Kluwer Arbitration Blog

Consequences of the Judicial Nature of Arbitration: An Egyptian Perspective

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Introduction

Although the nature of arbitration is still a matter of debate in the Egyptian legal system, the arbitration-friendly jurisprudence of Egyptian courts now supports the idea that the arbitration process is indeed of a judicial nature.

A clear example is provided by the Supreme Constitutional Court ("SCC"),[1)] which previously deemed Article 66 of the Public Sector Agencies and Companies Law No. 97 of 1983 ("Public Sector Law") unconstitutional. Article 66 stipulated that the decisions of arbitral tribunals constituted pursuant to Public Sector Law may not be subject to challenge by any means. In support of its stance, the SCC held that arbitral tribunals' awards rendered under Public Sector Law should be treated the same as courts judgements and voluntary arbitration awards governed by the Egyptian Arbitration Law ("EAL"), and that each of these types of judgments and awards are of judicial nature. Therefore, if arbitration under Public Sector Law is equal to voluntary arbitrations,[2)] voluntary arbitrations are equally of judicial nature.

The same idea is reflected in the Court of Appeal's[3)] prior holding that "*arbitration is a technical mean with a judicial nature that aims to settle a dispute*".

Therefore, the authors are of the view that arbitration proceedings in Egypt are indeed of judicial nature and the consequences of such view is the subject of this blog.

Consequences of Considering Arbitration Proceedings as Having a Judicial Nature

There are various consequences of arbitral proceedings being considered of a judicial nature related to (i) referral of disputes to and from arbitral tribunals; (ii) contradictions between court judgements and arbitral awards; (iii) conflict of jurisdiction between arbitral tribunals and domestic courts; and (iv) pleas of unconstitutionality. Each is discussed in turn.

(i) Referral of Disputes to and from Arbitral Tribunals

Article 110 of the Civil & Commercial Procedural Law ("CCPL") allows a domestic court to refer a case to another court, if the first court finds it lacks jurisdiction over the case in question. If we assume that arbitration proceedings are of a judicial nature, arbitral tribunals would be able to refer a certain case to a domestic court in the event that a tribunal decided it lacks jurisdiction over the dispute.

This is supported by the Supreme Administrative Court's decision that an arbitral tribunal constituted under Public Sector Law may refer a dispute to the competent court, if it lacks competence.[4] Although this decision was rendered within the context of arbitration under Public Sector Law, the same principle could be understood to apply equally to regular arbitration constituted according to the EAL. Thus, voluntary arbitration proceedings should be equal to arbitration under Public Sector Law.

Similarly, the Court of Cassation held that if the case lies within the jurisdiction of a Public Sector Law tribunal, the court still has to refer the case to that tribunal.[5] The Court of Cassation explained that although the *travaux preparatoires* of Article 110 referred to the main judicial branches (the civil and administrative courts), Article 110 was drafted with general and absolute terms. Thus, it applies also when the case falls within the jurisdiction of an entity with judicial competence.[6] Arbitral tribunals (even those other than the Public Sector tribunals) thus were held to be entities with judicial competence as will be explained below.

This conclusion could be practically problematic though, due to the special nature of arbitration if compared to state courts. First, arbitral tribunals do not have the same standing as domestic courts. A tribunal is normally constituted after the initiation of the arbitral proceedings, and is often appointed by the parties. Thus, if a court finds it has no competence and decides to refer the dispute, which entity should the court refer the dispute to? Even if this problem can be avoided to some extent (for example, in case of institutional arbitration, by referring the dispute to the relevant institution), what if the agreed arbitration is *ad hoc*?

However, this does not undermine the judicial nature of arbitration, nor does it affect the validity of a court's referral of cases to arbitration in theory. It only concerns a practical impediment that might affect the application of the rule in some exceptional cases (in cases of *ad hoc* arbitration), but does not affect the validity of that rule (*exceptio probat regulam*).

By way of example, before the current CCPL, referral did not previously occur between ordinary (civil) courts and State Council courts, for reasons related to both branches' independence vis-a-vis each other, before expressly providing for such referral in the current law. This did not mean that any of those branches was not a judicial entity.

Second, it could be argued that such referral is inconsistent with the voluntary nature of arbitration, which is based on the consent of the parties. Suppose that the claimant raised court proceedings against the respondent, and the latter made a jurisdictional plea that the court supposedly accepted. In that case, the claimant might not be willing to go to arbitration. To that effect, we may find arbitration proceedings initiated against the will of one party.

A possible response is that referral does not equate forcing the claimant to arbitration against its

will. In any case, the claimant can request termination of arbitration proceedings according to Article 48 of the EAL.

Third, in case the domestic court referred the dispute to the relevant institution, such referral decision may be challenged by the parties. Will the relevant institution proceed with the constitution of the arbitral tribunal to decide over the referred dispute or will the relevant institution decline to proceed with the arbitration and suspend the case while awaiting the outcome of the challenge against the referral decision?

An answer can be inferred by analogy from Article 13 of the EAL, which provides that if proceedings are initiated before a court in a matter that is subject to an arbitration agreement, such proceedings shall not hinder the initiation of the arbitration proceedings and the continuance thereof until an award is rendered. Thus, by the same means, if the referral judgment is challenged before the competent court, this should not prevent the arbitration proceedings from moving on until an award is rendered.

Fourth, what is the situation if the said relevant arbitration institution decided that it is incompetent to decide the referred dispute? Will the arbitration institution re-refer the dispute to the domestic court or refer the dispute to the other relevant arbitration institution? Or will it only decide its non-jurisdiction without any referral?

Yet, this is a case of passive conflict of jurisdiction that might also occur in cases of referral to domestic courts. In such case, the SCC shall be competent to decide on such conflict of jurisdiction, in accordance with Article 25 of the SCC Law.

It is to be noted that the Cairo Court of Appeal has recently stimulated some confusion concerning the nature of arbitration in Egypt. The judgement rendered by the Court of Appeal[7)] was related to annulment proceedings of an arbitral award that was rendered on 22 March 2013 by an *ad hoc* tribunal at the Cairo Regional Center for International Commercial Arbitration.

The Court annulled the award based on the non-jurisdiction of the *ad hoc* tribunal, as the dispute was under the auspices of the Unified Agreement for the Investment of Arab Capital in the Arab States, which provides for the jurisdiction of the Arab Investment Court to decide on disputes under its provisions. The Court, however, refused to refer the dispute to the entity that has jurisdiction (the Arab Investment Court) according to Article 110 of the CCPL.

Nevertheless, this should not cast doubt on the judicial nature of arbitration, since the Court was clear in its reasoning that the Arab Investment Court is not an Egyptian court, and thus the dispute may not be referred to it in accordance with Article 110 of the CCPL.

It is worth noting that Article 110 only allows the court to refer a dispute to an Egyptian court, stating that "*If the court decided that it lacks jurisdiction, it [the court] shall refer the dispute to the competent court…*". According to the Court's interpretation of this article, the referral of a case may only be to a domestic Egyptian court. Thus, the Court's reasoning may imply, *a contrario*, that if the tribunal had been Egyptian, the Court would have referred the dispute to it under Article 110. This is reinforced by the above-mentioned Supreme Administrative Court decision which held that arbitral tribunals constituted under Public Sector Law may refer a dispute to the competent court.[8)]

(ii) Contradictions Between Court Judgements and Arbitral Awards

Article 25 of the SCC Law grants an exclusive jurisdiction to the SCC to resolve conflict pertaining to enforcement of two contradictory judgements, one issued from a judicial authority or an authority with a judicial competence and the other from another of said authorities. Therefore, if the arbitration proceedings are to be considered of judicial nature, any conflict between an award rendered by an arbitral tribunal and a court judgement shall be resolved by the SCC.

Nonetheless, the above conclusion might be in contradiction with Article 58 of the EAL, which requires that an arbitral award not contradict a previous court judgement.

However, the SCC previously decided that it had competence to decide on the enforcement of two contradictory arbitral awards and a domestic court judgement. In this case, the SCC held that the arbitral award would be enforceable, since the arbitral tribunal had the exclusive jurisdiction over the subject matter of the dispute.[9)]

(iii) Conflict of Jurisdiction Between Arbitral Tribunals and Domestic Courts

The SCC is competent to decide on cases where there is a conflict of jurisdiction between a domestic court or an authority with judicial competence and another court or authority with judicial competence. If arbitration is to be considered of judicial nature, the SCC would have the final word in cases where the same dispute is filed before an arbitral tribunal and the other party rushes to file the same dispute before the domestic court. In this scenario, the SCC would have the final word on which proceedings would continue and which would be terminated.

(iv) Pleas of Unconstitutionality and Arbitration

The judicial nature of arbitral proceedings would mean that, pursuant to Article 29 of the SCC Law, an arbitral tribunal would be competent to refer constitutional pleas to the SCC in order to decide on the constitutionality of a law or regulation.

This could be achieved either by a party claiming the unconstitutionality of a certain provision of law or regulation, or the arbitral tribunal's initiative to suspend the arbitral proceedings and refer the question of constitutionality of a certain provision of a law or regulation to the SCC for its decision.

Conclusion

Based on the above, Egyptian law recognizes that arbitration is indeed of judicial nature. Although some of the consequences of this conclusion might be problematic from the practical aspect, practice will indeed be able to overcome such issues while reserving the judicial nature of arbitration.

This Blog expresses the authors' point of view only and not the firm's view.

References

?1 Supreme Constitutional Court, Challenge No. 95 of 20 JY, session dated 11 May 2003. *See also* Supreme Administrative Court, Challenge No. 35839 of 57 JY, session dated 7 February 2018 holding that arbitration is of judicial nature.

?2 Voluntary Arbitration or Regular Arbitration is meant to be arbitration that is subject to Arbitration Law No. 27 of 1994.

?3 Cairo Court of Appeal, Circuit (50), Challenge No. 17 of 135 JY, session dated 31 December 2018.

?4 Supreme Administrative Court, Challenge No. 35839 of 57 JY, session dated 7 February 2018.

?5 Court of Cassation, Challenge no. 634 JY 45, dated 27 March 1979.

?6 *Ibid*.

?7 Cairo Court of Appeal, Circuit (62), Challenge No. 39 of 130 JY, session dated 6 August 2018.

?8 *Supra* note 4.

?9 Supreme Constitutional Court, Challenge No. 8 of 22 JY, session dated 4 August 2001.