

New Approval Required for Government Contracts and Arbitration Agreements in Egypt

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Egypt has been trying to control the number of investor-state arbitration disputes which has been steeply increasing since 2011 and the Arab Spring movement (see past discussion on the Blog here). To that end, Egypt created alternative out-of-court forums for amicable settlement of existing arbitration cases and worked toward curbing the eruption of new cases as much as possible. This post reviews some of those government efforts and, in particular, focuses on a new December 2020 Decree specifying the scope of governmental review and approval of all state contracts and arbitration agreements.

The Landscape of Relevant Decrees in Egypt

The Investment Law No. 72 of 2017 created special committees for the settlement of conflicts and disputes relating to investments and investment contracts. One of these committees is the Ministerial Committee for Resolving Complaints and Disputes that may arise between an Investor and the Government under Law 72/2017. The familiar short name of this committee is the Dispute Resolution Committee.

Another such committee is competent to settle disputes between investors and the government arising out of investment contracts. This committee is known as the Committee for the Settlement of Investment Contracts Disputes. In carrying out its job, the committee can reschedule financial dues, rectify inaccurate formalities followed to enter into the contract, or extend limitation periods specified in the contracts.

To ensure efficiency, Law No. 72/2017 provides that the decisions of these committees will be final and enforceable against the government/ state once approved by the Cabinet of Ministers. Investors, conversely, retain the right to resort to state courts or arbitral tribunals to initiate the claim anew.

The establishment of these committees resulted in the successful conclusion of a substantial number of investment arbitration cases. According to a previous Blog post, Egypt concluded 11 investor-state settlements between 2014 and 2020.

Furthermore, the Prime Minister issued Decree No. 1062 of 2019 to establish a ministerial committee to study existing investor-state arbitration cases and advise the government on how to best defend or settle such disputes. The committee's name was the Higher Commission for Studying and Opining on International Arbitration Cases ("**Commission**").

Most recently, in December 2020, the Prime Minister issued Decree No. 2592 of 2020 ("**Decree**") to rename the Commission to the Higher Commission for Arbitration and International Disputes; and more importantly, to expand its role from just studying and expressing an opinion on arbitration cases to carrying out a review of all state contracts and arbitration agreements before execution. According to the Decree, the Commission is currently mandated to:

- review contracts concluded between a foreign investor and any governmental entity or a company wholly or partially owned by the state; and
- draft the arbitration clause in such contracts as well as other 'governing clauses' such as those related to force majeure and the change of law.

The Decree prohibits all governmental entities and companies wholly or partially owned by the state from taking any of the following actions without referring the matter to the Commission for prior review:

- concluding or amending any contract with a foreign investor;
- agreeing to arbitrate; or
- taking any measure or action in relation to any arbitration dispute.

Prior Review of Government Contracts with a Foreign Investor

The Decree stipulates that the Commission will review all contracts concluded between a foreign investor and any governmental entity or state company and provide a 'no-objection' prior to execution.

The legality of such prior review requirement might be questionable under the principle of fair and equitable treatment of foreign investors given that contracts with national investors are not subject to such prior approval by the Commission.

The Decree comes in broad terms and general language to indicate that it will apply on all types of contracts regardless of their value, risk, subject matter, or the pertaining business sector. It will also apply to all companies wholly or partially owned by the state, no matter how minor the government shareholding percentage is.

The Decree does not provide a definition of what constitutes a 'foreign investor' nor how the corporate nationality will be defined. A company's nationality can be determined according to many criteria (e.g., the place of incorporation, ownership of shares, nationality of management, or repatriation of profits). According to Egyptian law, a company that is incorporated in Egypt will be categorized as having Egyptian nationality regardless of the ownership of its shares. Therefore, choosing an appropriate criterion of corporate nationality will be a challenging task, especially if it might lead to jeopardizing the important international investment principle that foreign investors should receive nondiscriminatory treatment.

The Committee is headed by the Prime Minister and includes in its membership the Minister of the Central Bank of Egypt, the Minister of Justice, the Minister of Petroleum, the Minister of International Cooperation, the Minister of Finance, the Minister of Public Business Sector, the Minister of Trade and Industry, the Head of the State Lawsuit Authority, representatives of the Ministry of Interior and the General Intelligence Authority. As such, it is composed only of high level political

and judicial figures rather than technical legal experts. It is accordingly questionable whether the members of the Commission will have the time or the technical expertise required to review and opine on each and every contract to be concluded with the government.

The Commission has a technical secretariat which will be headed by the Assistant of the Minister of Justice and will include a number of legal experts from the Minister of Justice as well as independent experts. The technical secretariat will carry out the legal works, meet on a monthly basis and will report to the Commission.

A question arises here as to the boundaries between the role of the Commission and that of the Advisory and Legislative Department within the Egyptian State Council. This department, according to the State Council law No. 47 for 1972, advises governmental entities on public law matters such as tenders and administrative contracts, and its consultation is mandatory with respect to government contracts with a value above EGP 5,000. In addition to the advisory department of the State Council, each governmental entity has an in-house member of the State Council who has an advisory role in relation to administrative law matters within the entity.

Additional Approval for Agreements to Arbitrate

The Egyptian Arbitration Law No. 27 for 1994 (the 'Arbitration Law') generally allows governmental entities and state companies to agree to arbitration of future disputes; only in the case of administrative contracts, the approval of the competent minister is required.

Nevertheless, by virtue of the Decree, all governmental entities and state companies are now prevented from signing any arbitration agreement without referring the matter first to the Commission to get its 'no objection' clearance. The Decree therefore comes with an additional layer of approval beside the one required under the Arbitration Law. Such additional approval however is broader in its scope as it applies to all government contracts not only the administrative ones.

Settling Existing Arbitration Disputes

Governmental entities and state-owned companies are prevented by virtue of the Decree from taking any measure or action in relation to any arbitration dispute without seeking the opinion of the Commission first. The Commission is charged in this respect with the following:

- approve the legal counsels, international experts, and the arbitrators who will be involved in arbitration cases;
- provide advice and opinion regarding the defence strategy, the defence adequacy and the sufficiency of evidence;
- assess the expected award and its impact;
- offer all needed legal support as may be requested by legal counsels;
- approve the costs and legal fees pertaining to arbitration cases; and
- suggest amicable settlement and lead negotiations with counterparties.

The tasks entrusted to the Commission in this respect are similar to those assigned to the abovementioned committees established under the Investment Law No. 72 for 2017 for the settlement of investment disputes. Such committees however are empowered to conclude settlement agreements with private counterparties and their decisions are binding on the relevant governmental authorities and have the force of a writ of execution (i.e., enforceable without the need to take any further legal action) once approved by the Cabinet of Ministers.

Conclusion

Private counterparties who intend to enter into an agreement for arbitration or settlement negotiations with an Egyptian governmental entity or a state company must ensure that the matter is first referred to the Commission in order to mitigate related enforcement risks.

A foreign investor should expect that their contract with the government will be reviewed by the Commission which is competent to draft the arbitration clause and other 'governing clauses' such as those related to force majeure and the change of law.

While developing standard contractual clauses for governmental contracts might

be suitable for lower value, low risk government contracts, it is unsuitable for specific industries which have their standard documents (e.g., construction forms) or for complex and high-risk projects which require bespoke contractual arrangement (e.g., large infrastructure and energy projects or PPPs).

The government of Egypt (including governmental entities and companies) plays an important role in the procurement of major projects in all business sectors especially the infrastructure, energy, and the construction sectors. Foreign investors therefore should be aware of the new involvement of the Authority which is expected to delay the negotiation and execution process of such contracts, as well as the related arbitration agreements.