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Arbitrating Government Contracts in Egypt

Observations on DIPCO v. Damietta Port Authority

ALEXANDER HILLER[1]

Egypt – Arbitrability – Public policy – BOT – Concession – Public works – Administrative contract – Government contract – Public private partnership

Summary

In a recent judgment regarding the development of the port of Damietta, the Egyptian Court of Cassation held that public policy considerations prevent arbitral tribunals from ruling on Cabinet approvals of certain government contracts. This article provides an overview of the key tenets of the judgment and their impact on government contract arbitration in Middle East. It discusses the essential reasoning of the award and the subsequent judgments, and puts them in the context of previous jurisprudence. A striking feature of the Court of Cassation's decision is its conclusion qualifying the approval of the contract as an administrative decision. As a consequence, the existence and validity of the approval was held to be inarbitrable – even if the arbitration does not concern the approval as such, but rather the financial rights arising out of the concession. This outcome adds to the uncertainties associated with administrative approvals and may render arbitration involving such approvals practically unfeasible. Given the influence of Egyptian jurisprudence, courts elsewhere in the Arab world may be inspired to take a similar stance. Investors entering into such contracts are well-advised to ensure that all necessary approvals clear and unequivocal; parties and arbitrators should be aware that an award may be susceptible to a challenge and enforcement may be necessary outside of Egypt.

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I. Introduction

Contracts between foreign investors and a host state entity, it seems, form a red thread tightly woven into the fabric of modern arbitration in Arab states. It does not take specialised knowledge to recognise the contribution to modern arbitration made by, e.g., the petroleum arbitrations or cases such as *Chromalloy*, *Westland Helicopters* or *Southern Pacific Properties*. In recent decades, much ink has been spilled (and some might say: wasted) over the host state's right to invoke its domestic law to evade its obligation to arbitrate.

It may be surprising, then, that some questions still remain unanswered. It may be less surprising that these questions are not devised by legal scholars, but happen to arise in real life. The arbitration between the Damietta Port Authority (DPA) and the Damietta International Port Corporation (DIPCO) is such an occurrence. The decision was triggered by a rather obscure amendment to the law regarding special ports. The legal issues raised by the Egyptian Court of Cassation, however, bear the potential to severely affect any government contract in Egypt, rendering the arbitration of state contracts impractical at best.

II. Summary of the Facts and Proceedings

In 2006, the DPA awarded a 40-year concession to DIPCO, an investment vehicle owned by a majority of Kuwaiti shareholders, regarding the establishment of a new container terminal in the Mediterranean port of Damietta. The concession covered the design, development, construction and operation of the terminal; it was later characterised by the Egyptian courts as a build-operate-transfer (BOT) contract.[2] Technical and financial difficulties led to a dispute between the DPA and DIPCO, which was initially settled in 2009 by way of a novation agreement and two contract addenda.[3]

As the works continued, so did the quarrels between the parties. Ultimately, the DPA notified DIPCO of the unilateral termination of the concession in August of 2015, which was approved by the Prime Minister's decree no. 2799/2015.[4] In response, DIPCO initiated an ICC arbitration seeking damages for what it claimed to be a breach of the principle of good faith and an unjustified termination of the contract.

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2 Cairo Court of Appeal, judgment dated 9 December 2020, case no. 48, 137th judicial year, at paras. 1 and 2; Egyptian Court of Cassation, judgment dated 8 July 2021, cases no. 1964 and 1968, 91st judicial year, at p. 5.

3 Cairo Court of Appeal, *ibid.*, at para. 3.

4 *Ibid.*, at para. 5.

The arbitral tribunal, by majority, came to the conclusion that DIPCO was not entitled to damages for a breach of the concession. This was because the addenda, which formed the basis of the damages claim, were invalid.

The legal basis of that conclusion was article 4bis of law no. 1/1996 regarding special ports, introduced by law no. 22/1998. The provision allows parties to a port concession to derogate from the traditional concession laws with the approval of the council of ministers (i.e., the Cabinet). It reads, in the pertinent parts:

> *"[C]oncessions for public utilities may be granted to Egyptian or other investors, be they domestic or foreign natural or legal persons, for the establishment of general or special ports or specialised quays at existing ports and their administration, utilisation, maintenance and for charging fees for their use, without the limitations of the law no. 129/1947 regulating the granting of concessions and public utilities and law no. 61/1958 regulating concessions on public services […].*
>
> *And the concession and the determination of its conditions and provisions or their amendment […] is* ***issued through a decision of the council of ministers*** *upon recommendation of the competent minister."*[5]

According to the arbitral tribunal, the outcome of the arbitration depended on the question whether the Cabinet had rendered such a decision.[6] It discussed a number of exhibits which may have documented at least an implicit approval. These documents included (i) an extract of the minutes of a Cabinet meeting, (ii) a letter from the Minister of Transportation, attaching a statement of the Minister of Transportation and the Minister of Investment regarding the opinion of the Cabinet, (iii) the approval of the termination of the concession and (iv) a letter from the Cabinet Secretary General to the Minister of Transportation communicating the Cabinet's approval of the second addendum.[7]

The majority held that none of these documents were sufficient to demonstrate compliance with article 4bis of law no. 1/1996.[8] The majority further found that DIPCO was therefore not entitled to damages as a result of

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5 Author's translation; emphasis added.

6 The tribunal found that the original concession was duly approved. See ICC Case No. 21341/MCP/DDA/AYZ (c-21413/DDA), Award dated 9 February 2020, at paras. 900-902.

7 *Ibid.*, at paras. 886, 896, 915 and 920.

8 *Ibid.*, at paras. 915, 918 and 926-927.

a breach of contract. Instead, given that the basis for payments under the addenda never existed, it held the DPA liable to pay to DIPCO approximately USD 303 million (plus interest and costs) on the basis of unjust enrichment.[9]

The DPA challenged the award before the Cairo Court of Appeal, asserting that the BOT contract was an administrative contract over which the administrative courts exercise exclusive jurisdiction. The DPA contended that the arbitral tribunal's adjudication of such a dispute contravened public policy.[10] DIPCO, on the other hand, responded that a concession, by its nature, is arbitrable and that the DPA had not raised the issue in the arbitral proceedings.[11]

The Cairo Court of Appeal rejected the DPA's challenge, noting that Egyptian law considers monetary rights arising out of administrative contracts to be arbitrable.[12] The court added that arbitral tribunals can apply mandatory laws (such as article 4[bis] of law no. 1/1996), even if they form part of public policy. Awards misapplying such provisions may only be set aside if the misapplication is manifest and affect the outcome of the arbitration.[13]

III. The Decision of the Court of Cassation

The Court of Cassation set aside the appeal judgment and, consequently, annulled the award. Its decision is based on three core determinations.

First, the Court of Cassation held that BOT contracts fall within the category of administrative contracts.[14] The concept of administrative contracts was adopted by the Egyptian administrative judiciary from French law. As the Egyptian Court of Cassation noted, a contract is characterised as administrative under Egyptian law if it meets three conditions: it must be concluded by a public entity, have as its object the establishment, operation or maintenance of public utilities (Arabic: *marāfiq al-'āmma*, corresponding to the French notion of *services publics*), and must provide the public entity with exorbitant powers beyond those ordinarily available to private parties.[15] The administrative courts

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9 *Ibid.*, at paras. 927 and 1013(c)).

10 Cairo Court of Appeal, judgment dated 9 December 2020, case no. 48, 137th judicial year, at para. 16.

11 *Ibid.*, at para. 18.

12 *Ibid.*, at paras. 20 and 24.

13 *Ibid.*, at para. 28.

14 Egyptian Court of Cassation, judgment dated 8 July 2021, cases no. 1964 and 1968, 91st judicial year, at pp. 5 and 9.

15 *Ibid.*, at p. 5. See also Administrative Court of Justice, case no. 11492, 65th judicial year, judgment dated 7 May 2011, 12 (2011) Mağallat at-taḥkīm al-'alamīya, pp. 585-641, at

(known as the State Council or *al-Mağlis ad-Dawla* in Arabic) have exclusive jurisdiction over disputes involving administrative contracts pursuant to article 10(11) of the State Council Law no. 47/1972.

The Court of Cassation's reasoning is straightforward: Since the contract in dispute meets the three prerequisites of an administrative contract, it is an administrative contract.[16]

Second, the Court of Cassation held that the decision of the Cabinet pursuant to article 4bis of law no. 1/1996 must be qualified as an administrative decision.[17] As a starting point, the Court of Cassation apparently agreed with the arbitral tribunal which had held that the approval pursuant to article 4bis of law no. 1/1996 is required for the validity of the substantive contract or its amendment, and not merely for an exemption from the traditional concession laws. The court added that the approval is an administrative decision. This decision is a procedural step towards the conclusion of the contract; yet it is independent of the contract and does not follow the same rules.[18]

In the opinion of the Court of Cassation, the State Council has the exclusive jurisdiction to invalidate administrative decisions pursuant to article 190 of the Egyptian Constitution of 2014, as well as articles 10(5), (11) and (14) of the State Council law.[19] These provisions concern the delimitation of the jurisdiction of ordinary and administrative courts. This determination forms part of public policy and is, as such, not subject to party agreement—including the agreement to arbitrate.[20]

Third, the Court of Cassation argued that administrative decisions (as opposed to administrative contracts) are not considered as arbitrable under Egyptian law. Therefore, an arbitral award opining on the validity or existence of such a decision violates public policy and must be set aside.[21]

In the eyes of the Court of Cassation, the arbitral tribunal had violated Egyptian public policy,

> *"when it decided to dismiss the decision issued by the Prime Minister […] approving the agreement on the amicable*

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p. 630; Ahmed Sadek El-Kosheri/Tarek Fouad Riad, New Generation of petroleum agreements, ICSID Review 1986, pp. 257-288, at p. 260; Mansour Saeed, Legal protection of Economic Development Agreements, Arab Law Quarterly 2002, pp. 150-177, at p. 155.

16 Egyptian Court of Cassation, judgment dated 8 July 2021, cases no. 1964 and 1968, 91st judicial year, at pp. 5 and 10.

17 *Ibid.*, at pp. 5-6.

18 *Ibid.*

19 *Ibid.*, at p. 6.

20 *Ibid.*

21 *Ibid.*

> *settlement dated 5 May 2009 and addenda 1 and 2 and when it decided that it was not rendered according to the requirements of article 4bis […], concluding that that it was not valid, thus turning to the decision on the lawfulness of this administrative decision even though this was beyond the authority of the arbitral tribunal".*[22]

The Court of Cassation went on to explain that the arbitral tribunal made a decision on the existence and formal validity of an administrative decision, thereby implicitly accepting its authority to rule on such a matter. This implicit assumption of its authority was, according to the Court of Cassation, contrary to Egyptian public policy.[23]

The Court of Cassation instead proposed that the arbitral tribunal should have stayed the arbitration pursuant to article 46 of the Egyptian Arbitration Law,[24] which provides:

> *"If during the arbitral proceedings a question arises which is outside the authority of the arbitral tribunal […] the arbitral tribunal may continue to assess the substance of the arbitration if it considers that this question […] is not necessary for the decision on the substance of the dispute, and otherwise it stays the proceedings until a final judgment on that question is rendered […]."*[25]

The Court of Cassation thus considered the validity or existence of the requisite Cabinet decision to be such a preliminary question outside the authority of the arbitral tribunal.

The Court of Cassation further explained that the privileges enjoyed by the administration as a party to an administrative contract serve to ensure the uninterrupted operation and functionality of public utilities.[26] These privileges are of a non-financial character and cannot be the object of a settlement as they relate to public policy. The Court of Cassation reproached the arbitral tribunal for its analysis which sets the parties on equal footing, disregarding the DPA's privileged position.[27]

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22 *Ibid.,* at p. 7 (author's translation).

23 *Ibid*.

24 *Ibid.*

25 Author's translation.

26 Egyptian Court of Cassation, judgment dated 8 July 2021, cases no. 1964 and 1968, 91st judicial year, at p. 13.

27 *Ibid.* (referring to paras. 964-943 of the award).

IV. The Legal Nature of the BOT Contract

Government contracts between private investors and the Egyptian state or its entities are governed by a variety of laws whose scope and effect are not easily distinguished. Beyond the rules of general administrative law and the early laws on concessions,[28] recent decades have seen a rise in legislation regulating government contracts with certain characteristics (such as the BOT, PPP and Investment laws and their executive regulations) and in specific sectors (such as the energy, airport and maritime port sectors).[29] The qualification of a contract as a matter of private or public law has a potential impact on both the substantive and procedural level, including the jurisdiction over challenges to an arbitral award.

A. The BOT Contract – Private or Administrative Contract?

The qualification of BOT contracts as private or administrative contracts was addressed in the Egyptian Supreme Constitutional Court's landmark decision in the so-called *Malicorp* case. The *Malicorp* tribunal had dealt with a BOT contract for an airport, concluded between a company incorporated in England and the Egyptian Minister of Civil Aviation. The Egyptian Supreme Constitutional Court was called upon to decide whether the ordinary or the administrative courts had jurisdiction to annul the award.[30] The Supreme Constitutional Court noted that the BOT contract in question bore all characteristics of an administrative contract and must therefore be qualified as such.[31]

It is easy to see that the *Malicorp* decision provided the groundwork for the decision of the Court of Cassation. Regardless, the Court of Cassation's ruling in *DIPCO* was not as straightforward as it might first seem, for two reasons.

First, the Cairo Court of Appeal had proposed a rather differentiated approach in its initial decision on the challenge. Regarding the qualification of BOT contracts as civil or administrative contracts, the Court of Appeal

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28 Most notably the traditional concession laws no. 129/1947 and no. 61/1958, and articles 668 *et seq.* of the Egyptian Civil Code regulating concessions on public utilities.

29 See below, Section V. A.

30 Egyptian Supreme Constitutional Court, judgment dated 15 January 2012, case no. 47, 31st judicial year, published in English in BCDR International Arbitration Review 2016 (English section), pp. 97-104. For an overview of the details of the facts and procedures see Julien Fouret, The MALICORP Saga: A Spaghetti Bowl of Proceedings, International Journal of Arab Arbitration 2012 (issue 2), pp. 7-27.

31 Egyptian Supreme Constitutional Court, *ibid.*, at p. 103.

found that BOT contracts do not fall within either category completely.[32] In its opinion, these contracts give rise to a multitude of legal relationships which cannot be subjected to a single legal system.[33] However, according to the Court of Appeal "in light of the majority of its content […] and international legal concepts, they are contracts of private law – civil law contracts […]".[34] The Cairo Court of Appeal had previously alluded as much in its now notorious judgment in *Al-Kharafi v. Libya*, when it quoted the arbitral tribunal's ruling that the BOT contract must be qualified as a private law contract "pursuant to Libyan and international criteria".[35] In its *DIPCO* judgment, the Court of Appeal added that a BOT contract can be separated into several phases: the first ("Build") phase is essentially a construction contract subject to contractual liability (under private law); in the subsequent ("Operate") phase, the contractual principles become less and less marked, giving way to the objectives of public services that start to overweigh.[36]

Second, the principle laid out in the *Malicorp* judgment collided with another provision, namely article 4bis of law no. 1/1996. In the judgment subject to cassation, the Cairo Court of Appeal had noted that article 4bis clearly states that the administrative authorities are not bound by the restrictions of the traditional concession laws, i.e., laws no. 29/1947 and 61/1958. Therefore, the administration may enter into concession agreements without the need to comply with the conditions and procedures of this somewhat antiquated legislation.[37] It has been suggested that this provision must therefore be understood to mean that special port concessions cannot be characterised as administrative contracts.[38]

The Court of Cassation does not go into the intricacies of this legislation and rejects the differentiated approach of the Court of Appeal. The concession may show some characteristics of private law contracts. But in essence, they

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32 Cairo Court of Appeal, judgment dated 9 December 2020, case no. 48, 137th judicial year, at para. 21.

33 *Ibid.*

34 *Ibid.* (author's translation).

35 Cairo Court of Appeal, judgment dated 3 June 2020, case no. 39, 130th judicial year, at section 1. B. (author's translation).

36 Cairo Court of Appeal, judgment dated 9 December 2020, case no. 48, 137th judicial year, at para. 22. The Court of Appeal does not mention the "Transfer" phase.

37 *Ibid.*, at para. 23.

38 Mohamed Abdel Magid Ismail, Legal Globalisation and PPPs in Egypt, European Procurement and Public Private Partnership Law 2010, pp. 54-67, at p. 62.

are public work contracts which are administrative contracts,[39] per the definition of article 10(11) of the State Council law.[40] Therefore, the exceptional, public law character takes priority.[41]

B. Jurisdiction over the Challenge to the Award

The qualification of the BOT contract as an administrative contract raises the question why the ordinary courts, rather than the State Council, have jurisdiction to rule on the challenge to the award. This question, too, was addressed by the Egyptian Supreme Constitutional Court in *Malicorp*.

The Supreme Constitutional Court pointed to article 9(1) of the Egyptian Arbitration Law. This provision confers the competence to set aside an arbitral award on the court which, absent an arbitration agreement, would hear appeals against a first instance judgment. In administrative disputes, that court would be the Supreme Administrative Court.[42] The Supreme Constitutional Court also pointed out the exception to that rule set out in the same provision: in international[43] commercial arbitrations, the Cairo Court of Appeal has exclusive competence. That exclusive competence even extends to the jurisdiction over administrative disputes, as the Supreme Constitutional Court clarified.[44]

The Supreme Constitutional Court noted that the BOT contract in *Malicorp* involved an economic interest and was therefore "commercial" for

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39 Egyptian Court of Cassation, judgment dated 8 July 2021, cases no. 1964 and 1968, 91st judicial year, at p. 5.

40 Article 10(11) of the State Council Law provides that the State Council has exclusive competence to decide "disputes over concessions, public works contracts […] or any **other** administrative contract" (author's translation; emphasis added).

41 Egyptian Court of Cassation, judgment dated 8 July 2021, cases no. 1964 and 1968, 91st judicial year, at p. 5.

42 Egyptian Supreme Constitutional Court, judgment dated 15 January 2012, case no. 47, 31st judicial year, published in English in BCDR International Arbitration Review 2016 (English section), pp. 97-104, at p. 101.

43 The issue of when an arbitration is considered international has given rise to a heated debate among Egyptian scholars. A contribution to the debate in English is made by Mohamed Abdel Wahab, The "Deemed" Internationalisation of Arbitration under Egyptian Arbitration Law No. 27 of 1994 – Considerations beyond Hope and Fear, BCDR International Arbitration Review 2016 (English section), pp. 47-64, at p. 57. A French translation of a Cairo Court of Appeal judgment taking a different view is provided in Cahiers d'Arbitrage 2017, p. 566.

44 Egyptian Supreme Constitutional Court, judgment dated 15 January 2012, case no. 47, 31st judicial year, published in English in BCDR International Arbitration Review 2016 (English section), pp. 97-104, at pp. 103-104.

the purposes of the Egyptian Arbitration Law, despite its administrative nature.[45] As the arbitration was also "international", the court held that the Cairo Court of Appeal had jurisdiction to decide the challenge.[46]

In other words, arbitral awards dealing with administrative contracts can be challenged before the Cairo Court of Appeal if they are both commercial and international in nature. If they are not, the challenge will be decided by the administrative courts.

With this in mind, it stands to reason that there was some critical international element to the *DIPCO* dispute. The decisions mention two elements which might confer an international character on this arbitration. First, as noted by the Cairo Court of Appeal in passing, the main capital contribution to DIPCO was of Kuwaiti provenance.[47] Second, even though the arbitration took place on CRCICA premises in Cairo, it was held under the auspices of a foreign arbitral institution, namely the ICC.[48]

However, both elements are mentioned in a different context. The courts do not discuss the international character of the dispute explicitly, and any attempt at an answer to this question would be speculative.

V. The Requirement of Cabinet Approval

The farthest-reaching aspect of the decision of the Court of Cassation is, arguably, the qualification of the Cabinet approval as an administrative decision. To understand the consequences of that qualification, it is appropriate to first provide a brief overview of the various approvals which may be necessary when contracting with the state. After discussing the *Omar Effendi* case as an example of the considerations associated with such contracts in a next step, the *DIPCO* decision is put into context.

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45 *Ibid.*, at p. 103 (referring to article 2 of the Egyptian Arbitration Law).

46 *Ibid.*, at p. 104.

47 Cairo Court of Appeal, judgment dated 9 December 2020, case no. 48, 137th judicial year, at para. 2. The main shareholder is identified as KGL Ports International at para. 183 of the award.

48 See the second paragraph of article 3 of the Egyptian Arbitration Law which stipulates that an arbitration is international "if the parties to the arbitration agree to resort to a permanent arbitral organisation or a centre for arbitration having its seat within the Arab Republic of Egypt or outside it" (author's translation). However, the exact scope of article 3 and its second paragraph is subject to debate, see the references in footnote 43.

A. Approval Requirements in Egypt

The list of approval requirements for government contracts with Egyptian state parties is long. It appears, in fact, as though there is barely a piece of legislation on government contracts which does not provide for some type of approval by a minister or ministry-level committee. A non-exhaustive list includes:

- the Cabinet approval allowing for BOT concessions derogating from the concession laws in certain sectors;[49]
- the approval of the competent minister to enter into arbitration agreements relating to administrative contracts;[50]
- the opinion of the *fatwa* department of the State Council on any contract, settlement, arbitration agreement and relating to administrative contracts exceeding a value of 5,000 Egyptian Pounds;[51] and
- the approval of the Supreme Committee for Public Private Partnerships of the amendment of contract conditions and the conclusion of arbitration agreements.[52]

A recent addition is the Prime Minister's decree no. 2592/2020, which establishes the seventeen-member Supreme Authority for Arbitration and International Disputes. Pursuant to article 2(2) of the decree, the competence of the Supreme Authority includes the review of arbitration clauses in international investment contracts before the conclusion of the contract.

It is still not entirely clear how these approval requirements interact in case of a conflict. Nor is it always certain whether they affect the validity of the agreement between a public and a private entity. For instance, failure to request an opinion of the *fatwa* department in accordance with article 58(3) of

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49 Article 12bis of law no. 84/1968 regarding public roads, article 7 of law no. 100/1996 regarding the Energy Agency, article 1 of law no. 3/1997 regarding airport concessions and the provision subject to the *DIPCO* dispute, article 4bis of law no. 1/1996.

50 Article 1(2) of the Egyptian Arbitration Law; see below, Section B. The arbitration clause contained in the contract between DIPCO and the DPA was duly approved by the competent Minister of Transportation, see Cairo Court of Appeal, judgment dated 9 December 2020, case no. 48, 137th judicial year, at para. 6.

51 Article 58(3) of the Egyptian State Council Law.

52 Articles 7 and 35(2) of the Egyptian Public Private Partnership law no. 67/2010. Pursuant to article 14 of the same law, the Supreme Committee includes the Prime Minister, the head of the PPP Central Unit and at least six more Ministers, with the option to add more Ministers to the committee.

the State Council Law does not render the agreement invalid, and may only bring about disciplinary consequences.[53]

B. The *Omar Effendi* Decision of the State Council

To gain a better understanding of the matter, the seminal decision revolving around the privatisation of the once-iconic *Omar Effendi* retail company may serve as a case study.

After its nationalisation in 1957, the company had run into financial trouble. In 2001, it was decided to re-privatise the company by selling 90% of its shares in accordance with the public tender law no. 89/1998.[54] The tender was awarded to the only bidder, a Saudi investor. The sale of a national icon for what was claimed to be too low a price, coupled with the dismissal of employees, lead to a public outcry. Former employees banded together and sued the investor in the administrative courts, demanding the invalidation of the privatisation contract.[55]

The case was brought to the administrative court of appeal at the State Council, known as the Administrative Court of Justice. The Administrative Court of Justice accepted the claim and invalidated the privatisation contract. Among the many points discussed by the Administrative Court of Justice, two are of interest with a view to the Court of Cassation's judgment on the Damietta port project.

First, the Administrative Court of Justice raised on its own motion the jurisdiction of the State Council. It explained that the administrative courts have jurisdiction irrespective of the private or administrative character of the privatisation agreements. This is because of the staggered approach underlying the tender process: the phase leading up to the conclusion of the contract (the first phase) pertains to the domain of public law, and the decision to award the contract is an administrative decision.[56] The privatisation agreement (the second phase) may be either an administrative or private contract. However, the administrative courts exert exclusive jurisdiction over challenges to the administrative decisions rendered in the first phase.[57]

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53 See Egyptian Court of Cassation, judgment dated 23 June 1964, case no. 62, 27th judicial year, year 15 of the official bulletin, vol. 2, no. 133, p. 857.

54 Egyptian Administrative Court of Justice, judgment dated 7 May 2011, case no. 11492, 65th judicial year, Mağallat at-taḥkīm al-'alamīya 2011, pp. 585-641, at pp. 591-592.

55 See *ibid.,* at pp. 593-594.

56 *Ibid.,* at pp. 586, 591 and 600-601.

57 *Ibid.,* at p. 591. See also article 10(11) of the State Council law cited above, Section IV.

Second, the Administrative Court of Justice found that it was not bound by a previous arbitral award in that matter because the privatisation agreements were, in fact, administrative contracts and the arbitration clause was not approved by the competent minister pursuant to article 1(2) of the Egyptian Arbitration Law.[58] By contrast to its position on the decision to privatise, however, it did not consider the minister's approval to be an independent administrative decision. According to the Administrative Court of Justice, the approval is a matter of authority to enter into the arbitration agreement on behalf of the public entity, akin to the powers of a guardian of a minor.[59] In a subsequent decision in *National Gas*, the Egyptian Court of Cassation followed that reasoning almost word by word.[60]

C. Decision of the Court of Cassation

Without explicitly referring to the staggered approach described by the State Council, the Court of Cassation appears to apply the same principle on the Cabinet approval of special port concessions. In the opinion of the Court of Cassation, article 4bis of law no. 1/1996 does not govern the authority to enter into such contracts. Rather, the approval is an administrative decision which is detachable from the contract and, as such, can be an independent object of judicial review.[61] Accordingly, the rules applying to provisions governing authority (including special provisions such as article 1(2) of the Egyptian Arbitration Law) cannot be applied to the Cabinet approval pursuant to article 4bis of law no. 1/1996.

VI. Arbitrability and Public Policy

Characterising the Cabinet approval as a separate administrative decision is decisive for the outcome of the case. Whereas the validity of the contract subject to arbitration – including the authority to enter into it – can, as a general rule, be decided by an arbitral tribunal, the same cannot be said for administrative decisions.

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58 *Ibid.,* at pp. 632-634.

59 *Ibid.,* at p. 633.

60 Egyptian Court of Cassation, judgment dated 12 May 2015, cases no. 13313 and 13460, 80th judicial year, 31/32 (2016) Mağallat at-taḥkīm al-'alamīya, pp. 651-657, at pp. 655-656.

61 Egyptian Court of Cassation, judgment dated 8 July 2021, cases no. 1964 and 1968, 91st judicial year, at p. 6.

A. The Decision of the Court of Appeal

Initially, the Court of Appeal had followed a different approach. It had noted at the outset that the object of the arbitration was limited to "contractual financial rights in regard to which the settlement and waiver are allowed, in line with the general principle for disputes in which arbitration is allowed."[62] This is because the concession is, in essence, based on a meeting of the minds of the parties. Accordingly, questions relating to this agreement, including the financial claims arising out of the termination of the concession, originate from the contractual relationship.[63]

The "general principle" referred to by the Court of Appeal is laid down in article 11 of the Egyptian Arbitration Law. That principle is that arbitration is allowed where the parties may enter into a settlement. It is detailed further in article 551 of the Egyptian Civil Code, pursuant to which a settlement (and hence arbitration) is not permitted in matters relating to personal status and public policy. Article 551 also provides that the financial claims depending on personal status or arising out of a criminal act are capable of settlement (and hence arbitration).

On this, the Court of Appeal opined:

> *"[T]he application of mandatory principles, even if they are part of public policy, are not a monopoly of the judiciary of the state system. If a dispute and its capability to be subject to arbitration is put to arbitration, this does not mean a renunciation or marginalisation of any mandatory principle […]. There is no dispute that it is necessary that the arbitrator consider the content of mandatory principles which govern the dispute put before him […]."*[64]

As a result, the arbitrator must consider the facts of the case and apply even mandatory laws.[65] However, if the arbitrator comes to the conclusion that a mandatory provision is not applicable on the basis of those facts, the award may only be set aside in cases of obvious and manifest misapplication of the law, whereas a simple misapplication or misinterpretation does not suffice.[66]

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62 Cairo Court of Appeal, judgment dated 9 December 2020, case no. 48, 137th judicial year, at para. 24 (author's translation).

63 *Ibid*.

64 *Ibid.*, at para. 26.

65 *Ibid.*, at para. 27.

66 *Ibid.*

In the eyes of the Court of Appeal, the arbitral tribunal acted within its powers when it determined that Cabinet approval pursuant to article 4[bis] of law no. 1/1996 is necessary for the valid conclusion or amendment of the concession contract and that such approval had not been proven.[67]

B. The Decision of the Court of Cassation

The Court of Cassation disagreed. Like the Court of Appeal, the Court of Cassation did not engage with the arbitral tribunal's application of article 4[bis] of law no. 1/1996—but for entirely different reasons. The Court of Cassation did not practice self-restraint from interfering with the arbitral tribunal's decision. Rather, it claimed the sole authority to assess the facts underlying the Cabinet approval and its validity as a matter of law.[68]

For the Court of Cassation, it was unnecessary to investigate whether the claims subject to the arbitration were of a financial character in order to assess their arbitrability. The outcome of the case depended on the existence and validity of the Cabinet approval. These issues are within the sole purview of the state (administrative) courts, meaning that the arbitral tribunal should have deferred to them by staying the arbitration.[69] Merely by asking whether the various documents amounted to the requisite approval, the arbitral tribunal presumed a decision-making power it did not possess. That undue presumption of authority violated Egyptian public policy,[70] causing the DPA's challenge to succeed.[71]

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67 *Ibid.*, at para. 29.

68 Egyptian Court of Cassation, judgment dated 8 July 2021, cases no. 1964 and 1968, 91st judicial year, at p. 6.

69 *Ibid.*

70 *Ibid.,* at p. 7.

71 It should be noted that traditionally, Egyptian law does not distinguish between domestic and international public policy: Yehya Ikram Ibrahim Badr, The Grounds for Setting Aside Arbitral Awards under the Egyptian Arbitration Code, Arab Law Quarterly 2018, pp. 33-59, at p. 57; Nathalie Najjar, The difficult accession to the harmonization of arbitration laws in the Mediterranean Countries, Revue Libanaise de l'Arbitrage Arabe et International 66 (2013), pp. 7-13 (English Section), at p. 11. See also Ismail Selim, Egyptian Public Policy as a Ground for Annulment and refusal of Enforcement of Arbitral Awards, BCDR International Arbitration Review 3 (2016), pp. 65-80, at pp. 67-68 (claiming that the distinction has been adopted since the mid-twentieth century, but later acknowledging that the concept of international public policy was only "recently" defined in jurisprudence).

VII. Final Remarks and Outlook

The judgment of the Court of Cassation will raise concerns with concessionaires in Egypt and sets a questionable example for courts elsewhere in the Arab world. It will also disappoint those hoping that the introduction of BOT legislation and other regulations relating to public private partnerships would set investors on an equal footing with government entities.[72] Those who still maintained that BOT contracts were subject to the rules of private law alone now stand corrected.

More concerning, perhaps, is the impact of the reasoning of the Court of Cassation. Any party contracting with Egyptian state entities will be confronted with various laws requiring approval from a number of high-ranking officials or committees. The *DIPCO* decision puts a question mark over the legal nature of these approvals and whether they can be assessed by an arbitral tribunal. The Court of Cassation does not even discuss why arbitral tribunals cannot be trusted to apply public-policy-related provisions themselves, subject to an *ex-post* review during set-aside proceedings.

In fact, both the judgment of the Court of Appeal and existing jurisprudence (including that of the Court of Cassation itself) demonstrate that the outcome of the case was by no means automatic.

First, in the judgment subject to cassation, the Court of Appeal has pointed out that the dispute did not concern the validity of the Cabinet approval as such, but rather the financial consequences of the validity or invalidity of the concession. This approach would have allowed arbitral tribunals to focus on the consequences of procedural errors without necessarily invalidating administrative decisions. This is also in line with existing jurisprudence and international practice.[73]

Second, both the State Council in *Omar Effendi* and the Court of Cassation itself in *National Gas* considered a similar approval requirement and concluded that such approval was not an administrative decision rendered by an outside administrative body and separable from the contract. Rather, the courts determined that the approval concerned the competence to express consent to the agreement.

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[72] See, e.g., Mohamed Abdel Magid Ismail, Legal Globalisation and PPPs in Egypt, European Procurement and Public Private Partnership Law 2010, pp. 54-67, at pp. 62 and 65. See also Mohamed Abdel Magid Ismail, International Investment Arbitration: lessons from developments in the MENA region (2013), pp. 147-159, at p. 159.

[73] Cairo Court of Appeal, International Journal of Arab Arbitration 2014 (issue 4), pp. 23-28, at pp. 27-28; *Bernard Hanotiau*, L'Arbitrabilité, Recueil des Cours 296 (2002), pp. 25-253, at pp. 99-100 and 103.

Regardless of the legal merits of its decision, the alternative suggested by the Court of Cassation provides little consolation: it involves a stay of the arbitral proceedings in favour of litigation in several instances of administrative courts – in other words, what the parties intended to avoid by resorting to arbitration.

For the time being, actors contracting with Egyptian state-parties should take particular caution to ensure that all necessary approvals are obtained in an unambiguous and undisputable form so as to avoid such provisions being invoked in the first place. Parties and arbitrators should be aware that an award may be susceptible to a challenge in Egypt. Therefore, potential claimants are well-advised to consider at an early stage their options of enforcing an award outside of Egypt.

In the medium term, legislative and procedural simplification is needed. That includes, most pressingly, streamlined approval processes for government contracts, a concentration of the competence to confer concessions and the abolition of the cumbersome procedure envisaged by article 46 of the Egyptian Arbitration Law.

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Manuscripts and related correspondence should be sent to the Editor. At the time the manuscript is submitted, written assurance must be given that the article has not been published, submitted, or accepted elsewhere. The author will be notified of acceptance, rejection or need for revision within eight to twelve weeks. Manuscripts may be drafted in German, French, Italian or English. They should be submitted by e-mail to the Editor **(mscherer@lalive.law)** and may range from 3,000 to 8,000 words, together with a summary of the contents in English language (max. ½ page). The author should submit biographical data, including his or her current affiliation.

Aims & Scope

The ASA Bulletin is the official quarterly journal of the Swiss Arbitration Association (ASA). Since its inception in 1983 the Bulletin has carved a unique niche with its focus on arbitration case law and practice worldwide as well as its judicious selection of scholarly and practical writing in the field. Its regular contents include:

– Articles
– Leading cases of the Swiss Federal Supreme Court
– Leading cases of other Swiss Courts
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