

Egypt's Outlook Toward Int'l Arbitration May Be Shifting

By **Randa Adra** (December 13, 2021, 2:56 PM EST)

Commentators have often described the Egyptian attitude toward international arbitration as arbitration-friendly. There is indeed ample support for this characterization.

Egypt is a member of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention, and is a party to numerous bilateral and multilateral treaties on arbitration, including over 70 bilateral investment treaties currently in force, which grant protections to foreign investors.

For years, Egyptian courts also tended to follow modern international arbitration trends. Further, over the course of the last few years, the Egyptian Court of Cassation has issued judgments that reinforce Egypt's pro-arbitration reputation.

However, while Egypt appears to support international arbitration among commercial parties and even other states, one recent Court of Cassation decision as well as two new laws signal a significant shift in the willingness of Egypt itself to be subject to international arbitration. The evolution of this stance over the course of recent events is noteworthy.

The Court of Cassation decision evinces a progressive approach toward arbitration.

On Oct. 27, 2020, in Case No. 18309 of Judicial Year 89, the Egyptian Court of Cassation issued a milestone decision that clarified its pro-arbitration stance in cases between private, commercial parties.^[1] The underlying arbitration involved the construction of a sewage treatment plant.

A subcontractor initiated arbitration proceedings at the Cairo Regional Center for International Commercial Arbitration alleging the contractor's failure to perform its contractual obligations. The subcontractor prevailed in the arbitration and defeated the contractor's attempt to set aside the award before the Cairo Court of Appeal. The contractor appealed, seeking to overturn the Court of Appeals decision, but the Court of Cassation rejected the contractor's arguments.

In refusing to set aside the award, the Court of Cassation's decision demonstrated a progressive approach that aligns with several fundamental principles of international arbitration.

First, the court found that the contractor waived its right to object to the validity of the arbitration



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agreement because it failed to do so during the course of the arbitration proceedings in which it actively participated. Moreover, the court confirmed the existence of the principle of estoppel under Egyptian law, finding that the contractor's claim was barred because its contradictory conduct was prejudicial to the other party.

Second, the Court of Cassation held that nothing under Egyptian law prohibits parties from freely appointing nonlawyers as representatives in arbitration proceedings. As part of its reasoning, the Court of Cassation acknowledged the winds of change in the international arbitration industry, including increasing globalization and reliance on virtual hearings, among other developments.

Finally, the Court of Cassation dismissed the contractor's claim that the award was based on the expertise of a single arbitrator, as opposed to proper deliberations by the tribunal. The court reasoned that there was sufficient evidence of deliberations and that the parties had consented to the constitution of the tribunal, which was expected to rely on the expertise of the appointed arbitrators.

Importantly, the court emphasized that judicial review and annulment of arbitral awards is limited to the grounds enumerated in Article 53 of the Egyptian Arbitration Law.[2]

In both embracing party autonomy and refusing to expand the grounds for annulling arbitral awards, the Court of Cassation appeared to espouse a modern, arbitration-friendly approach.

Decree No. 2592 demonstrates a resistance to arbitration agreements involving the state.

Under Egyptian arbitration law, arbitration agreements in administrative contracts — i.e. contracts that satisfy three conditions: (1) a public authority is a party, (2) a public utility is involved, and (3) an "onerous" clause from the public law is included — must first be approved by a competent minister.

However, on Dec. 9, 2020, a few months after the Court of Cassation rendered a seemingly pro-arbitration judgment, Egyptian Prime Minister Mostafa Madbouly issued Decree No. 2592, which introduced new restrictions for entering into arbitration agreements in all government contracts, whether administrative contracts or otherwise.

Under this decree, a prior commission authorized to study and provide opinions on international arbitration disputes was renamed to form the Supreme Commission for Arbitration and International Disputes.

The reimagined commission's mandate is, among other things, to review and authorize arbitration clauses in any contracts involving foreign investors and the Egyptian state. The state includes not only ministries, authorities and affiliated bodies, but also state-owned companies and companies receiving any state contributions.

Indeed, no Egyptian governmental entity — or entity receiving government contributions — can conclude a contract with a foreign investor, sign a contract containing an arbitration clause, or take any measure or action regarding an arbitration dispute without it first being reviewed by the commission.

While this decree does not appear to affect the validity of any investment treaties to which Egypt is a party, or the availability of treaty-based arbitration, it does apply quite broadly, serving to create an additional barrier to foreign investors seeking to enter into arbitration agreements with state-owned or affiliated entities, including those that merely receive contributions from the state.[3]

The sheer breadth of the decree reveals a resistance to subjecting the state to commercial arbitration with foreign investors moving forward.

Notably, some of the mechanics of this decree remain unclear, including how it will affect existing government contracts containing arbitration agreements that have not been approved by the commission, and whether procuring the requisite approval will create burdensome delays.

The Court of Cassation reinstates arbitral award against Libya.

On June 24, 2021, in Challenge No. 12262 of Judicial Year 90, Egypt's Court of Cassation reinstated a substantial award against Libya in *Al-Kharafi & Sons. Co. v. Libya*, a dispute stemming from an unsuccessful tourism construction project in Tripoli.

In the underlying arbitration, an ad hoc tribunal seated in Cairo issued an astounding and controversial nearly \$1 billion award in favor of Al-Kharafi under the 1981 Unified Agreement for the Investment of Arab Capital in Arab States. Libya challenged the award in Egyptian court and the Cairo Court of Appeals set it aside on public policy grounds, criticizing the tribunal for granting an award that was disproportionate to the harm.

The Court of Cassation disagreed with the lower court and reinstated the award, finding that the Court of Appeals erred in examining the damages awarded by the tribunal. As it did in its October 2020 decision, the Court of Cassation emphasized that arbitral awards may only be annulled on grounds enumerated in Article 53 of the Arbitration Law, which does not include errors in damages calculations.

This decision confirms the Egyptian Court of Cassation's narrow interpretation of both the public policy exception and the grounds for setting aside a commercial arbitration award, even if the losing party is a state.

However, as described below, the court takes a different approach when a commercial arbitration award is rendered against Egypt itself.

The Court of Cassation sets aside award against an Egyptian state agency.

In a decision that overturned the findings of the Cairo Court of Appeals, on July 8, the Court of Cassation decided Challenges No. 1964 and 1968 of Judicial Year 91 in favor of Egyptian state agency Damietta Port Authority, or DPA, and annulled a \$490 million International Chamber of Commerce arbitration award rendered in favor of Damietta International Port Co., or DIPCO, an international consortium.

The underlying arbitration stemmed from a build-operate-transfer, or BOT, agreement to develop a container terminal at the Damietta port in Egypt. DIPCO alleged that the agreement was wrongfully terminated by DPA, and the tribunal agreed. In reaching its ruling, the tribunal concluded that certain amendments to the agreement were not executed in accordance with Egyptian law, and thus DPA could not rely on them.

The Cairo Court of Appeals upheld the award, finding that the financial rights of the parties were at issue and were arbitrable, even though the BOT agreement involved a public entity and utility. Moreover, the Court of Appeals refused to rely on public policy as a ground to justify judicial review of the arbitral tribunal's reasoning.

The Court of Cassation took an opposite view and set aside the award. Focusing on the nature of the contract, the Court of Cassation held that the BOT agreement was an administrative contract because a public entity was a party and the agreement involved matters of public interest.

The Court of Cassation explained that decisions related to the validity of administrative contracts fall exclusively within the jurisdiction of administrative courts and outside the jurisdiction of an arbitral tribunal. Because Egyptian courts had exclusive jurisdiction over this issue, the Court of Cassation determined the award violated the principles and foundations of public order.

It remains to be seen whether this decision will ultimately be interpreted narrowly or as finding that administrative contracts are wholly nonarbitrable. However, it does call into question whether arbitral awards stemming from administrative contracts containing arbitration agreements can survive a challenge in Egyptian courts on public policy grounds, particularly if the tribunal rules against the state.

A new law expands judicial review of international decisions.

In another controversial move to apparently shield itself from adverse arbitration awards, on Aug. 15, Egypt ratified Law No. 137, which amends the powers of the Supreme Constitutional Court to allow for the review of the constitutionality of decisions and awards issued by foreign courts and international organizations that may be enforceable against the Egyptian state.

The new law also grants the prime minister the right to request that the Supreme Constitutional Court set aside the decisions and rulings of an international organization, as well as the resulting obligations.

While last-minute amendments to the law appear to have intentionally excluded express references to "arbitral awards" as being subject to the Supreme Constitutional Court's review, the wording of the law is sufficiently broad and vague that it could be interpreted as creating a new means of challenging the enforcement of international arbitral awards rendered against Egypt, including those made under bilateral investment treaties to which Egypt is a party.

The Egyptian government has claimed that this new law is meant to protect the national economic security of Egypt.^[4] Indeed, its position is not very surprising in light of the flood of arbitration cases Egypt has faced since the Arab Spring.

Nonetheless, this development illuminates Egypt's eagerness to minimize its exposure to liability stemming from international rulings, even at the expense of its international reputation as an arbitration-friendly forum.

Conclusion

Over the last 15 months, there have been significant developments in Egypt's approach to international arbitration, vacillating between, on the one hand, showing continued support for fundamental principles of international arbitration and party autonomy, and on the other, minimizing the state's own exposure to international arbitration.

These new changes in Egyptian law do result in a renewed sense of uncertainty as to whether any arbitration awards rendered against the state will survive a challenge in Egyptian court. And it will likely take time before such concerns can be addressed. As recently as Nov. 12, Egypt reportedly prevailed in

an arbitration brought by Bahraini company Nile Douma Holding under the Bahrain-Egypt bilateral investment treaty.

Moreover, as of Dec. 9, Egypt settled a treaty case brought by a Finnish investor under successive Egypt-Finland bilateral investment treaties after the investor, Mohamed Abdel Raouf Bahgat, was awarded over \$100 million. If Egypt continues to either prevail or otherwise exercise a diligent effort to settle as many international arbitration cases as possible, it may be years before these recent legal developments are put to the test.

For those interested in investing in Egypt, entering into an arbitration agreement with a commercial entity even partially supported by the state is now a more onerous process. Thus, while it remains unclear what the precise effect of the recent changes in the law will be — including on foreign investment — there is certainly a more pronounced sense of "investor beware," when doing business with the Egyptian government.

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Disclosure: Crowell & Moring represented DIPCO in the underlying arbitration, DIPCO v. DPA.

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[1] The Court of Cassation redacted the parties' names in the decision.

[2] Article 53 provides that an arbitral award may be annulled only if the arbitration agreement is void, there was serious procedural unfairness such as a party was incapacitated or unable to present its case, the award is in conflict with the parties' agreement or dealt with matters outside the scope of the arbitration agreement, or the award is in conflict with the public policy of Egypt. This approach is consistent with, for example, the grounds for vacating an arbitral award under the United States Federal Arbitration Act and the French Code of Civil Procedure.

[3] The fact that this additional layer of review only applies to agreements with foreign investors (and not national investors) does raise questions as to whether this new rule violates principles of fair and equitable treatment.

[4] See Gamal Essam El-Din, Proposed legislative amendments to Supreme Constitutional Court's law, new safeguards for the economy? (June 24, 2021), available at <https://english.ahram.org.eg/News/414849.aspx>.