and in absence of custom according to the principles of sharia (Islamic law), in absence of such principles, the principles of natural law and justice shall apply."

Arbitration as an Alternative Dispute Settlement in Egypt

Arbitration has long existed in Egypt, although it has not been greatly welcomed. It existed before codification, and was governed by sharia (Islamic law) rule. Then the Ottoman Decree of 13/11/1883 enacted the first civil procedure code in Egypt, which included a chapter on arbitration. It was the first arbitration law in Egypt and the Arab world at large.

Although Egypt had quite early signed and ratified the New York Convention and the International Convention on the Settlement of Investment Disputes (ICSID), Egypt – as well as many other Middle Eastern countries – were perceived as hostile to arbitration. Due to the need of a neutral and efficient way to settle disputes that occurred between investors and public or private sectors and the adoption of the country of a more liberal economic policy, it was eminent to have an arbitration friendly environment. The parliament enacted the Law No. 27/1994, regulating domes-

tic and international arbitration, in civil and commercial matters.

The Egyptian Arbitration Law (the EAL) – Law No. 27/1994, as amended – is based on the United Nations Commissions on International Trade Law Model (UNCITRAL Model Law). There is also substantial case law dealing with the application of the Arbitration Law.

However, there were differences. First, unlike the UNCITRAL, the new arbitration law governs both national and international arbitrations, second, amendments were introduced to how law operates, particularly in the area of challenging arbitration awards and awards enforcement in the Egyptian courts.

THE EGYPTIAN ARBITRATION LAW

Scope of Application

Unless the respondent waives its right to arbitration, the courts generally enforce arbitration agreements and decline to review cases wherein there is a valid arbitration agreement. The court rules these cases inadmissible.

Pursuant to Article 1 of the EAL, 1) any arbitration that takes place in Egypt including both domestic and international arbitrations, or 2) when parties agree to submit to the provisions of this law when an international commercial arbitration is conducted abroad, shall be governed by the EAL.

Furthermore, and due to the importance of the issue of the arbitrability of administrative contracts, Law No. 9/1997 was passed and provided that the concerned minister, or whoever may replace him, has to approve the arbitration agreement in administrative contracts related to his ministry and no delegation of powers shall be authorized in this respect. Therefore, in administrative contract, the minister's approval on the arbitration agreement

is essential to validate the arbitration agreement.

International Arbitration

The arbitration law's Article 3 sets the criteria to determine the international nature of arbitration. It sets two criteria to be met; 1) The subject matter is a dispute related to international commerce, and 2) Any of the listed geographical criteria's are satisfied.

Agreement to Arbitrate

The legal requirements regulating the form and content of a valid arbitration agreement are mostly found in the EAL; 1) a valid arbitration agreement must be in writing, 2) if the parties incorporate within their agreement a model form of contract that includes an arbitration provision, they must expressly confirm that they also incorporate the arbitration provision, 3) an arbitration clause is regarded as an independent agreement from the other underlying provisions in the contract. Thus, an arbitration agreement would be valid regardless of the validity of the other provisions in the contract. In addition, 4) the Arbitration Law allows parties to build their own arbitration agreements choosing their own procedural rules, 5) parties may choose the number and qualifications of arbitrators, and 6) unless agreed in contract, an ad hoc arbitral award should be issued within 12 months, which may be extended by the tribunal for another six months.

Our recommended best practice provisions include:

1) The time limit for rendering awards; the EAL sets an 18-month time limit for rendering awards (unless otherwise agreed by the parties), therefore if the parties foresee the need for a longer period, they should specify such period in their agreement.

2) As discussed hereinabove in Scope of Application, for administrative contracts the signature of the concerned Governmental Minister should be obtained to confirm his or her consent to the arbitration agreement.

3) If the parties wish to grant the tribunal, the power to award interim measures and injunctive relief, this must be expressly provided for in the arbitration agreement.

4) If the parties wish for the proceedings to be conducted in a language other than Arabic, it is recommended that this be expressly stated. The default, absent agreement, or a decision by the tribunal is in Arabic.

PARAMETERS OF ARBITRAL PROCEEDINGS

Duration

Arbitral proceedings commonly take one to two years from the request for arbitration until a final award is rendered. Enforcement may take another 6 to 12 months, which may be extended through various tactics adding a further six months. Nullity actions may take two to three years before a final judgment is rendered. Pursuant to the Arbitration Law a nullity action should not provide grounds for a stay of enforcement of an arbitration award.

Confidentiality

Arbitration is referred to in literature as confidential. Confidentiality is regarded as one of the top reasons disputing parties choose arbitration over.

Flexibility

The parties to the dispute are given flexible methods of dispute resolution wherein they are able to actually argue their case effectively and before a competent tribunal, usually of their own choosing.

Separability

An arbitration clause is deemed to be a distinct agreement from the other provisions of the underlying contract. Therefore, an arbitration agreement would remain valid to regulate disputes about the validity and/or enforceability of the underlying contract including the arbitration agreement.

The Cairo Court of Appeal's Decision on December 31st, 1997 in the Case No. 62 of the 113th Judicial year rendered a judgment which indicated -inter alia- that Article 23 of the Arbitration Law provided that "the Arbitral Clause is deemed to be an agreement that is independent from the other conditions of the contracts and that nullity, rescission, or termination of the contract shall not affect the arbitral clause therein provided such clause is valid per se" and the Court decided therefore in the Case under review that nullity, rescission, or termination of the contract does not have any effect on the Arbitral Clause under consideration.

Arbitration Organizations

The most prominent arbitration organization in Egypt is the Cairo Regional Centre for International Commercial Arbitration (CRCICA / www.crcica.org.eg). CRCICA applies the UNCITRAL rules

with some amendments.

The CRCICA provides a competitive and less costly alternative to foreign arbitration and mediation centers for Egyptian and regional disputes. It is an independent non-profit international organization established in 1979.

Pursuant to the headquarters agreement concluded in December 1987 between AALCO and the Egyptian Government, CRCICA's status as an international organization was recognized and the Center and its branches were endowed with all necessary privileges and immunities ensuring their independent functioning.

Challenges to Awards

Arbitration awards are final, binding, and subject to no appeal on the merits. Arbitral awards can be challenged as null and void, based on any of the grounds provided for under Articles 52 and 53 of the EAL. They are challenged mainly on formalistic and procedural errors. With regards to content, breach of principles of public order or morality may also be a reason to nullify an award. A nullity action must be brought within 90 days from the date on which the successful party notifies the other party of the award.

A nullity action does not stop enforcement. However, the enforcement of the arbitration award may be suspended by the court if a nullity action includes a request for suspension, based on prima facie strong grounds.

For international commercial arbitrations, a nullity action is initiated before the Cairo Court of Appeal, and the proceedings usually take between 9 and 18 months for completion.

Recognition and Enforcement of Awards Issued Pursuant to the EAL

Recognition and enforcement of arbitral awards are covered under Articles 55 to 58 of the EAL. The party seeking enforcement must first formally notify the other party with the award. The enforcing party must then wait for 90 days to allow the other party if it wishes to initiate a nullity action, before it lodges the original copy of the award with the secretary of the competent court, as stipulated in the law. Afterwards, the award will then be engrossed with a writ of execution (exequatur) by the competent court execution judge.

Following the issuance of the exequatur, enforcement is executed through attachment actions by court bailiffs. However, there are tactics used to delay execution, such as initiating an 'execution contestation' if there are new events subsequent to the award that may render execution invalid or may delay enforcement for 6 to 12 months, or other tactics relating to moveable assets.

Recognition and Enforcement of Foreign Awards

Egypt has been a party to the New York Convention since 1959. There are also several bilateral and multilateral treaties for reciprocal enforcement of judicial awards; for example between Egypt and France, and the Arab League Trea-

ty. Therefore, if a court writ of execution is obtained, the writ can be enforced abroad under these treaties.

On the other hand, if a foreign arbitral award is final and binding according to its place of issuance, the courts in Egypt will enforce it. Otherwise, they will not be enforced.

The Cairo Court of Appeal rendered a judgment on February 26th, 2003 in the recourse No. 23 of the 119th judgment year, which stated that the Egyptian judiciary has no jurisdiction to view the actions for nullity of foreign arbitral judgments as long as the parties have not agreed to subject the arbitration to the Egyptian Arbitration in Civil and Commercial Matters Law No. 27/1994. In other words, if the parties agree to hold the arbitration outside Egypt – without subjecting it to the Egyptian Arbitration law – then this would result in subjecting the arbitration to the law of another state in accordance to its procedures or to the procedures they agree to apply.

The judgment added that Article 3 of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Judgments has obliged the adhering states to recognize the arbitral judgments that are rendered outside their territory and to execute them in accordance to the rules of procedures applicable in their territory. Article 5/1/5 of this Convention prohibits the refusal to recognize or to execute the above mentioned arbitral judgments except in certain specific cases.

Also in another case, the Egyptian Court of Cassation rendered an important judgment on March 1st, 1999 in Recourse No. 10350 of the 65th judicial year, which mentioned that the Egyptian law on procedures – in its chapter relating to the execution of foreign judgments, orders, and official documents – provides that foreign treaties between Egypt and foreign states concerning the execution of foreign judgments, orders, and official documents shall have to apply. As Egypt has adhered to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, therefore, this Convention legally becomes one of the laws of the state and is applicable even if it contradicts the Egyptian law on Arbitration in Civil and Commercial Matters.

New York Convention and ICSID

Considering the international nature of arbitration as a mechanism for settling legal disputes, the legal framework that governs international arbitration in Egypt is relevant from two main perspectives.

First, the recognition and enforcement of foreign arbitral awards in Egypt, as well as the foreign recognition and enforcement of arbitral awards rendered in Egypt, is, for the most part, governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958; the New York Convention.

Secondly, the ICSID Convention of 1965 provided for the establishment of the International Center for Settlement of Investment Disputes (ICSID) as a member of the World Bank Group, which

stands as the primary venue for the settlement of investment disputes between a member state and nationals of other member states.

According to statistics published in 2012, Egypt, with seventeen cases, ranked third among the countries most frequently appearing as respondents before the ICSID, following Argentina and Venezuela.

An ICSID ruling in Egypt's favor issued in April 2014, the ICSID tribunal declined jurisdiction to hear the case "due to [the] lack of foreign control of [the] ICSID claimant [National Gas]."

State Entities and Enforcement

State entities are not immune to enforcement in Egypt. An official who intentionally refuses to implement a court order or judgment may face criminal prosecution.

Challenges

Pursuant to the Ministerial Decree 8310/2008, it made the process of enforcing arbitration awards burdensome in terms of substance and internal procedure. It required the initial deposit of an award for enforcement subject to approval of the Ministry of Justice. It may be withheld in certain cases, including among other things, where it contradicts public policy or dealing with title to property. Such regulations potentially cast serious doubt over enforceability and it has been suggested that these regulations contradict the Arbitration Law and are, therefore, legally invalid.

Arbitration Reality in Egypt

Since the 2011 revolution, the economic difficulties, that Egypt has encountered, have rendered the country more susceptible to international claims before the ICSID. A most recent arbitration proceeding in the Egyptian oil and gas sector is between Gas Natural Fenosa, a Spanish energy company, which filed a case against the Egyptian government, represented by the Egyptian Gas Holding Company (EGAS), for the latter's failure to meet its obligations under the contract. The Egyptian government diverted oil from export to the domestic market in violation of the contracted capacity of the plant. The arbitration was worth \$270 million in addition to the interest rate.

Arbitration in Egypt, has received criticisms over the past years, some of which are untrue, especially with contracts concluded with the government. Foreign investors and International Financial Institutions are refusing to accept seat of arbitration to be in Egypt, nor the application of the EAL to any arbitral disputes, while the Egyptian State Council is refusing to accept arbitration outside Egypt.

Therefore, and unless, legislative reform is carried to avoid the problems encountered with nullification, enforcement, and recognition of awards pursuant to the current laws, or other compromise(s) are offered, such entities, shall lose their interests in investing in Egypt.

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