Arbitrators' Conflict of Interest: An Egyptian Perspective

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Introduction

An ongoing discussion in the world of international arbitration concerns the conflict of interest of arbitrators and how such issue should be addressed. In this regard, the Egyptian Court of Cassation has very recently enriched this discussion by evincing its perspective on this matter, particularly, with respect to the standard of impartiality and independence of arbitrators, and the parameters of the duty of disclosure of arbitrators.

Egyptian Courts' Perspective on Arbitrators' Conflict of Interest

To deliver the full picture regarding this discussion in Egypt, we have to begin with the Cairo Court of Appeal's[fn]Cairo Appeal Challenge No. 29/ Judicial Year No. 131, Hearing Dated 4 August 2014.[/fn] – quite interesting – judgment in a different case. In 1998, the challenged arbitrator was a member of an arbitral tribunal. However, the arbitral tribunal in this case did not issue an award. This was because the competent court[fn]The competent court means the court referred to under article (9) of the Egyptian Arbitration Law, which would be either (a) Cairo Court of Appeal in case of International Arbitration; or (b) Territorially competent Court of Appeal in case of Domestic Arbitration.[/fn] had issued a judicial order terminating such arbitral proceedings for exceeding the time limit for rendering arbitral awards under the Egyptian Arbitration Law. This order was based upon article 45 (2) of the Egyptian Arbitration Law which empowers the competent court to issue a judicial order either: (i) extending the period of time for rendering the arbitral award, or (ii) terminating the arbitral proceedings. All this in case the arbitral tribunal has failed to issue its arbitral award within the time limit prescribed under article 45 (1) of the Egyptian Arbitration Law (*i.e.*, 12 months plus a further extension of 6 months).[fn]It should be noted that this time limit for rendering arbitral awards does not apply where the parties have agreed otherwise (*i.e.*, chose the rules of an arbitral institution).[/fn]

More than a decade later, in 2013, the challenged arbitrator became, yet again, a member of another arbitral tribunal that was constituted to review the same dispute between the same parties. This time around, the arbitral tribunal was able to render its award which has prompted the challenging party to file an annulment action before the Cairo Court of Appeal. The challenging party has based its action for annulment on the ground that the arbitrator in question lacked the requisite impartiality and independence under the Egyptian Arbitration Law. The Cairo Court of Appeal, however, refused to annul the arbitral award. The Court made it clear that the duty of disclosure is only required when the

arguably suspicious facts are not known to the challenging party. In this regard, the Court held that the fact the two arbitrations were between the same parties and were concerning the same dispute – undoubtedly – evidence the presumed knowledge of the challenging party of such facts and, therefore, the challenged arbitrator was not under any obligation to re-disclose these facts when he accepted the mission for the second arbitration. The Court added that the challenging party, in this case, has waived its right by failing to raise any challenges against the arbitrator in question within the time limit prescribed under the law.[fn]*Supra* note 1.[/fn]

Four years later, in July 2018, a contrasting fact pattern was presented to the Cairo Court of Appeal.[fn]Cairo Appeal Challenge No. 65/ Judicial Year 134, Hearing Dated 22 July 2018.[/fn] This time around, it was not known to the challenging party before the issuance of the arbitral award that the challenged arbitrator has acted previously as a legal counsel to the other party. The case recitals show that the challenged arbitrator also did not disclose such facts when he officially accepted his arbitration appointment. Yet, the Cairo Court of Appeal decided to reject this ground of annulment on the basis that such facts were presumably known to the challenging party before the issuance of the arbitral award. Therefore, according to the court, failing to object to such appointment before the issuance of the arbitral award has constituted a waiver of this right. In other words, the Cairo Court of Appeal has shifted the burden of proof to the challenging party, whereby the latter is the party under an obligation to prove that he did not know such suspicious facts before the lapse of the time limit prescribed under CRCICA rules for challenging arbitrators.

The Cairo Appeal judgment was further challenged before the Court of Cassation. Consequently, the Cassation Court decided to overrule the Court of Appeal judgment.[fn]Court of Cassation Challenge No. 18116/ Judicial Year No. 88, Hearing Dated 11 June 2019.[/fn] The Cassation Court began, first, by elaborating the standard of impartiality and independence of arbitrators by stating that:

> "*The arbitrator's independence and impartiality means that the arbitrator has no implicit, material, or moral relation to any of the parties in a way that affects such impartiality and constitutes a flagrant & imminent threat real danger of bias, or raise justifiable doubts*".

Then, the Cassation Court made it crystal clear that the presumption of knowledge of the challenging party is only created when the challenged arbitrator discloses the relevant suspicious facts at the time of officially accepting his arbitration appointment; not the other way around. Accordingly, if the challenged arbitrator fails to prove that the challenging party already knows these suspicious facts, then it cannot be said that the challenging party has waived its right concerning this ground.

In light of the above, there are three (3) key takeaways, as follows:

- The Egyptian Court of Cassation has aligned its views with international arbitration best practices when it defined the standard of arbitrators' independence and impartiality as the one constituting "a real danger of bias", or raising "justifiable doubts".
- The Egyptian Court of Cassation has deemed that the presumption of knowledge of the challenging party of any arguably suspicious facts arises only when the arbitrator in question discloses such facts at the time of accepting his appointment.
- Egyptian Courts might rely on supporting facts other than the disclosure statement by the arbitrator in question to deduce whether the challenging party was aware of the relevant suspicious facts before the issuance of the arbitral award.

Conclusion

It is evident that the Egyptian Courts' position is very much in line with best international practices when it comes to the issue of arbitrators' conflict of interest. In the meanwhile, the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration are increasingly used by the parties as well as arbitral institutions in Egypt. However, the author and another notable jurist[fn]Mohamed Abdel-Raouf, WORLD ARBITRATION REPORTER 2nd Edition (2019), page 26.[/fn] were not able to locate any Egyptian courts' judgments featuring or referring to these guidelines.

The fact that the IBA guidelines are available in Arabic language could be a stepping stone towards promoting their utilization in Egypt and other Arab jurisdictions. However, translation does not always suffice. The IBA has to act more proactively towards endorsing these guidelines through organizing multiple events and roundtables with Egyptian and Arab Judges in that respect. This would immensely support the incorporation of these guidelines in the Egyptian and Arab arbitration landscape.