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The Egyptian Court of Cassation Sets Standards and Affirms Arbitration-Friendly Principles and Trends in a Ground-Breaking Judgment

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On 27 October 2020, the Egyptian Court of Cassation ("Court") rendered a ground-breaking judgment that is demonstrative of the Court's appreciation of ongoing global developments in the field of arbitration (a courtesy translation prepared by the author of this post is available here).

The case pertains to a domestic construction dispute under a subcontract that included an institutional arbitration clause. Owing to disputes between the contracting parties, an arbitration case was filed and an award was rendered in favour of the subcontractor. The contractor filed for annulment before the Cairo Court of Appeal, and a subsequent further challenge was lodged before the Court.

The Court addressed and analyzed the grounds for the challenge, and ultimately dismissed it. In the context of its analysis and reasoning, the Court affirmed certain general principles of Egyptian law and acknowledged and recognized certain trends in arbitration. Amongst the principles espoused by the Court are *estoppel and resorting to general principles of law as a source of legal principles*, *prohibition of taking advantage of one's own wrongdoing*, the *right to representation in arbitration by foreign lawyers and/or non-lawyers*, the *distinction between the 'seat/place of arbitration' and the 'venue for certain aspects of the proceedings'*, and the *limited judicial review of awards in a nullity action*. The Egyptian Court of Cassation also made passing references to the '*notion of delocalization*' and the practice of '*virtual hearings*'.

Prohibition of taking advantage of one's own wrongdoing, estoppel and resorting to general principles of law as a source of legal principles

The Court held that if a party continued with the arbitration proceedings, without an objection, despite its knowledge of a breach of a condition of the arbitration agreement or one of the non-mandatory provisions of the Egyptian Arbitration Law No. 27 of 1994 ("EAL"), this would be deemed a waiver of his/her right to object. The Court found that the appellant had participated in the arbitration without objecting and in full knowledge that the agreement was concluded by the vice-chairman of the board of directors, and went further to hold that even if the appellant had invoked this objection earlier, the challenge would still be rejected because a person may not benefit from his/her own wrongdoing. The Court also added that the principle of estoppel would

militate against the success of the appellant's plea, and remarked that estoppel is in application of the universal maxim '*non concedit venire contra factum proprium*' which is derived from Roman law.[1)]

The Court innovatively unveiled two conditions for application of this principle, these are: (i) a statement, an act, or an omission is made by a party and contradicts with its previous conduct; and (ii) that contradiction would prejudice the other party who acted in reliance on the validity of the first party's previous conduct. Whilst the Court did not expressly refer to Islamic Shari'a in this context, it is worth noting that the principle of estoppel is also derived from Islamic Shari'a where no party may revoke what he/she has undertaken, concluded or consented to. It is also worth mentioning that estoppel is considered a variant of good faith.[2)]

The fact that the principles of *no party may benefit from its own wrongdoing* and *estoppel* are not expressed in Egyptian legislative texts does not negate their inclusion as overarching general principles of Egyptian law. The Court correctly affirmed the diversity of sources of legal principles and norms when it expressly referred to the long-forgotten and rarely invoked Article 1(2) of the Egyptian Civil Code No. 131 of 1948, which lists the sources of legal principles.[3)]

Party representation in arbitration proceedings

The Court made several important findings and determinations, these are: (i) parties in Egyptian-seated arbitrations need not be Egyptian lawyers, despite the express reference in the Advocacy Law No. 17 for 1983 and that the subsequently enacted EAL, which is the *lex specialis* that trumps any express requirement of Egyptian lawyers in the Advocacy Law, does not include any restrictions or limitations on the parties' right of representation; (ii) parties to an arbitration can elect to be represented by persons of their choice, whether lawyers or non-lawyers, Egyptians or foreigners in domestic or international arbitration; and (iii) rules relating to party representation in arbitration are not part of Egyptian public policy.[4)] The Court also emphasized that arbitration has gradually distanced itself from strict territorial limitations following the release of the New York Convention on the Recognition and enforcement of Foreign Arbitral Awards (1958).

Modernization of arbitration and virtual hearings

The Court held that arbitration has gradually shifted away from the traditional notion of localization. The Court did not expressly refer to arbitration as an autonomous legal order as championed and endorsed by French courts,[5)] but such reference was used to anchor the distinction between the notions of '*legal seat/place*' and '*geographical venue*' (already expressed in Article 28 of the EAL), and to expressly acknowledge that "*virtual hearings*" are increasingly used in arbitrations across the globe.

The Court was keen on incorporating an express reference to '*virtual hearings*' (in English) in its judgment, and this came across as a coded message that virtual hearings are consistent with Egyptian law, which does not include any express prohibition of virtual hearings. In essence, this is a ground-breaking statement, whereby the Court signals that if parties wish to try and set aside

arbitral awards on the sheer ground that a hearing is held virtually, this may not fly as a matter of principle.[6)] Accordingly, concerned parties would need to establish how, if at all, virtual hearings would encroach upon their fundamental rights on a case-by-case basis.

Role of arbitrators and the review of arbitral awards

The Court remarked that it is common in arbitration for parties to choose arbitrators with technical knowledge and expertise on the subject matter of the dispute. The Court did not consider this sufficient to render arbitrators partial. In that specific Case, the Court found no evidence that the arbitrators decided the case on the basis of the personal knowledge of the facts.

The Court also confirmed that arbitral awards may not be reviewed on the merits and that a setting aside action is not an appeal. Accordingly, judicial review of awards should not transcend the normative limitations and courts may not (i) review the arbitral tribunal's understanding and assessment of the facts; and (ii) ascertain whether the arbitral tribunal erred on the application of the law governing the merits. The Court also held that there is a presumption that the proceedings have been properly conducted, which implies that the party, which claims otherwise, would naturally bear the burden of proof. The Court emphasized that the grounds for setting aside arbitral awards are exhaustively defined in Article 53 of the EAL and that the Court may not review the arbitral award to examine its adequacy/appropriateness and/or to ascertain the soundness of the determinations of the arbitrators.

Concluding remarks

This landmark judgment serves as a further welcomed development, affirming the Court's willingness to boldly set standards and principles that are of utmost importance for users. It also affirms the leading edge of the Egyptian judiciary within Africa, the MENA region and beyond. This wide-ranging judgment serves as a beacon of hope and a clear testament to the indispensable role of the judiciary in supporting the legitimacy and development of arbitration.

The Court capably navigated its way through intricate procedural and substantive issues, and reminded us of the unequivocal fact that the law goes well above and beyond the four corners of legislative texts. To all those familiar with Egyptian law and the fact that the judgments of Egyptian courts do set principles and address legal issues that are not necessarily fact-specific, it is clear that the Court seized an opportune moment to showcase its support to credible arbitration proceedings and its commitment to aligning Egypt with best practices in international arbitration.

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References

?1 This is not the first time the Egyptian Court of Cassation affirms the existence of the principle of estoppel as a matter of Egyptian law. As early as the 1950s, the Egyptian Court of Cassation affirmed the existence of the principle of estoppel, *albeit* in a non-arbitration context. In 1952, by way of example, the Egyptian Court of Cassation unequivocally held (in Challenge No. 171 of Judicial Year 20, Court Session of 3 April 1952) that "*he/she whomever seeks/attempts to negate what he/she has previously consented to/acknowledged/undertaken shall be estopped/prevented from doing so*". The Arabic words used in that judgment to refer to the principle of estoppel mirror those used in the 27 October 2020 judgment.

?2 See for example, the Cairo Court of Appeal, Challenge No. 57 of judicial year 128, hearing session dated 4 April 2012; the Cairo Court of Appeal, Challenges Nos. 35, 41, 44 and 45 of judicial year 129, hearing session dated 5 February 2013.

?3 Article 1(2) of the Egyptian Civil Code states "*if there is no applicable legislative provision, the judge shall rule on the basis of custom, and if it does not exist, [the judge shall rule] by virtue of the principles of Islamic sharia, and if they do not exist, [then the judge shall rule] according to principles of natural law and rules of equity*" [Bracketed words added for clarity].

?4 On the issue of appearance of foreign counsel in arbitrations seated in Egypt, see Amr Omran, '*The Appearance of Foreign Counsel in International Arbitration: The Case of Egypt*' (2017), 34(5) Journal of International Arbitration, pp. 901-920.

?5 On the existence of an arbitral legal order that is distinct from national legal systems, see Emmanuel Gaillard, '*Legal theory of International Arbitration*' (2010), Martinus Nijhoff Publishers, Leiden, pp.52-66.

?6 This is consistent with the ICT revolution that the Egyptian judiciary is undergoing. By way of example, a recent Law No 146 of 2019 was enacted to amend Law No 120 of 2008 establishing the Economic Courts, and the new 2019 amendments provide for the possibility of conducting court proceedings electronically. Moreover, the Egyptian State is currently preparing a draft law aimed at introducing amendments to the Criminal Procedures Law, whereby the competent investigating or trial authority may conduct all or part of the investigations remotely, noting that a criminal trial has already taken place online in 2020 owing to the COVID-19 crisis.