

Waiver & Estoppel in Egyptian Arbitration: Cementing Egypt's Status as an Arbitration-Friendly Jurisdiction in Africa

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This article tries to show how the Egyptian Courts have progressed in recent years to try and protect the enterprise of international commercial arbitration in the Egyptian jurisdiction. The article sheds light specifically on how Egyptian Courts have interpreted the concept of “waiver of procedural rights” in an arbitration-friendly manner and hence boosting Egypt as a hub for arbitration across the Middle East Region and the African Continent. Further, the Egyptian Courts have also applied the principle of “Estoppel” to try and combat the guerilla tactics that have been used by parties to evade their obligations or their dues under the award. This should be seen as a welcoming development in one of the historical arbitration jurisdictions in Africa and hopefully would pave the way for other African courts to go down the same arbitration-friendly road.

A) Waiver of Procedural Rights:

The Egyptian Courts have used the waiver argument on a steady basis in rejecting the annulment of arbitral awards. More precisely, Egyptian Courts have relied upon the wording of article (8) of the Law which reads as follows:

“If either party to a dispute **knows** that **any requirement under the arbitration agreement has been violated or a non-mandatory provision of this Law** has not been complied with, **yet proceeds with the arbitration without invoking his objection** to the violation or noncompliance **within the period agreed upon, or without undue delay** in the absence of such agreement, **the party shall be deemed to have waived his right to object.**” [emphasis added]

Accordingly, the Egyptian Arbitration Law (the “**Law**”) provides that the arbitrating parties have an unequivocal obligation to object to any arguable violation in a timely manner. However, waiver does not occur when the violation relates to a mandatory provision of the Law.

For instance, if the one of the parties has failed to abide with the provision of article (30) of the Law which enlists some details that the claimant should mention under the statement of claims. Further, article (34-1) entitles the arbitral tribunal to terminate the arbitral proceedings if such details are not mentioned. However, both articles (30) and (34-1) are default rules. Therefore, the Cairo Court of Appeal has denied an application to annul an arbitral

award on the basis of such a violation because the counter-party did not raise any objection before the arbitral tribunal concerning this issue.¹

What if the arbitral tribunal was constituted in a manner violating the parties' agreement? The Egyptian Courts have also found that the failure by the challenging party to raise a timely objection in that respect means that such a party has waived its right arising from such a violation.² Failing to object in a timely manner means objecting as soon as possible. Therefore, failing to raise any objections with respect to the constitution of the arbitral tribunal until after the hearings were conducted means that the challenging party has waived its right.³

B) Estoppel Principle:

The Cairo Court of Appeal has even gone further beyond the provisions of the Law and has adopted the "Estoppel"⁴ principle when reviewing annulment actions concerning Egyptian arbitral awards. The Court has determined this principle emanates from the arbitrating parties' duty to act in good faith. Therefore, an arbitrating party cannot benefit from its contradicting positions; adopting a position during the arbitration entirely different from the one adopted before the court reviewing the annulment action. Accordingly, a party cannot try to taint the arbitral award and argue that such an award should be annulled when the cause for annulment has its roots in the actions of such a party. The Court found that this approach is equivalent to fraud in procedures which should be denied. Furthermore, the Court has acknowledged the prevalence of such estoppel principle in arbitral proceedings on a global level.

On the basis of this estoppel principle, the Cairo Court of Appeal has denied the annulment of an arbitral award whereby the challenging party has directed all of its subsidiaries/ sister companies to be parties to the said arbitral proceedings then tried before the reviewing court to plead that arbitration agreements should not be extended to his own subsidiaries/ sister companies.⁵

¹ Cairo Court of Appeal Challenge No. 73/Judicial Year 123, Hearing dated 30 January 2007.

² Cairo Court of Appeal Challenge No. 70/Judicial Year 130, Hearing dated 3 July 2014.

³ Cairo Court of Appeal Challenge No. 28/Judicial Year 132, Hearing dated 15 March 2016; Cairo Court of Appeal Challenge No. 16/Judicial Year 135, Hearing dated 4 April 2019; Court of Cassation Challenges No. 9450, 9584/ Judicial Year 80, Hearing dated 13 November 2012; Court of Cassation Challenge No. 8605/ Judicial Year 85, Hearing dated 6 April 2016.

⁴ Cairo Court of Appeal Challenge No. 57/Judicial Year 128, Hearing dated 4 April 2012; Cairo Court of Appeal Challenges No. 41, 44, 45/Judicial Year 129, Hearing dated 5 February 2013; Cairo Court of Appeal Challenge No. 18/Judicial Year 132, Hearing dated 6 January 2016; Cairo Court of Appeal Challenge No. 65/Judicial Year 132, Hearing dated 6 January 2016. The word "Estoppel" was mentioned in English Language in these four judgments.

⁵ Cairo Court of Appeal Challenges No. 41, 44, 45/Judicial Year 129, Hearing dated 5 February 2013.

In another instance, the Cairo Court of Appeal has relied on the same estoppel principle to deny the annulment of the resulting arbitral award. The challenging party in such a case has alleged that the signatory of the arbitration agreement was not authorized to sign the arbitration agreement. The Court refuted such argument by implementing the estoppel principle where the court did not find it plausible to have the party perform its obligations under the contract, then plead much later on that the contract containing the arbitration agreement was not signed by its duly authorized representative. In the eyes of the Court, such an attitude is rather a contradicting one and therefore should not affect the validity of the arbitral award.⁶

Also, the Cairo Court of Appeal has applied the estoppel principle in a third different fact-pattern.⁷ In this case, the challenging party has pleaded the arbitration agreement to argue that a litigation case is rather inadmissible. After having the court referred the dispute to arbitration and after the arbitral award was rendered, the challenging party then has tried to base its case for annulling the arbitral award on the ground that the arbitration agreement is itself null and void. The Court has interpreted such a party's attitude as a contradicting one and hence has denied this ground upon applying the estoppel principle.

⁶ Cairo Court of Appeal Challenge No. 18/Judicial Year 132, Hearing dated 6 January 2016; See also, Cairo Court of Appeal Challenge No. 57/Judicial Year 128, Hearing dated 4 April 2012.

⁷ Cairo Court of Appeal Challenge No. 65/Judicial Year 132, Hearing dated 6 January 2016.