

Treading the Waters of Egyptian Commercial Agency Laws, and Their Impact on Foreign-Based Tendering Investors

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ABSTRACT

Egyptian law imposes certain requirements on parties contracting with governmental authorities and on principals entering into commercial agency agreements with local agents, a precondition to contracting with the government. This article focuses on the common risks posed by Egyptian law so that foreign-based businesses may better protect their interests to secure a smooth, long-term, performance of their contracts, particularly if they select Egyptian law as the law governing their agency agreements.

I. INTRODUCTION

Egypt has recently been witnessing significant growth in investment in large projects, including contracting over the construction of a new capital, extension of the Cairo metro, and the erection and operation of photo-voltaic and eolic energy farms. Large projects are also found in special economic zones, which provide investors with benefits, including certain tax and customs exemptions, that are provided by other laws.¹ These projects, however, entail contracting with Egyptian governmental entities, which mandates the application of special rules that may pose certain legal risks to international investors, including rules relating to administrative contracts, residency requirements under tendering legislation, registration and classification requirements

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¹ Special economic Zones are governed by Law No. 83 of 2002 on Economic Zones of a Special nature. There are currently eleven special economic zones. The benefits of doing business in a special economic zone include important incentives to investors wishing to establish or operate agricultural, industrial, and service projects in the zone, which enjoy autonomy, as they are governed through an independent general authority (General Authority), which means they are relatively free from bureaucracy. For detail on Egypt's Special Economic Zones Law, see T. Badawy, 'Egypt's Special Investment Law and the Suez Canal' <<https://mfaegypt.org/2015/10/03/egypts-special-investment-law-and-the-suez-canal-special-economic-zone-a-positive-prospect-for-future-investment/>>, Egypt MFA Blog, (visited on 22 May 2016).

under the Egyptian Federation for Construction & Building Contractors,² as well as limitations imposed by commercial agency laws and regulations.

Contracting with Egyptian governmental entities typically takes place by means of a tender.³ Besides meeting tender document requirements, foreign-based tenderers must, by law, appoint a local agent.⁴ As discussed in this article, the requirements imposed by Egyptian law, notably with respect to government contracts, and commercial agencies, raise flags of which foreign-based businesses operating in Egypt must be aware, particularly if they select Egyptian law as the law governing their agreements. The purpose of this article is to alert foreign-based investors to certain possible risks posed by Egyptian law so that they may better protect their interests to secure a smooth, long-term, performance of their contracts.

II. GOVERNMENT CONTRACTS

A large number of contracts with the government, any of its branches, or its authorities can be considered 'administrative agreements' under Egyptian law, even if, from the perspective of private parties contracting with the government, they serve a commercial purpose. Administrative agreements have been subject to extensive court scrutiny in Egypt, where the Supreme Administrative Court has defined an administrative agreement as a contract that meets all the following criteria:⁵

- (1) Agreement entered into by a public law person (e.g., public authorities, municipalities, and certain government agencies). Under Egyptian law, contracts between private parties and the Egyptian government, including its many ministries, agencies, authorities and, in certain limited cases, its publicly owned private enterprises (when acting as representatives of the State), are generally considered administrative contracts;⁶
- (2) Agreement related to the management or functioning of a public utility; and

² Law No. 104 of 1992 regarding the establishment of the Egyptian Federation for Construction & Building Contractors ('EFCBC Law' establishing the 'EFCBC').

³ Law No. 89 of 1998 ('Procurement Law'), as amended, and its executive regulations ('Procurement Regulations') regulate contracts between 'competent authorities' and private sector entities. Article 1 of the Procurement Law's promulgating legislation defines 'competent authorities' for the purpose of the law as the State's administrative machinery, units, inclusive of ministries, departments, bodies having special budgets, local administrative units, and public authorities. While the Procurement Law requires private parties to enter into a tender, in certain limited instances outlined in Articles 7 and 8 of the Procurement Law, governmental entities may enter into a direct contract with private parties. This, however, does not preclude foreign-based private parties from the obligation to appoint a local agent.

⁴ Article 61 of the executive regulations to the Procurement Law states that contracting parties must be resident in Egypt, or have an agent in Egypt if they are based overseas. Either the principal or the agent can contract with the government.

⁵ G.G. Nassar, *Administrative Contracts* (Cairo: Dar Al-Nahda Al-Arabiya, 2004), 47.

⁶ Administrative Court Cases No. 34517, 40510 and 34248 of Judicial Year 65; see also Administrative Court, Case No. 1976 of Judicial Year 58. This must be carefully considered, particularly in light of the fact that such publicly owned private entities may pose problems relating to investor-state claims under bilateral investment treaties, notably with respect to attributing the acts of those entities to the State.

- (3) Agreement that contains conditions that are atypical to contracts between private parties, i.e. ‘Exorbitant Clauses’⁷

As a consequence, parties to an administrative agreement must select their dispute resolution mechanism carefully, since contracting with the State will, by default, grant jurisdiction to Egypt’s *Conseil d’État*.⁸ Such jurisdiction overrides any agreement to arbitrate potential disputes, unless certain formalities are completed by the authority contracting on behalf of the State.

In turn, Article 1(2) of Law No. 27 of 1994 as amended (the ‘Arbitration Act’) stipulates that any agreement to subject disputes respecting administrative contracts to arbitration necessitates the approval of the concerned Egyptian minister, and that no delegation of such power is authorised.⁹ The Egyptian Court of Cassation recently ruled that the concerned minister’s approval to the arbitration clause in administrative contracts is a matter of public policy.¹⁰ Failure to obtain the minister’s approval, therefore, will result in the invalidity of the arbitration clause, the setting aside or non-enforcement of the award, and the referral of the dispute to the Egyptian *Conseil d’État*.

III. AGENCY LAW MATTERS

In addition to the restrictions imposed by the nature of government contracts, the fact that Procurement Law No. 89 of 1998 (the ‘Procurement Law’) and its executive

7 While the scope of Exorbitant Clauses is not defined by law, Egyptian doctrine has grouped exorbitant terms in the following broad categories:

- a. Conditions that provide the public party with privileges that may not be enjoyed by the private contracting party, which make the balance of the contract tip in favor of the public party (examples of these conditions include the public party’s right to amend the contract unilaterally, suspend it temporarily, or terminate it without the private party’s consent);
- b. Granting the private party the right to perform certain public powers in relation to third parties (examples include police powers, or the right to expropriate or occupy private property on behalf of the State);
- c. Referring agreements to pre-existing specifications that contain terms that are not typically found in commercial contracts (examples include certain standard-form documents found in requests for proposals and requests for qualification in the context of tenders);
- d. Specifying in a contract that disputes arising in the course of its implementation shall be subject to the jurisdiction of Egyptian State Council (*Conseil d’État*), as opposed to ordinary courts; and
- e. Requiring the private party to participate directly in the management of a public utility.

S. El-Tamawi, *The General Principles of Administrative Contracts* (Cairo: Dar Al-Fikr Al-Araby, (2011), 91-103.

8 Article 10 of the *Conseil d’État* Law, Law No. 47 of 1972.

9 Arbitration Act 1994 (EG) Art. 1(2) states that: ‘With regard to disputes relating to administrative contracts, agreement on arbitration shall be reached upon the approval of the competent minister or the official assuming his powers with respect to public juridical persons. No delegation of powers shall be authorised in this respect’.

10 In Court of Cassation, Cases No. 13313 and 13460 of Judicial Year 80, judgment of 12 May 2015. See also I. Selim, ‘The need for ministerial approval for arbitral agreements in Egyptian Administrative Contracts’, *Al-Tamimi*, <<http://www.tamimi.com/en/magazine/law-update/section-11/section-13/the-need-for-ministerial-approval-for-arbitral-agreements-in-egyptian-administrative-contracts.html>> (visited 31 May 2016).

regulations issued pursuant to Min. D. No. 1367 of 1998 (the ‘Procurement Regulations’) require that foreign-based parties appoint a local agent¹¹ for the purpose of contracting with the government raises a series of issues of which foreign-based parties must be aware.

The Egyptian Civil Code of 1948 (the ‘ECC’) defines an ‘agency agreement’ generally as ‘a contract whereby an agent binds itself to performing a juridical act on behalf of a principal’.¹² In 1982, the Egyptian parliament enacted Law No. 120 of 1982 (the ‘Commercial Agency Law’), which was followed by Ministerial Decree No. 342 of 1982 (the ‘Commercial Agency Regulations’), jointly addressing a number of specific matters relating to commercial agency. In 1999, Law No. 17 of 1999 (the ‘Commercial Code’) was promulgated to update the Egyptian commercial legal regime, including certain matters relating to commercial agencies not covered by the Commercial Agency Law or its Regulations. For example, the Commercial Code provided for specific rules relating to the termination and non-renewal of commercial agency agreements, making termination and/or non-renewal more difficult, absent serious cause. The rules outlined in the Commercial Agency Law and its Regulations, as well as the Commercial Code, therefore, became the *lex specialis* in matters relating to commercial agency, which supersede the provisions of the ECC that contradict them.

The Commercial Code, Commercial Agency Law, and Commercial Agency Regulations, as amended, distinguish between two types of commercial agencies that depend, to a large extent, on the level of a principal’s involvement in directing the affairs of its agent.

There are currently two main types of commercial agencies under Egyptian law, notably (i) ‘commission agencies’, where the agent contracts in its own name, yet for the account of and under the supervision and guidance of the principal;¹³ and (ii) ‘contract agencies’, where the agent undertakes on a continuous basis, and within a specific area of activity, to promote, negotiate, and conclude transactions in the name and for the account of the principal.¹⁴ Unlike commission agency agreements, a contract agency agreement must be in writing, and indicate the limits of the agency, the pay of the agent, the territory of the agent’s operation, and the period of the contract if it is for a definite

¹¹ Procurement Law Regulations (EG), Art. 61 states that contracting parties must be residents in Egypt, or have an agent in Egypt if they are based overseas. Either the principal or the agent can contract with the government. In turn, Article 14 of the Commercial Agency Law, Law No. 120 of 1982 states that contracting rules of public entities and public sector companies must stipulate the amount of brokerage or commission to be paid to the commercial agent or mediator in tenders.

¹² ECC 1948 (EG), Art. 699.

¹³ Commercial Code 1999 (EG), Art. 166(i) of the states:

A commission agency is a contract by virtue of which the agent undertakes to effect in his name a legal act for account of the principal.

¹⁴ Commercial Code 1999 (EG), Art. 177 states:

Contracts agency is a contract under which a person undertakes on a permanent basis, and in a specific area of activity, promoting, negotiating and concluding transactions and deals in the name and for account of the principal in return for pay. His assignment may also comprise executing the contracts in the name and for account of the principal.

period,¹⁵ the duration of which may not be less than five years if the contract agent is expected to erect a building for display, storage, repairs or maintenance.¹⁶ A contract agent also enjoys a certain degree of autonomy in doing business.¹⁷ Other important limitations apply to contract agencies.¹⁸ The main challenges faced by many principals is the difficulty of terminating or not renewing certain agency agreements, depending on whether they are commission or contract agencies, of a definite or indefinite nature.

a) Termination and compensation

1. Background and general rules

Generally, Article 715(i) of the ECC determines that compensation is due when a termination of an agency agreement is untimely or unjustified.¹⁹ The ECC, however, does not distinguish between commission and contract agencies, nor between definite or indefinite agreements, nor between termination and non-renewals of agreements.

In 1982, the Commercial Agency Law, and soon thereafter the Commercial Agency Regulations, addressed a number of regulatory matters relating to commercial agency, such as requiring all commercial agents, regardless of type,²⁰ to register with the General Organization for Import and Export Control in the Commercial Agencies Registry (the 'GOIEC'),²¹ and meet a certain financial and nationality threshold to be able to perform their duties as commercial agents.²² However, neither the Commercial Agency Law, nor the Commercial Agency Regulations (prior to their amendment in 2005), initially

¹⁵ Commercial Code 1999 (EG), Art. 180.

¹⁶ Commercial Code 1999 (EG), Art. 181.

¹⁷ Commercial Code 1999 (EG), Art. 178. *Court of Cassation, Case No. 14435 of Judicial Year 79*, dated 10 January 2012.

¹⁸ See Commercial Code 1999 (EG), Arts. 177-191.

¹⁹ ECC 1948 (EG), Art. 715(i) states:

The principal may, at any time and notwithstanding any agreement to the contrary, revoke or restrict the mandate. When, however, the mandate is remunerated, the principal must indemnify the mandatary for loss sustained by him as a result of an untimely or unjustified revocation.

²⁰ Commercial Agency Law 1982 (EG), Art. 1 contained a definition of commercial agency that included elements of both commission and contract agencies without distinguishing them, i.e. it defined an agent, *inter alia*, as one who acts for the account of a principal while acting either in his or her own name or in the name of the principal.

²¹ For example, failure to register entails a penalty of imprisonment of at least six months and a penalty ranging from EGP 500 to EGP 10,000. See Commercial Agency Law 1982 (EG), Art. 16; other penalties apply. Among other required documents to be submitted for the registration of a commercial agency, the application must be supported by the agency contract, notarised by the chamber of commerce or by the equivalent official body in the foreign country and approved (or authenticated, legalised) by the competent Egyptian consulate.

²² A party entering into an agreement with a local agent must ensure that certain nationality requirements are met pursuant to Commercial Agency Law 1982 (EG), Art. 3. For example, the commercial agent who is a natural person must be an Egyptian citizen or has acquired Egyptian Citizenship 10 years prior to becoming a commercial agent. Companies acting as commercial agents must fulfill the following main requirements:

- Their headquarters must be in Egypt;
- Their Bylaws must include Commercial agency as one of their purposes;
- Their capital must be fully owned by Egyptians or Egyptian entities, and must be at least EGP 20,000; and
- Their managers and the members of their boards of directors must be Egyptian citizens or entities (corporate entities can serve as board members under Egyptian law).

addressed matters related to termination or renewal of the agency agreement, nor did they make a distinction between definite and indefinite agencies, other than regulating the specific documentation required for registration and re-registration of agents every five years.²³ Indeed, as a result of the registration requirements under the Commercial Agency Law,²⁴ a recalcitrant agent that deems itself aggrieved by a particular termination or non-renewal, may be able to effectively block its de-registration, as well as the registration of other agents in its stead, effectively paralyzing the principal, who may be unable to proceed with tenders.

In 1999, the Commercial Code was promulgated, allowing the termination of commercial agencies at any time²⁵ subject to the payment of adequate compensation under certain circumstances that vary depending on the type of commercial agency agreements. In other words, the Commercial Code did, for the first time, distinguish between commission agencies and contract agencies, definite agencies and indefinite agencies, as well as termination and non-renewal in certain cases.

Against this background, Article 163 of the Commercial Code determines that no compensation is due to a commercial agent unless termination occurs (i) without prior notice, and (ii) at an unsuitable time. The Article adds that for fixed-term contracts, termination must be for cause, otherwise compensation will be due. Because this provision does not limit its application to any specific form of commercial agency, it applies to both commission and contract agencies, whether definite or indefinite. Article 163 of the Commercial Code largely replicates Article 715(i) of the ECC, which states that '[t]he principal may, at any time and notwithstanding any agreement to the contrary, revoke or restrict the agency. When, however, the agency is remunerated, the principal must indemnify the agent for loss sustained by him as a result of an unacceptable or unjustified revocation'.

In addition to the general rules relating to the termination of commercial agencies discussed above, certain particular conditions apply to the termination of contract agencies.

23 As discussed below, Commercial Agency Regulations 1982 (EG), Arts. 13-Bis-1 through Bis-3, were introduced only in 2005 by virtue of Min. D. No. 362 of 2005. This is discussed chronologically below.

24 Commercial Agency Regulations 1982 (EG), Art. 15(i)-Bis, which was introduced only in 2005 by virtue of Min. D. No. 362 of 2005 (addressing an agent's application to GOIC for the registration of an agency pursuant to an agency agreement), states:

If the agency had earlier been rescinded or struck off because of the agency having expired without being renewed or prior to the expiry thereof, it shall be required for the new agency to be registered that an evidence be provided that the compensation due whether to the principal or to the former agent as a result of the agency contract had been settled according to the provisions of the articles Nos. 13-Bis-1, 13-Bis-2 and 13-Bis-3, or that sixty days have lapsed with the former agent having not furnished the Authority with a copy of the notice of action or the arbitration request filed thereby to claim such compensation. (Emphasis added).

25 Commercial Code 1999 (EG), Article. 163 of the Commercial Code states:

Either party to the commercial agency contract may terminate the contract at all times. The compensation shall not be payable unless the termination of the contract occurs without prior notice or at an unsuitable time. If the contract is for a definite time, its termination shall be based on a serious and acceptable reason, otherwise the compensation shall be payable.

2. Contract Agencies

With respect to contract agencies, Article 188(i) of the Commercial Code determines that compensation is due by the principal if a termination of an indefinite contract agency occurs absent fault by the agent.²⁶ Further, Article 189 of the Commercial Code states that compensation is due by the principal if a definite contract agency is not renewed (i) without any error or omission by the agent, and (ii) when the agent was evidently successful in promoting the sales of the commodity or increasing the number of customers.²⁷ Article 189(3) provides for the relevant consideration in determining compensation in such case.²⁸

Three points are important to highlight with respect to termination of contract agencies. Firstly, both Articles 188(i) and 189(i) are mandatory, and any agreement to vary the terms of these articles shall be null and void. Egyptian courts take the view that the termination of an indefinite contract agency without cause will necessitate that the principal compensate the agent. In other words, the unsuspecting party to a contract agency containing provisions for termination may ultimately find that such provisions may be null and void, irrespective of the principle of *pacta sunt servanda*, applicable in Egypt and internationally.

Secondly, as already pointed out, Articles 188(i) and 189 do not address the termination of a definite contract agency. Instead, they address the termination of an indefinite contract agency²⁹ and the non-renewal of a definite contract agency.³⁰ Therefore, the termination of a definite contract agency is subject to the more general provisions of Article 163 of the Commercial Code (providing that compensation is due if a termination occurs (i) without prior notice, (ii) at an unsuitable time, and (iii) is not based on a serious and acceptable reason in the case of limited duration commercial agencies).

²⁶ Commercial Code 1999 (EG), Art.188 states:

1. The contract agency deed shall be concluded in the common interest of the two parties. If the deed is for an indefinite period, the principal shall not end it without the occurrence of a fault by the agent, otherwise he shall compensate him for the harm caused to him as a result of isolating him. All agreement to the contrary of that shall be null and invalid.
2. The agent shall compensate the principal for the damage/harm caused to him if he relinquishes the agency at an unsuitable time and without an acceptable excuse.

²⁷ Commercial Code 1999 (EG), Art.189 states:

1. If the deed is for a definite period, and the principle decides not to renew it at the expiry of its period, the agent shall have the right to receive a compensation to be determined by the judge, even if there is an agreement to the contrary.
2. For such compensation to be payable, the following is stipulated:
 - a. The agent shall not have committed an error or omission in the course of executing the deed.
 - b. The activity of the agent shall have led to evident success in promoting the sales of the commodity or increasing the number of customers.

²⁸ Commercial Code 1999 (EG), Art.189(3) states:

In estimating the compensation due consideration shall be given to the harm and damage caused to the agent and the degree of the benefit accruing to the principal from the agent's efforts in promoting the sales of the commodity and increasing the number of customers.

²⁹ Commercial Code 1999 (EG), Art. 188(i).

³⁰ Commercial Code 1999 (EG), Art. 189.

Thirdly, considering that Article 163 of the Commercial Code adds the ‘serious and acceptable reason’ requirement only with respect to definite commercial agencies, whether commission or contracts, and since Article 188(i) of the Commercial Code requires ‘fault’ by the agent (i.e. justified termination) with respect to indefinite contract agencies, the question of whether an indefinite commission agency can be terminated without justification is singularly not directly addressed by the Commercial Code. In this respect, since the Commercial Agency Law also does not address this issue either, one must defer to the general provisions of Article 715(i) of the ECC, which determines that compensation is due when a termination of an agency agreement, and therefore also an indefinite commission agency, is untimely or unjustified.³¹

It follows that the Commercial Code and the ECC together determine that the termination of a commercial agency, whether commission or contract, whether definite or indefinite, must be compensated by the principal if it is either without ‘serious and acceptable reason’, ‘unjustified’ or as a result of a ‘fault by the agent’.

3. *Constitutional issues*

The above issues are further complicated by constitutional questions. The Commercial Agency Law does not address matters related to either the termination or the non-renewal of commercial agencies, whether definite or indefinite. Yet, oddly, the Commercial Agency Regulations, which were issued to regulate the application of the Commercial Agency Law, were amended in 2005 to include three provisions related to termination and non-renewal.

- (1) Article 13-Bis-1, which is substantially similar to the provisions of Article 163 of the Commercial Code. Accordingly, alone, it does not add any novel provision, nor does it create any additional complexity.
- (2) Article 13-Bis-2, forbids the principal from terminating an indefinite agency agreement, whether commission or contract agency, without an error or fault by the agent,³² and entitles the agent to compensation if an ‘indefinite’ agency agreement is terminated by the principal for convenience. In such a case, the principal is liable for damages incurred by the agent as a result of such termination. While the language of Article 13-Bis-2 largely tracks the language

³¹ Commercial Code 1999 (EG), Art. 2(i) states:

The provisions of the agreement between the contracting parties shall apply to commercial matters. In case no such accord exists, the provisions of the present law, or other laws related to commercial matters, then the rules of trading practices and customs shall apply. If no trading practices or customs exist, the provisions of the Civil Code shall apply.

³² Commercial Agency Regulations 1982 (EG), Art. 13 Bis-2 states:

The principal may not terminate the indefinite agency contract with no error or fault by the agent, or else the principal shall be obligated to compensate the agent for the damage suffered thereby in consequence of the dismissal thereof and the termination of the agency contract.

A certain nuanced tension exists as to whether the agency contract may not be terminated at all (and thus binding the parties against their will), as opposed to it being deemed terminated, but subject to compensation. However, when read in conjunction with Commercial Agency Regulations 1982 (EG), Art. 13 Bis-1, Commercial Code 1999 (EG), Art. 163, and ECC 1948 (EG), Art. 715(i), the above Commercial Agency Regulations 1982 (EG), Art. 13 Bis-2 is best understood as imposing compensation as a result of the termination only.

of Article 188(1) of the Commercial Code, both articles differ in a fundamental way: Article 188(1) of the Commercial Code only makes compensation mandatory in the case of fault by the agent in the case of indefinite contract agencies; while Article 13-Bis-2 extends it to all indefinite commercial agencies (i.e. both commission and contract agencies).

- (3) Finally, Article 13-Bis-3,³³ forbids the principal from not renewing a definite agency agreement, whether commission or contract agency, without an error or fault by the agent,³⁴ and entitles that agent to compensation if a definite agency agreement is not renewed for no justified reason. In such a case, the principal shall be liable for damages incurred by the agent as a result of such termination.

As in the case of Article 13-Bis-2 of the Commercial Agency Regulations and 188(1) of the Commercial Code, the language of Article 13-Bis-3 largely tracks the language of Article 189 of the Commercial Code, yet they differ in a fundamental way: Article 189 of the Commercial Code only makes compensation mandatory in the case of fault by the agent in the case of the non-renewal of definite contract agencies; while Article 13-Bis-3 extends it to all definite commercial agencies, (i.e. both commission and contract agencies). However, the Egyptian Constitutional Court has determined that Article 189 of the Commercial Code is unconstitutional as it impedes a party's choice not to renew a definite agreement, thereby violating the rule against the perpetuity of contracts.³⁵ As a consequence and corollary, we are of the opinion that Article 13 Bis-3 of the Commercial Agency Regulations must be equally found to be unconstitutional under Egyptian law. This principle should not be limited to the non-renewal of a definite contract agency (the subject matter of Article 189 of the Commercial Code), but also to the non-renewal of a definite commercial agency, whether contract or commission as purportedly

33 Commercial Agency Regulations 1982 (EG), Art. 13 Bis-3 states:

In the event of the principal declining to renew the definite agency contract with no error or fault of the agent in the course of performing the agency contract, the principal shall be obligated to compensate the agent for the damage suffered thereby as a result of this, if the agent's activity had led to obvious success in promoting the commodity or in increasing the number of customers.

34 Commercial Agency Regulations 1982 (EG), Art. 13 Bis-2, footnote 35, *supra*. A certain nuanced tension exists as to whether the agency contract may not be terminated at all (and thus binding the parties against their will), as opposed to it being deemed terminated, but subject to compensation. However, when read in conjunction with Commercial Agency Regulations 1982 (EG), Art. 13 Bis-1, Commercial Code 1999 (EG), Art. 163, and ECC 1948 (EG), Art. 715(1), the above Commercial Agency Regulations 1982 (EG), Art. 13 Bis-2 is best understood as imposing compensation as a result of the termination only.

35 Egyptian *Supreme Constitutional Court, Case No. 193 for the Judicial Year 29*, dated 14 June 2012. ('No one, as a human being, should be compelled to be burdened with something that he does not accept. Liberty in contracting is not only a material feature of personal freedom but also has a great relevance to the right of ownership, whereby such right of ownership in itself or one of the rights that emerge therefrom could be the basis of contracting and represents the free will of choice and the power of decision making in contracting. If the legislative authority was exceptionally of the opinion to deal with some types of contracts to regulate some of their aspects with an imperative regulation on the basis of a legal interest, then this legislative authority itself should not invade the logical circuit in which the free will practices its movement because its power shall have no effect after demolishing it, as by doing so it shall terminate its existence and totally eradicate personal freedom in one of the most important scopes for expressing itself, i.e. represented in the freedom of choice independently from others in order to maintain the elements of this freedom and ensure its effectiveness.')

regulated by Article 13-Bis-3. Indeed, it may be possible to extend this principle also to the impossibility of terminating an indefinite contract agency agreement without cause under Article 188(1), yet this should be carefully considered with the assistance of capable Egyptian counsel prior to entering into such an agreement.

Furthermore, we are of the opinion that the constitutionality of Articles 13-Bis-2 and Bis-3 of the Commercial Agency Regulations is highly questionable because they breach the Egyptian legislative hierarchy by extending the terms of Articles 188(1) and 189 of the Commercial Code, which apply to contract agencies only, to cover commission agencies as well. Yet, nowhere in either the ECC, the Commercial Code, nor the Commercial Agency Law itself, from which the Commercial Agency Regulations derive their regulatory basis, can one find the power to extend the terms of Articles 188(1) and 189 also to commission agencies. This must be found *ultra vires*; and therefore, unconstitutional.

b) Practical Considerations

Given the above complexities, it appears that there is no bullet proof solution to protect principals entering into commercial agency agreements from the risk of being locked into a relation with their agents other than paying compensation in exchange for terminating or not renewing agreements, as the case may be. However, careful drafting of agency agreements, taking into consideration the commercial realities of each individual case, may provide for certain additional protections or at a minimum increase transparency in the parties' relationship.

1. Defining justifiable cause for termination or non-renewal

As seen above, while Article 715(1) of the ECC, Article 163 of the Commercial Code, as well as the Commercial Agency Regulations, expressly allow both the principal and the agent to terminate an agency agreement for legal cause and at a suitable time, neither the ECC, Commercial Agency Law, nor the Commercial Agency Regulations, nor the Commercial Code, defines what constitutes sufficient cause or suitable time for termination. Terms such as 'serious and acceptable reason';³⁶ 'error or default' by the agent;³⁷ 'fault' by the agent;³⁸ the agent's 'error or omission';³⁹ 'unsuitable time';⁴⁰ or 'untimely',⁴¹ can be found scattered within the Commercial Code, the ECC, and Commercial Agency Regulations without precise definitions.

Given the broadness of the foregoing terms justifying termination for cause, we recommend that the causes for termination be defined or specified in the agreement between the parties. This may limit, and, in certain cases, spare principals the obligation of demonstrating that the cause for termination is not deemed to be 'serious' enough

³⁶ Commercial Agency Regulations 1982 (EG), Art. 13 Bis-1; Commercial Code 1999 (EG), Art. 163.

³⁷ Commercial Agency Regulations 1982 (EG), Art. 13 Bis-2.

³⁸ Commercial Code 1999 (EG), Art. 188(1).

³⁹ Commercial Code 1999 (EG), Art. 189.

⁴⁰ Commercial Code 1999 (EG), Arts. 163 and 188(2).

⁴¹ ECC 1948 (EG), Art. 715(1).

to warrant ending the agency relationship, and the requirement that they compensate agents. By defining the cause for termination, the parties may reach mutually agreeable definitions for the benefit of certainty, and not need to identify whether termination was not in good faith, or amounted to negligence, willful misconduct, fraud, or gross negligence, none of which is defined in the law, particularly since available scholarly works and jurisprudence can be ambiguous or tautological, thus adding to the confusion.

2. *Clarifying the type of commercial agency*

Further, given the fact that the more 'draconian' provisions of the Commercial Code (for principals) relate to the termination and non-renewal of contract agency agreements, which are mandatory, principals are encouraged to enter into commission agencies to the extent possible, and clearly indicate in their agreement that the agent shall act in its own name, instead of in the name of the principal, and shall not enter into contracts in the name, or on behalf, of the principal.⁴²

Careful drafting targeting the proper intended form of commercial agency can greatly assist the parties in identifying the relevant applicable provisions to the specific commercial agency agreement under the ECC and the Commercial Code.

3. *Providing for a fixed-term agency agreement*

Considering that the more severe restrictions imposed by of the Commercial Code relate to the termination of an indefinite agency agreement (contract agency under Article 188(i) of the Commercial Code, which are mandatory, and any commercial agency under Article 13-Bis-2 of the Commercial Agency Law), principals are encouraged to enter into fixed-term commercial agreements. This allows them to minimise their losses, since as discussed below, shorter definite commercial agreements would allow for more controlled and predictable damages for termination should a court order compensation by a principal for not-renewal the agreement.⁴³

On this note, principals are further encouraged to avoid including an automatic renewal clause in their agreements, and demand that active steps towards renewal be followed by the parties instead. This will eliminate the risk of an Egyptian court or tribunal ruling that the agency agreement is of an indefinite nature.

4. *Legally providing for out-of-court termination*

The parties are also encouraged to stipulate in their agreement that termination for cause be 'without the need for formal summons and/or a court judgment or order of a tribunal' where applicable. Failure to do so will cause principals to be trapped by the rules of ECC which, out of concern for contractual balance and stability, precludes termination without a court order, unless the parties explicitly agree to waive that requirement.⁴⁴

⁴² Compare Commercial Code 1999 (EG), Art. 166(i) ('the agent undertakes to effect in his name a legal act for account of the principal') and Art. 177 (the agent 'deals in the name and for account of the principal') *supra*.

⁴³ This is supported by the fact that Commercial Code 1999 (EG) Art. 189 has been found unconstitutional with respect to the non-renewal of contract agency agreements and Article 13-Bis-3, should equally be so found.

⁴⁴ ECC 1948 (EG), Art. 158 states that '[t]he parties may agree that in case of non-performance of

While the restrictions on a principal's termination of a commercial agency agreement for cause may be controlled, defined, or in certain cases, even circumvented by the parties' carefully drafted agreement defining what may constitute a serious breach, fault, error, or omission by the agent, and on the explicit waiver of the requirement that termination take place by means of a court judgment or order of an arbitral tribunal, termination for convenience is more difficult to achieve, and varies depending on the type of commercial agency and length of the agency agreement's term, as discussed.

5. Notice of Termination

Prior notice to terminate an agreement should be given within a reasonable period, taking into account the extent of the agent's activity. In fact, Article 13 Bis-1 of the Commercial Agency Regulations and Article 163 of the Commercial Code state that no compensation shall be paid unless the contract was terminated without prior notice or at an unsuitable time.

Egyptian courts have held that a reasonable notice period is somewhere between three and six months but may be longer if the circumstances of a specific case so require.

c) Calculation of Compensation Due to an Agent

Termination for convenience or invalid cause will necessitate that the principal compensate the agent. Compensation will include actual damages and lost profits provided they were foreseeable by a (i) similarly-situated reasonable person, as the (ii) normal result of entering into the agency agreement, (iii) at the time parties entered into the agreement (iv) should the principal breach its contractual obligations.⁴⁵

Article 221 of the ECC provides:

The judge will fix the amount of damages, if it has not been fixed in the contract or by law. The amount of damages includes losses suffered by the creditor and profits of which he has been deprived provided that they are a normal result of the failure to perform the obligation or of the delay in such performance.

These losses shall be considered to be a normal result, if the creditor is not able to avoid them by making a reasonable effort. [Emphasis added]

Doctrine and jurisprudence interpret the phrase 'a normal result of the failure to perform the obligation' in Article 221 of the ECC to mean 'direct damages' which can

the obligations flowing from the contract, the contract will be deemed to have been rescinded without a Court order. Such an agreement does not release the parties from the obligation of serving a formal summons, unless the parties expressly agree that such a summons will be dispensed with'. ECC 1948 (EG), Art. 158 has been interpreted by the Egyptian Court of Cassation to state that the parties must resort to the courts, or arbitration if applicable, to determine the termination of a contract in general, even when parties have agreed on an *ipso facto* or automatic termination, unless they agreed with very clear language in the contract to state that the contract shall terminate 'without the need for a court order'. *Court of Cassation, Case No. 1952 of Judicial Year 54*, dated 30 October 1985, and others. Doctrine and scholarly writings are well established on this issue. Therefore, under Egyptian law, termination of a contract must be by court order or arbitral award, unless a specific set of words are used in the contract.

45 *Court of Cassation, Case No. 45 of Judicial Year 36; Court of Cassation, Case No. 206 of Judicial Year 36.*

include lost profits.⁴⁶ In addition to the foreseeability threshold, the party claiming lost profits must also establish that the loss would have inevitably occurred as a result of the other party's contractual breach (i.e., certain), and must demonstrate that it has taken reasonable steps to mitigate its losses.⁴⁷

The scope of the recovery of damages is widened, however, when the party claiming damages can establish that the other party committed fraud or gross negligence. In this case, the rules of the recovery of damages regulating tort liability will apply to contractual breaches,⁴⁸ and the suffering party can claim any direct damages whether or not they are foreseeable.⁴⁹ However, and as noted above, the ECC does not define the terms fraud and gross negligence, which may cause considerable ambiguity and uncertainty.

If the agreement is a definite agency contract, compensation for unjustified termination will cover direct and foreseeable damages and lost profit expected until the end of the term of the contract. As a result, and as briefly noted above with respect to the duration of agency agreements, we typically recommend that principals enter into a definite agreement, where possible, which may be renewed by the parties' agreement or by the principal's affirmative action, which would allow for certain control of ultimate damages in worse case scenarios.

d) Liquidated Damages under Egyptian Law

Finally, Egyptian law recognises the parties' right to agree to liquidated damages⁵⁰ subject to a finding by the reviewing court or arbitral tribunal of fault, causal link, that the liquidated damages amount represent a true and genuine pre-estimate of the claimed damages and reflect actual damages resulting from the breach of a party's obligation(s)⁵¹. It follows that, while parties can agree to the amount of damages in advance, a reviewing court or arbitration panel may *reduce* (but never raise!) the amount of damages in cases where the breaching party establishes that the amount fixed was grossly exaggerated or

⁴⁶ Court of Cassation, Case No. 1070 of Judicial Year 53; see also A.H. Foda, *A commentary on the Civil Code* (Cairo: Al-Nasheroun Al-Motahedoun, vol. 3), 496 and 500.

⁴⁷ N.I. Saad, *Obligations*, (Alexandria: Dar Al-Gamaa Al-Gadida, 2012), 301-302. Also, Commercial Code 1999 (EG) Art. 189 and Commercial Agency Regulations 1982 (EG) Art. 13 Bis-3, as amended, stipulate that agent's efforts in promoting the sales of the commodity and increasing the number of customers shall be factored into the calculation of compensation owed to an aggrieved agent.

⁴⁸ ECC, Art. 221(3). Foda, note 50, 482; see also A.R. Al-Sanhouri, *Commentary on the Civil Code* (Cairo: Dar Al-Shorouk, 2010, vol. 1), 599.

⁴⁹ *Court of Appeal, Case No. 3956 of Judicial Year 68* (cited in Foda, note 50, 500). Although indirect damages may not be recoverable even in cases of fraud and gross negligence, see Sanhouri, note 52, 597.

⁵⁰ ECC 1948 (EG), Art. 223 stipulates that '[t]he parties may pre-estimate the amount of the damages by means of a provision of the contract or in a subsequent agreement'

⁵¹ ECC 1948 (EG), Art. 224 of the ECC states:

Damages fixed by agreement are not due, if the debtor establishes that the creditor has not suffered any loss.

The judge may reduce the amount of these damages, if the debtor establishes that the amount fixed was grossly exaggerated or that the principal obligation has been partially performed.

Any agreement contrary to the provisions of the two preceding paragraphs is void.

that the principal obligation has been partially performed.⁵²

IV. DISPUTE RESOLUTION: TO ARBITRATE OR NOT TO ARBITRATE... AND WHERE?

Foreign-based parties should also pay particular attention to the dispute resolution clause in their agency agreement. In the absence of an agreement to subject disputes to arbitration, if the agreement is governed by Egyptian law, the Egyptian Code of Civil and Commercial Procedures (the 'ECCCP') establishes that an aggrieved principal to resort to an Egyptian court to settle its dispute, even if the parties agreed to subject their disputes to adjudication in a foreign court.⁵³ This will spare principals the time and procedural formalities related to enforcing a foreign judgment in Egypt. By the same token, even if the parties' select a foreign forum to resolve their disputes, an agent may be able to invoke the jurisdiction of an Egyptian court if the foreign-based principal has no domicile or a place of residence in Egypt when the dispute relates to money that is located in Egypt, or an obligation that originated, was implemented or is due in Egypt, or relates to bankruptcy that is declared in Egypt.⁵⁴ The Egyptian Court of Cassation has held that Article 30 is a public policy norm.⁵⁵

If the principal obtains a favorable judgment by a foreign court, he or she may face difficulties enforcing it in Egypt given the long enforcement process. The enforcement of foreign judgments in Egypt is subject to certain criteria, chief among which are (i) reciprocity, and (ii) the foreign court's compliance with certain procedural safeguards.

Article 296 of the ECCCP provides for the enforcement of foreign judgments and orders in Egypt; it states:

Judgments and orders issued in a foreign country may be enforced under the same conditions stipulated in the law of that foreign country as regards the

⁵² *Ibid.*

⁵³ Since all agents are by default Egyptian citizens or entities, ECCCP 1968 (EG), Art. 28 will apply, granting Egyptian courts jurisdiction. ECCCP 1968 (EG), Art. 28 states:

Egyptian courts shall have jurisdiction over cases filed against Egyptians, even if the Egyptian whom the case is being filed against has no domicile or residence Egypt, with the exception of cases involving real estate located abroad.

⁵⁴ ECCCP 1968 (EG), Art. 30 states:

The Courts of the Republic [of Egypt] shall have jurisdiction over disputes initiated against a foreigner that does not have a domicile or a place of residence in the Republic [of Egypt] in the following instances:

1. If the foreigner has a selected domicile in the Republic [of Egypt];
2. If the dispute relates to money that is located in the Republic of Egypt], or relates to an obligation that originated, was implemented or is due in the Republic [of Egypt], or relates to bankruptcy that is declared in the Republic [of Egypt]...

See also *Court of Cassation, Cases No. 668 and 641 of Judicial Year 60*, dated 28 April 1991.

⁵⁵ *Cairo Court of Appeals, Commercial Circuit 62, Appeals No. 2616 and 2661 of Judicial Year 125*, dated 8 April 2010; also see *Court of Cassation Case No. 1932 of Judicial Year 51*, Technical Office 33, Part 1, page 470; dated 3 May 1982. We note, however, that parties to a dispute effectively circumvent this jurisdictional provision granting Egyptian courts concurrent jurisdiction under ECCCP 1968 (EG), Art. 30 by subjecting their dispute to arbitration instead of court adjudication. In such case, they will be in a position to resolve their dispute by means of an arbitral tribunal located outside of Egypt. This exemption to the general rule is pursuant to Arbitration Act 1994 (EG), Art. 13. See *Cairo Court of Appeals, Commercial Circuit 62, Appeal No. 1641 of Judicial Year 127*, dated 3 July 2012; and *Appeals No. 5029 and 5098 of Judicial Year 123*; dated 6 June 2007.

enforcement of Egyptian judgments and orders therein.

Doctrine and jurisprudence suggest that the ‘same conditions stipulated in the law of that foreign country’ can be inferred from the existence of bilateral (or multilateral) agreements on judicial cooperation or enforcement of civil and commercial judgments between Egypt and the foreign State, or if the foreign State provides, through its internal legislation, for the enforcement of judgements issued by Egyptian courts.⁵⁶

We note from experience that Egyptian courts interpret Article 296 of the ECCCCP restrictively. Recently, an Egyptian court refused to enforce a Greek judgment (in the absence of a bilateral agreement between Egypt and Greece), although the Egyptian and Greek legal systems are founded in the civilist tradition.⁵⁷

Based on the above, in the absence of an international treaty on judicial cooperation or enforcement of civil and commercial judgments, as well as domestic legislation allowing foreign courts to enforce Egyptian court judgments, it is highly unlikely (if not impossible) that a foreign court judgment will be enforced in Egypt. Even when enforcement is possible, it will be a slow process.⁵⁸

The foregoing restrictions (including those relating to the automatic jurisdiction of Egyptian court despite agreement to the contrary) can be overcome by the parties’ agreement to subject their disputes to arbitration. Egypt is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the ‘New York Convention’).⁵⁹ In principle, the New York Convention should allow for the enforcement of a foreign arbitral award without hearing the merits of a case. Successful enforcement of a foreign arbitral award pursuant to the New York Convention in Egypt is common and is supported by Court of Cassation jurisprudence,⁶⁰ unless the award breaches public policy in Egypt, contradicts a judgment previously rendered by an Egyptian court on the subject matter in dispute, or was not properly notified to the party against whom it was rendered. Egypt’s Arbitration Act contains similar provisions,⁶¹ and

⁵⁶ A.A. El-Wafa, *Commentary on The Provisions of the Procedures Law* (Alexandria: Dar Al-Matbouaat Al-Gameeya, 2007), 1347.

⁵⁷ *Court of Cassation, Case No. 4543 of Judicial Year 84*, dated February 8, 2016

⁵⁸ ECCCCP 1968 (EG), Art. 298 indicates that an Egyptian court may not enforce a foreign judgment unless it ensures, that:

1. Egyptian courts have no jurisdiction over the dispute and that the foreign court that issued the decision has jurisdiction;
2. the parties to the dispute were properly notified and represented;
3. the foreign judgment enjoys *res judicata* status; and
4. the judgment does not contradict a judgment issued by an Egyptian court in a dispute involving the same parties and that it does not offend public order or morals.

⁵⁹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, UN Doc 330 UNTS 38 (adopted on 10 June 1958, entered into force on 7 June 1959). Egypt acceded to the New York Convention in March 1959; see Presidential Decree No. 171 of 1959.

⁶⁰ *Court of Cassation, Case No. 2994 of Judicial Year 57*, dated 16 July 1990. The Court of Cassation has established that the New York Convention supersedes Egyptian law to the extent that it requires that the enforcement of foreign arbitral awards be subject to no additional procedural hurdles as applicable to the enforcement to domestic arbitral awards. See e.g. *Court of Cassation, Case No. 966 of the year 1973*, dated January 10, 2005.

⁶¹ Arbitration Act 1994 (EG), Art. 58(2).

deals with enforcement of awards obtain in Egypt pursuant to the Arbitration Act.

In light of the above, to avoid a potential conflict of jurisdiction, risk of non-enforcement, and other possible delays of enforcement, we recommend that foreign-based parties agree to subject their disputes to arbitration. Ideally, arbitration should be held in Egypt, and in accordance with Egyptian law, since this will, in principle, accelerate the enforcement process. However, where there is a particular concern over the sensitivity of the matter, considering the circumstances *in toto*, the foreign-based party may consider subjecting disputes to arbitration seated abroad, even if physically held in Egypt, in order to subject the ultimate award to nullification provisions of that jurisdiction, instead of the provisions of Article 53 of the Egyptian Arbitration Act.

V. CONCLUSION

Contracting with Egyptian governmental entities entails dealing with certain legal obstacles, whether in the foreign-party's direct relation with the government or in its dealings with its Egyptian commercial agent. Administrative agreements are governed by special rules, and provide the State entity contracting with a foreign party with certain advantages, notably with respect to dictating the terms of the agreements, or in relation to the arbitration clause which must be accompanied by the concerned minister's consent; otherwise the default jurisdiction will lie in Egyptian courts.

A principal's entry into a commercial agency agreement is not without its challenges either. Certain limitations on a principal's right to terminate or not renew the agency agreement should cause principals to carefully study (and dictate, where possible) the terms of their agreements to ensure that they may terminate or not renew their agreements when needed. While there is no bullet proof mechanism that protects foreign-based principals from the obligation to compensate their Egyptian agents for early termination of their contracts, both law and practice can provide guidance as to which steps should be followed to minimise the principals' risk of liability, including avoiding contract agencies and indefinite agreements, defining what constitutes a breach, and providing for out of court termination. Since Egypt is a party to the New York Convention, foreign-based principals should also consider opting for international commercial arbitration, as applicable, as a means for resolving disputes. This will not only help them circumvent certain jurisdictional issues provided by the ECCCCP, but will also ensure that favorable awards could be enforced swiftly, while legal obstacles to enforcement could be minimised.