The need for ministerial approval for arbitral agreements in Egyptian administrative contracts

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Dissenting from its pro-arbitration stance, the Egyptian Court of Cassation decision dated 12 May 2015 upheld a relatively anti-arbitration interpretation of Article 1(2) of the Egyptian Arbitration Law which reads as follows:

“With regard to disputes relating to administrative contracts, agreement on arbitration shall be reached upon the approval of the competent minister or the official assuming his powers with respect to public juridical persons. No delegation of powers shall be authorized in this respect”. [emphasis added]

Prior to analyzing the said decision, it is worth clarifying that under Egyptian law a contract is administrative if three conditions are fulfilled. First, at least one of the parties to the contract must be a public juristic person (i.e. the State, public institutions and professional bodies) or if all the parties are private persons, at least one of the parties must be acting on behalf of a public juristic person. Secondly, the contract must be pertinent to the functioning of a public utility. Thirdly, the contract must comprise an “onerous” clause or condition from the public law (for example the possibility for the contracting authority to terminate the contract). The most common examples of administrative contracts are concessions of public utilities agreements, public works contracts, and supply contracts.

Historically, there have been two opposing interpretations for the aforementioned Article 1(2) of the Egyptian Arbitration Law, one of which is a pro-arbitration one and in line with the doctrines of good faith and estoppel, and one which is not (yet appears to be in conformity with the legislator’s intent).

The first interpretation, which has been honoured by some arbitral tribunals and applied in several CRCICA cases, considers that the absence of the ministerial approval would not lead to the annulment of the arbitration agreement but solely to the disciplinary liability of the official who consented to the arbitration agreement without obtaining such approval.

The second interpretation, as adopted by the Administrative Courts of the Conseil d’Etat, is that the absence of ministerial approval causes the annulment of the arbitration agreement enshrined in an administrative contract.

There were justified hopes that the Ordinary Judicial Courts, whose commercial chambers are known for their pro-arbitration approaches, would adopt a stance different from the Conseil d’Etat’s conservative position. Unfortunately, the winds do not blow as the vessels wish.

The ruling of the Court of Cassation relates to a dispute between National Gas Company (“NGC”) and the Egyptian General Petroleum Corporation (“EGPC”) arising out of a contract from 1999 by which NGC was under the obligation to provide certain areas of Sharkia Governorate with natural gas. The dispute was settled by an arbitral award rendered according to CRCICA rules in the case No 567/2008. The arbitral tribunal rejected EGPC’s plea against its jurisdiction and stated that the obligation to obtain the ministerial approval of the arbitration clause lies on the administrative entity (i.e. EGPC). Therefore, the failure to obtain such approval shall not cause the nullity of the

arbitration clause.

EGPC initiated setting aside proceedings invoking the nullity of the award based on the absence of the Petroleum Minister's approval. On 12 September 2009, Cairo Court of Appeal rendered a decision annulling the award. NGC challenged the said decision of the Cairo Court of Appeal before the Court of Cassation. The statement of challenge before the Court of Cassation ("Statement of Challenge") was based, among other things, on the following grounds:

First, NGC contended that (i) the Minister of Petroleum had approved the arbitration clause pursuant to two addendums to the agreement dated 6 January 1999, by which he ratified EGPC's assignment of its rights and obligations under the disputed contract, including its arbitration clause, to the Egyptian Natural Gas Holding Company ("EGAS").

The Court of Cassation rejected this argument for lack of evidence since NGC had failed to enclose the disputed contract and its addendums with its Statement of Challenge. The Court of Cassation finding in this regard is in conformity with Article 255 of the Egyptian Code of Civil and Commercial Procedures which should be carefully considered by parties when filing appeals before the Court of Cassation in civil and commercial matters.

Secondly, NGC invoked the aforementioned pro-arbitration interpretation of Article 1(1) of the Egyptian Arbitration Law according to which the conclusion of the contract, by EGPC's Chairman, is sufficient to validate the arbitration clause without need for further ratification by the Minister of Petroleum. NGC further affirmed that the arbitration clause should be given effect according to the principle of good faith and the "Appearance Theory".

The Court of Cassation rejected NGC's position. The Court stated that whenever it becomes impossible for the judge to infer the legislator's intent from the plain wording or the indications of a statutory provision, the judge may have to consider extrinsic elements like preparatory works for the law, historical sources and the legal rationale behind the provision. Further, the Court of Cassation reiterated its definition of Public Policy which has constantly been affirmed:

"Rules aiming to achieve a public interest, whether political, social or economic, pertaining to the society's high order and which prevails over the individual's interest".

The Court of Cassation referred to the Preparatory Works for the law No. 9/1997 and found that the legal rationale of the law was to resolve a pre-existing controversy over the arbitrability of administrative contracts through a conclusive statutory provision leaving no room for opposing opinions and which explicitly "validates the agreement to arbitrate in administrative contracts, determines the administrative authority entitled to ratify such agreement in order to regulate and ensure that the agreement to arbitrate complies with public interest considerations" . Such balancing of public interest and agreement to arbitrate in administrative contracts is entrusted to "the competent minister or the official assuming his powers with respect to public juridical persons which are not subordinated to any ministry like the Accounting Central Authority".

Accordingly, the Court of Cassation concluded that "the validity or nullity of the arbitration clause based on the exclusive approval of the competent minister is a public policy rule since it has been enacted for a public interest thereby permitting both parties to a contractual relation to invoke the nullity" of the arbitration clause whenever the competent minister's approval has not been granted.

Finally, NGC contended that the challenged decision of the Cairo Court of Appeal should be quashed for lack of reasoning and violation of the right of defence as it rejected the documented arguments evidencing the implicit approval of the competent minister which is inferred from the attendance of the Minister of Petroleum to the contract signing ceremony and EGPC's enforcement of two arbitral awards in the cases No. 400/2004 and 490/2006 settling other disputes arising out of the same contract without invoking the absence of the ministerial approval.

This was rejected by the Court of Cassation. The Court of Appeal has a discretionary power to assess whether there has been a tacit approval or implicit ratification even if the challenged decision has not addressed some immaterial documents.

Conclusion

Conservatism in this area is not exclusive to Egyptian law. Indeed, under French law the non-arbitrability of administrative contract disputes is the rule and their arbitrability is the exception.

The source of such restrictions may be found in public international law, where public acts of nation states (jure imperii) enjoyed immunity from adjudication by foreign courts.

The added value of this important decision resides in the predictability and certainty of the rule of law governing the arbitrability of administrative contract disputes.

The Egyptian Court of Cassation has confirmed the precedents of the Conseil d'Etat that without Ministerial approval arbitration clauses in administrative contracts are ineffective, and any award made as a result of them will be annulled. Persons who are negotiating administrative contracts to be entered into with Egyptian public bodies must therefore be vigilant should they wish to select arbitration as the means of resolving any future dispute with the Egyptian State or any other Egyptian public juristic person. Written approval of the competent minister must be obtained on or before the date of signature of the administrative contract.