The Ministerial Approval Requirement for Arbitration Agreements in Egypt: Revisiting the Public Policy Debate

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The Egyptian Arbitration Law No. 27/1994 (the 'Egyptian Arbitration Law') was enacted without delineating the subject of arbitrability of administrative contracts. This was one of the hottest pre-existing debates preceding the promulgation of the Egyptian Arbitration Law, yet the latter has succinctly mentioned that arbitration is valid between public and private entities. The Legislature did not find such wording sufficient to settle this debate and decided in 1997 to introduce a specific amendment elaborating this issue.

The 1997 amendment might have settled the arbitrability of administrative contracts debate, however, it initiated another debate when it required that arbitration agreements under administrative contracts be approved by the competent minister. Until now, there are some unsettled issues concerning this ministerial approval requirement. For instance, which party is liable to procure such ministerial approval: the administrative authority or its private counter-party? Could this ministerial approval be implied? For example, what if the competent minister has attended the contract signing ceremony, would that be enough? Another recurring question is whether such a ministerial approval pertains to public policy or not. This article tries to answer these questions in light of the recent decisions rendered by the Egyptian courts and arbitral tribunals.

Keywords: Ministerial Approval Requirement, Administrative Contracts, State Contracts, Egyptian Arbitration, Public Policy, Annulment of Arbitral Awards, Enforcement of Arbitral Awards, Implied Consent, ex officio, Egyptian State Council

1 INTRODUCTION

The starting point of this article is defining the conditions for administrative contracts, then the article will shed light on how the ministerial approval requirement was introduced to the Egyptian Arbitration Law. Special attention will then be paid to the jurisdictional conflict between civil and administrative courts concerning annulment actions for arbitral awards issued as arising out of administrative contracts. The article will then dissect the line of recent decisions rendered

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by the Egyptian courts and arbitral tribunals, especially with respect to determining whether or not ministerial approval is a public policy issue in Egypt.

2 DEFINING ADMINISTRATIVE CONTRACTS

Under Egyptian law, administrative contracts must fulfil three conditions collectively[1]:

(1) at least one party must be a public law entity;
(2) the contract must pertain to a public utility; and
(3) the contract must include an 'onerous' clause or condition derived from the public law (for example, the possibility for the contracting authority to unilaterally terminate the contract).

The most common examples of administrative contracts in practice are concessions, such as public utilities agreements, public works contracts, and supply contracts.[2]

It should be noted that the above definition does not mean that every contract signed by a public authority or a state-owned entity would necessarily fall under this definition.[3] A recent decision by the Cairo Court of Appeal in 2018 has embraced this approach.[4] The Court in this case refused to characterize a contract entered into between Egypt Post[5] and a private company as falling within the above-mentioned definition of 'administrative contracts'. This was because, although the contract was entered into with a public law entity, the second and the third conditions for administrative contracts were not fulfilled; the contract was entered into for the purpose of organizing a conference in Sharm El-Sheikh. Furthermore, both parties were acting on an equal footing when negotiating the terms and conditions of such contract; there were not any onerous conditions imposed by Egypt Post on its private counter-party. The Cairo Court of Appeal hence decided that no ministerial approval was required for such a contract as it was not an administrative contract in the first place.

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1 Samaa A. F. Haridi & Mohamed S. Abdel Wahab, *Public Policy: Can the Unruly Horse Be Tamed? In Special Focus on Middle Eastern and North African Arbitration*, 83(1) Arb. 38 (Gordon Blanke ed. 2017).

2 Ismail Selim, *Egyptian Public Policy as a Ground for Annulment and Refusal of Enforcement of Arbitral Awards*, in *BCDR International Arbitration Review* vol. 3, iss. 1, 76 (Nassib Ziadé ed., Kluwer Law International 2016).

3 Haridi & Abdel Wahab, *supra* n. 1, at 38.

4 Cairo Appeal Challenge No. 39, JY 134, Hearing dated 13 Feb. 2018.

5 Egypt Post is the Governmental agency responsible primarily for postal services in Egypt.

3 INTRODUCING MINISTERIAL APPROVAL TO THE EGYPTIAN ARBITRATION LAW

The second paragraph of Article 1 of the Egyptian Arbitration Law as introduced in 1997[6] explicitly provides that the competent minister (or the officer assuming his powers with respect to public entities) is solely empowered to approve the inclusion of an arbitration agreement in administrative contracts. Furthermore, the competent minister may not delegate or assign his power in this regard.

The Explanatory Note to this amendment indicates that its main goal is putting an end to the recurring conflicting judgments concerning arbitration in administrative contracts. In this respect, the Explanatory Note showed that there was a rigorous debate before the introduction of the Egyptian Arbitration Law in 1994 within the State Council concerning the arbitrability of administrative contracts. Then, the Explanatory Note indicated that the Egyptian Arbitration Law itself did not settle such a disagreement despite the fact that Article 1 explicitly stipulated that the provisions of the Egyptian Arbitration Law would apply to any arbitration between private persons and public persons.[7]

Also, the Explanatory Note denoted that it was the intention of the Legislature to introduce this amendment to the Egyptian Arbitration Law in order to explicitly indicate that administrative contracts are arbitrable and to designate the administrative authority that would be in charge of approving the arbitration agreement in order to ensure that:

> the arbitration agreement is in line with the *public interests* of the [Egyptian State].[8] [emphasis added]

In light of the above, the Explanatory Note shows that the main purpose behind introducing this ministerial approval requirement is confirming the arbitrability of disputes arising out of administrative contracts. The explicit wording of the Explanatory Note cannot be ignored when it comes to asserting the public interest rationale behind requiring the ministerial approval for arbitration agreements in administrative contracts. In the sections below, it will be discussed whether such 'public interests' should be construed as a public policy ground for annulling Egyptian arbitral awards or for rejecting the enforcement of Egyptian and foreign awards.

[6] Law No. 9/Year 1997 amending Art. 1 of the Egyptian Arbitration Law.
[7] Explanatory Note to Law No. 9/1997, amending Art. 1 of the Egyptian Arbitration Law.
[8] *Ibid.*

4 JURISDICTIONAL CONFLICT BETWEEN CIVIL AND ADMINISTRATIVE COURTS

The 1997 amendment might have settled the question of arbitrability of administrative contracts once and for all, however, soon after such amendment was introduced another debate has arisen. This debate has revolved around the competent court to hear annulment actions for arbitral awards arising out of administrative contracts that arguably satisfy the 'international commercial arbitration' definition set out under Article 3 of the Egyptian Arbitration Law.

It was a controversial conflict between the civil courts and the State Council that was settled to some extent by the Supreme Constitutional Court in early 2012.[9] The Supreme Constitutional Court decision was part of the ongoing 'Malicorp Saga', derived from the BOT contract for development of Ras Sidr Airport concluded between Malicorp Ltd. and the Egyptian Civil Aviation Authority.[10] The Supreme Constitutional Court stated that the Malicorp dispute fulfils the definition of 'international commercial arbitration' set out in Article 3 of the Egyptian Arbitration Law and hence any annulment action concerning the Malicorp award should be reviewed by the Cairo Court of Appeal instead of the Supreme Administrative Court.

Consequently, the jurisdiction of any annulment actions concerning arbitral awards that fulfil the 'international commercial arbitration' definition prescribed under Article 3 of the Egyptian Arbitration Law would be reviewed by the Cairo Court of Appeal and not the Supreme Administrative Court. However, it should be noted that defining what constitutes 'international commercial arbitration' is still highly debated between the circuits of the Egyptian Court of Cassation, as conflicting judgments were issued in 2018 and 2019 respectively on this particular subject.

The fact pattern was the same and the question was the same under both Cassation cases, yet the Court of Cassation has answered the question differently. In both cases, the cases did not meet any of the criteria of 'international' arbitration under Article 3 of the Egyptian Arbitration Law except for the fact that the arbitrations were conducted under the auspices of the Cairo Regional Center for International and Commercial Arbitration (CRCICA). In this regard, Article 3 (second) of the Egyptian Arbitration Law adds one criteria over and above the criteria established by the UNCITRAL Model Law for defining 'international' arbitrations, namely:

9 Supreme Constitutional Court, Case No. 47, JY 31, Hearing dated 15 Jan. 2012.
10 Cairo Appeal Challenge No. 48, JY 123, Hearing dated 5 Dec. 2012.

> if the parties to the arbitration agree to resort to a permanent arbitral organization or to an arbitral institution having its headquarters in Egypt or abroad.

The Court of Cassation in 2018 did not consider that an arbitration that does not have any connection with any jurisdiction outside of Egypt should be considered an 'international arbitration' for the sole reason that the parties choose to arbitrate their dispute under the auspices of CRCICA.[11] Thirteen months later, the Court of Cassation adopted the entirely opposite interpretation. In a similar fact pattern, where the arbitration did not have any connection with any jurisdiction outside of Egypt, the Cassation Court nevertheless characterized such an arbitration as an 'international' one for the sole reason that it was a CRCICA arbitration.[12]

The Supreme Administrative Court itself might be inclined towards not characterizing any CRCICA arbitration as satisfying the definition of 'international' arbitration under Article 3 of the Egyptian Arbitration Law. This was the exact approach adopted by this Court in late 2018.[13] This would surely affect the destination of annulment actions concerning CRCICA arbitral awards arising out of administrative contracts.

5 MINISTERIAL APPROVAL AND PUBLIC POLICY

Determining whether or not the ministerial approval required for arbitration agreements under administrative contracts is a public policy issue has some critical ramifications. First, if the ministerial approval was simply another ground for annulment that does not pertain to public policy, then failing to raise an objection during the arbitral proceedings that such ministerial approval requirement is not met would qualify as a waiver of such right in accordance with Article 8 of the Egyptian Arbitration Law.

Secondly, the lack of the ministerial approval would not serve as a valid ground for rejecting the enforcement of arbitral awards before Egyptian courts.

That is why it is crucial to ascertain the legal nature of this requirement and whether it pertains to Egyptian public policy or not. In this regard, below is a chronological summary of the Egyptian courts' and arbitral tribunals' decisions reviewing this issue in particular.

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[11] Cassation Challenge No. 8777/Judicial Year 87, Hearing dated 7March 2018.

[12] Cassation Challenge No. 11348/Judicial Year 88, Hearing dated 11 Apr. 2019.

[13] Supreme Administrative Challenge No. 9703, JY 55, Hearing dated 25 Dec. 2018.

5.1 *NGC v. EGPC*, Cassation, Judgment dated 12 May 2015

This case concerned a dispute between National Gas Company (NGC) and the Egyptian General Petroleum Corporation (EGPC) arising out of a 1999 administrative contract where NGC was obliged to provide natural gas to certain areas of Sharkia Governorate. This dispute was settled by a CRCICA arbitral award whereby the arbitral tribunal rejected EGPC's jurisdictional plea. EGPC initiated annulment proceedings invoking the nullity of the award based on the absence of the Petroleum Minister's required approval.

On 12 September 2009, the Cairo Court of Appeal rendered a decision annulling this arbitral award. NGC challenged the decision of the Cairo Court of Appeal before the Court of Cassation, arguing that the conclusion of the contract by EGPC's Chairman was sufficient to validate the arbitration clause without need for further approval by the Minister of Petroleum. The Court of Cassation rejected such an argument, referring to the Explanatory Note to Law No. 9/1997, and found that the legal rationale of the law was to resolve a pre-existing controversy over the arbitrability of administrative contracts through a decisive statutory provision, leaving no room for opposing opinions, and which explicitly validated the agreement to arbitrate in administrative contracts.

Also, this Explanatory Note added that the administrative authority is entitled to ratify such agreement in order to regulate and ensure that the agreement to arbitrate complies with public interest considerations. Accordingly, the Court of Cassation concluded that:

> *the validity or nullity of the arbitration clause based on the exclusive approval of the competent minister is a public policy rule since it has been enacted for a public interest thereby permitting both parties to a contractual relation to invoke the nullity* of the arbitration clause whenever the competent minister's approval has not been granted. [emphasis added].[14]

Further, NGC argued that there was an implicit approval of the Petroleum Minister which should be inferred from the attendance of the Minister of Petroleum to the contract signing ceremony and EGPC's voluntary enforcement of two arbitral awards in Cases Nos. 400/2004 and 490/2006 settling other disputes arising out of the same contract without invoking the absence of ministerial approval. This argument was rejected by the Court of Cassation, as the latter indicated that this is a purely substantive matter which the Court of Appeal has a discretionary power to assess without further review from the Cassation Court as long as the Court of Appeal's reasoning is sound.

There are two critical facts that must be asserted with respect to this case. First, this case involved a dispute between two state-owned entities and no private

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[14] Cassation Challenges No. 13313, 13460 JY 80, Hearing dated 12 May 2015.

person was involved. This might be regarded as evoking some relief for private entities when entering into administrative contracts with state-owned or public entities. The Cassation Court might adopt a different view when the case involves a private entity; this could be based on the argument that the responsibility to procure the ministerial approval lies principally with the administrative authority and not its private counter-party.

Secondly, the Court of Cassation has left some room open for the possibility of construing the conduct of the relevant minister as an implied consent to arbitration. The Court simply characterized this issue as a substantive matter that would be within the discretionary powers of the Court of Appeal, as long as the latter adopts a coherent reasoning.

5.2 *Malicorp*, Cassation, Judgment dated 26 May 2015

In this infamous saga, Malicorp Ltd. was seemingly shopping for the best forum for its case, especially after the Administrative Court has annulled the arbitration agreement under the BOT contract entered into between Malicorp Ltd. and the Egyptian Civil Aviation Authority.[15] Accordingly, Malicorp Ltd. filed a case with the Supreme Constitutional Court, which led to averting the Administrative Court judgment and transferring the annulment action to be reviewed by the Cairo Court of Appeal instead, as detailed above.

Interestingly enough, the Malicorp award was annulled by the Cairo Court of Appeal in December 2012,[16] a decision which was later confirmed by the Court of Cassation in May 2015.[17] The ground for annulment was not, however, the lack of ministerial approval but rather the fact that the arbitral award was issued by a truncated arbitral tribunal. This is an intriguing decision because there is an acute distinction between the two types of annulment; annulling an arbitral award for procedural reasons attributable solely to the arbitral proceedings does not invalidate the arbitration agreement itself. This is because arbitration agreements have continuous effects and annulling an award does not nullify the arbitration agreement as long as the annulment ground does not pertain to the arbitration agreement itself.[18] On the other hand, annulling an arbitral award for a defect in the arbitration agreement itself invalidates the whole process and leaves the parties no room but to refer their disputes to the national courts, unless the parties opt to enter into a subsequent arbitration submission agreement.

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[15] The Administrative Court decision is not publicly available but was mentioned under Cairo Appeal Challenge No. 48, JY 123, Hearing dated 5 Dec. 2012.

[16] Cairo Appeal Challenge No. 48, JY 123, Hearing dated 5 Dec. 2012.

[17] Cassation Challenge No. 2047, JY 83, Hearing dated 26 May 2015.

[18] Cassation Challenge No. 17518, JY 76, Hearing dated 28 Mar. 2017.

If the ministerial approval was truly a public policy issue,[19] then it should have been raised *ex officio* by the Court of Cassation. This might signal an implied deviation from a previous stance by the Cassation Court.[20] This is also backed up by the fact that the challenge concerning the lack of ministerial approval was raised before the Cairo Court of Appeal and was essentially left unanswered.[21]

5.3 Supreme administrative court, judgment dated 5 march 2016

This decision was issued by the Unification of Principles Circuit within the Supreme Administrative Court. This occurs when the Supreme Administrative Court has found that it is about to issue a judgment embedding a principle that is in absolute conflict with another principle that was previously adopted by another circuit in the Supreme Administrative Court.

In 2005, the Supreme Administrative Court held that ministerial approval under the main contract approving arbitration as a dispute resolution mechanism is sufficient and hence if the concerned administrative authority entered into a subsequent arbitration submission agreement, then no additional ministerial approval would be required again to support the validity of such submission arbitration agreement.[22] In 2013, the Supreme Administrative Court was about to render a judgment deviating from such a position, so it decided to refer the issue to the Unification of Principles Circuit within the Supreme Administrative Court in accordance with Article 54 of State Council Law No. 47/1972.

In 2016, the Supreme Administrative Court decided that ministerial approval is required to be granted again if the parties to the administrative contract have decided to enter into an arbitration submission agreement.[23] What is intriguing about this judgment is that at the very end of the reasoning part of the judgment, the Supreme Administrative Court slipped in the term 'public policy' as part of its reasoning. The term 'public policy' was neither defined nor elaborated by the Court; it was just abruptly mentioned.

The reasoning of the Court could not entirely be labelled as an anti-arbitration approach; the Court only considered that a subsequent arbitration submission agreement would terminate the prior arbitral clause under the main administrative contract and therefore required a new ministerial approval. This interpretation is in

[19] Cassation Challenges No. 13313, 13460 JY 80, Hearing dated 12 May 2015.
[20] The Malicorp Cassation decision was rendered only fourteen days after the Cassation Court had considered the issue of ministerial approval for arbitrating administrative contracts to be an issue pertaining to public policy.
[21] Cairo Appeal Challenge No. 48, JY 123, Hearing dated 5 Dec. 2012.
[22] Supreme Administrative Challenge No. 3603, JY 48, Hearing dated 10 May 2005.
[23] Supreme Administrative Challenge No. 8256, JY 56, Hearing dated 5 Mar. 2016.

line with how Egyptian courts generally construe arbitration submission agreements.[24]

The significance of this precedent is that it was issued by the Unification of Principles Circuit. This denotes that no circuit within the Supreme Administrative Court would be entitled to deviate from this position. However, it does not mean that the circuits would be bound to characterize the ministerial approval as a public policy issue. They will only be bound to require an additional ministerial approval for any arbitration submission agreement, notwithstanding the prior approval granted to the arbitral clause under the administrative contract.

5.4 CRCICA Arbitral Award, Dated 26 August 2017

Following the above precedents, this CRCICA arbitral award was issued in August 2017 advocating another perspective on handling this issue.[25] This dispute was initiated by Europe Company 2000 against both the General Authority for Cleanliness and Beautification of Cairo and the Cairo Governorate.

The administrative authority in this award raised the ministerial approval issue, referring to the Supreme Administrative 2016 precedent,[26] and argued that such approval was a public policy issue and hence its absence should nullify the whole arbitration process. However, the arbitral tribunal refuted this argument with a coherent set of reasons. First, the arbitral tribunal held that such ministerial approval is a condition that was legislated for the sole benefit of the administrative authority and not its private counter-party in administrative contracts. Stemming from this characterization, the tribunal made it clear that it is the administrative authority who is required to procure such an approval, as otherwise adopting another position would make the arbitral process conditional on the sole will of the administrative authority itself. This would be, according to the tribunal, in contradiction with the intent of the legislature when such ministerial approval requirement was introduced to the Egyptian Arbitration Law.

Secondly, the tribunal asserted that such ministerial approval does not need to take the form of a written explicit approval; it could be in the form of an implicit or an oral approval. The tribunal has found that the conduct and attitude of the administrative authority in this dispute supports an unequivocal admission by such authority that the arbitration agreement is valid and in full force and effect. For instance, the administrative authority has pleaded several times before Egyptian

[24] Cassation Challenge No. 7307, JY 76, Hearing dated 8 Feb. 2007. For similar recent decisions *see* Cairo Court of Appeal Challenge No. 75, JY 135, Hearing dated 8 May 2019.
[25] CRCICA Award No. 1073/Year 2016, Hearing dated 26 Aug. 2017.
[26] Supreme Administrative Challenge No. 8256, JY 56, Hearing dated 5 Mar. 2016.

courts that the dispute is inadmissible due to the presence of an arbitration agreement.

Thirdly, the tribunal concluded that even if such ministerial approval was arguably a public policy issue, the conduct and attitude of the administrative authority qualifies as bad faith, reaching the extent of malicious fraud. This is because the administrative authority (in the words of the tribunal) has prevented its private counter-party from accessing justice in accordance with Article 97 of the Egyptian Constitution, and hence protecting such a right is an issue that prevails even over public policy considerations.

This line of reasoning cannot be considered as conflicting with the previous stance adopted by the Court of Cassation in May 2015.[27] As mentioned above, the context here is rather different; a private party was involved. Moreover, the fact pattern of this case showed the bad faith of the administrative authority trying to deprive a private entity of its constitutional right to access justice.

The question then becomes whether the conclusion would have been any different if the administrative authority had not tried to evade the jurisdiction of the national courts. What if the administrative authority was the one that filed the case with the administrative court and argued that the dispute should be heard before them instead of arbitration due to the absence of the required ministerial approval? It is always hard to predict the outcome but certainly this could be a ground to repeal the arbitration agreement, unless and until the national court explicitly shifts the burdening liability of procuring this ministerial approval to the administrative authority instead of its private counter-party.

5.5 Supreme administrative court, judgment dated 28 november 2017

This case was rendered in another context, that is, the enforcement of an Egyptian arbitral award. The question here was whether the absence of the ministerial approval should be deemed as a ground to reject the enforcement of an Egyptian arbitral award. The Supreme Administrative Court answered this question in the negative.[28] The Supreme Administrative Court admitted that the absence of ministerial approval could qualify as a valid ground for annulment, however, it would not qualify as a ground for rejecting the enforcement of an arbitral award. The Court explicitly stipulated that such a ground does not constitute a 'violation of public policy'.

This holding should signal a new trend in Egyptian courts, one that explicitly does not consider the ministerial approval to be a public policy issue. This attitude

[27] Cassation Challenges No. 13313, 13460 JY 80, Hearing dated 12 May 2015.
[28] Supreme Administrative Challenge No. 28702, JY 57, Hearing dated 28 Nov. 2017.

should be welcomed as an arbitration-friendly approach by Egyptian courts and should pave the way for the Court of Cassation to adopt the same view in the future.

5.6 State council, fatwa dated 7 May 2018

The General Assembly of the Legislature and Fatwa Department at the State Council has followed the pro-arbitration stance adopted by the Supreme Administrative Court Decision in 2017,[29] yet on a different valid ground.[30] In an enforcement context, the General Assembly adopted the view that the lack of ministerial approval could qualify as a ground for annulment, but it should not qualify as a ground for rejecting the enforcement of an arbitral award.

The General Assembly reasoned its decision on another basis, that is, the fact that the legislature has vested res judicata in arbitral awards issued in accordance with the Egyptian Arbitration Law and hence res judicata considerations should prevail over public policy considerations, and therefore arbitral awards should be enforced notwithstanding the lack of such ministerial approval.

This is another step indeed in the right direction; this position might not have explicitly stated that the ministerial approval is not a public policy matter, however, it still found a way to support the enforcement of arbitral awards despite the lack of such ministerial approval. The res judicata argument is a novel angle that could put this controversial dilemma to rest, especially in the realm of enforcing arbitral awards arising out of administrative contracts in Egypt.

5.7 Supreme administrative court, judgment dated 25 December 2018

Here, the Supreme Administrative Court considered that the absence of ministerial approval is a valid ground for annulling a CRCICA arbitral award.[31] The Court disagreed with the analysis of the arbitral tribunal, whereby the latter based its jurisdiction solely on the fact that the parties did not include such ministerial approval requirement in their administrative contract. The silver lining here is that the Court did not mention in any way that the ministerial approval requirement pertains to Egyptian public policy.

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29 *Ibid.*

30 General Assembly of the Legislature and Fatwa Department at the State Council Fatwa No. 630/Year 2018, Hearing dated 7 May 2018. The Fatwas issued by the General Assembly of the Legislature and Fatwa Department at the State Council are binding upon the Administrative Courts in accordance with the State Council law.

31 Supreme Administrative Challenge No. 9703, JY 55, Hearing dated 25 Dec. 2018.

More importantly, the Court mentioned in its dicta that the administrative authority had followed a contradictory path, as the relevant administrative authority included the arbitration agreement in the contract, yet soon after the other party referred the dispute to arbitration, the same administrative authority tried to evade this dispute resolution mechanism. However, the Court did not penalize the administrative authority for such a malicious conduct. Perhaps, if the administrative authority's conduct had been similar to that experienced in the 2017 CRCICA arbitral award mentioned above,[32] the Court would then have followed the same position embraced by the arbitral tribunal in that award.

It should be noted that the Court hinted concisely that procuring the ministerial approval was a common obligation for both contracting parties (the administrative authority and its private counter-party). This approach is quite distinct from the analysis depicted in the 2017 CRCICA award.[33]

6 CONCLUSION

There are several positive concluding remarks we can arrive at from the above line of decisions.

First, the issue of whether or not the ministerial approval pertains to public policy has not been entirely settled just yet, especially with respect to administrative contracts concluded between public and private entities. There are two judgments that evoked the public policy argument; one just slipped the term in without any elaboration,[34] whilst the other was in a public–public context.[35] Moreover, it is evident that the Court of Cassation has not raised the issue of public policy in a public–private context *ex officio*, even when there was a chance to do so.[36] To the contrary, the Supreme Administrative Court has even gone so far in a public–private context to explicitly state that it is not a 'public policy violation'.[37] Also, in a subsequent judgment by the Supreme Administrative Court, the latter seems to have refrained from labelling such a requirement as a public policy issue, even in the context of annulling arbitral awards.[38]

Secondly, the matter of implied ministerial approval seems to be a valid defence against annulling arbitral awards, if evident. The conduct and attitude of the administrative authority has been taken into consideration to determine

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[32] CRCICA Award No. 1073/Year 2016, Hearing dated 26 Aug. 2017.
[33] *Ibid.*
[34] Supreme Administrative Challenge No. 8256, JY 56, Hearing dated 5 Mar. 2016.
[35] Cassation Challenges No. 13313, 13460 JY 80, Hearing dated 12 May 2015.
[36] Cassation Challenge No. 2047, JY 83, Hearing dated 26 May 2015.
[37] Supreme Administrative Challenge No. 28702, JY 57, Hearing dated 28 Nov. 2017.
[38] Supreme Administrative Challenge No. 9703, JY 55, Hearing dated 25 Dec. 2018.

whether or not an implied approval was granted.[39] Further, the Court of Cassation did not refute the implied approval issue even in a public–public context; it was only stated that it is a substantive matter that should fall within the discretionary powers of the Court of Appeal.[40] Therefore, determining whether an implied approval was in fact granted by the relevant minister is an entirely factual issue and would differ on a case-by-case basis.

Moreover, should the administrative authority plead the inadmissibility of a case before a national court on the basis of the existence of an arbitration agreement, and then later on plead the nullity of the arbitration agreement itself before the arbitral tribunal, such attitude should be construed as fraudulent conduct by the administrative authority denying its counter-party its constitutional right to access to justice.[41] Under this fact-pattern, it does not even matter whether the ministerial approval requirement is part of Egyptian public policy. This is because securing access to justice should trump any public policy considerations. This approach could also be inferred from the recent Supreme Administrative Court decision, which did not appreciate the fact that the administrative authority had tried to nullify the arbitration agreement after including the arbitral clause in the administrative contract.[42] Although the Supreme Administrative Court did not penalize this mischievous conduct by the administrative authority, nevertheless, this precedent signals that failing to object to the lack of ministerial approval during the arbitral proceedings would most probably be interpreted as a waiver of such objection by the administrative authority in line with Article 8 of the Egyptian Arbitration Law.

Thirdly, there is some relief evident in the recent trends in the State Council, which show that the absence of ministerial approval should not posit an obstacle in the way of enforcement of arbitral awards, whether Egyptian or foreign. The State Council relied on two different arguments on two separate occasions. In the first one, the Supreme Administrative Court entirely refuted the argument that ministerial approval is even a public policy issue.[43] In the second, the General Assembly of the Legislature and Fatwa Department at the State Council was of the opinion that res judicata principles should have the upper hand over public policy considerations. On both occasions, the State Council has vouched for the enforcement of the arbitral award in question.[44]

[39] CRCICA Award No. 1073/Year 2016, Hearing dated 26 Aug. 2017.
[40] Cassation Challenges Nos. 13313, 13460 JY 80, Hearing dated 12 May 2015.
[41] CRCICA Award No. 1073/Year 2016, Hearing dated 26 Aug. 2017.
[42] Supreme Administrative Challenge No. 9703, JY 55, Hearing dated 25 Dec. 2018.
[43] Supreme Administrative Challenge No. 28702, JY 57, Hearing dated 28 Nov. 2017.
[44] General Assembly of the Legislature and Fatwa Department at the State Council Fatwa No. 630/Year 2018, Hearing dated 7 May 2018.

In the case of foreign arbitral awards, another argument could be made that, even if the ministerial approval would be characterized as a public policy issue, however, it should only be considered as pertaining to domestic rather than international public policy.[45] In other words, ministerial approval should never be contemplated as part of the international public policy landscape and therefore should not hinder the enforcement of foreign arbitral awards in Egypt.

45 Cairo Appeal Challenges Nos. 20, 64/JY 128 and 16, 20, 47/JY 129, Hearing dated 7 Apr. 2013.