
**SOME CURRENT LEGAL ISSUES
CONCERNING TRADE AND INVESTMENT IN EGYPT**

by

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In my presentation today, I will provide a few observations on the current commercial environment in Egypt, then briefly summarize the modern development of certain Egyptian commercial laws and, finally, discuss some of the more important legal issues which may arise when a foreign company is selling to, or doing business in, Egypt.

Commercial Environment

The Arab Republic of Egypt ("Egypt") holds a strategic political, cultural, and commercial position in the Middle East, at a point where Europe, Asia and Africa meet.¹

Egypt enjoys substantial financial and political support from the United States and other Western governments. In the summer of 1986, then-Vice President George Bush visited Cairo and confirmed: "A stable Egypt is vitally in the interest of the United States".²

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Among the more publicized recent examples of such financial support: the French helped build Cairo's new subway, the Americans and British are coordinating the mammoth Cairo wastewater project, and the Japanese government funded Cairo's new Opera House (officially named the "Education and Culture Center"), which opened last October in Zamalek.³

Foreign companies continue to find Egypt to be a potentially attractive market, with a population estimated at 52 million and with total imports estimated to be at least U.S. \$9 billion annually.⁴

Nonetheless, Egypt faces formidable economic obstacles, including its nagging unfavorable balance of payments and a shortage of hard currency which continues to exist, despite various measures adopted by the Egyptian government.⁵ Egypt's civilian and military debt continues to grow, despite recent restructuring. And while the size of Egypt's population makes it an attractive market to foreign manufacturers, Egypt's population "explosion" is probably the most challenging problem facing that country. Fifty percent (50%) of the Egyptian population is under the age of twenty.

Most recently, Egyptians have encountered increasing inflation and sporadic shortages of such staples as flour, sugar and cooking oil.⁶ President Mubarak recognized Egypt's ailing economy, when he said last year:

When someone has a serious illness, he takes medicine. Sometimes, the medicine is bitter. But he has to bear it for his future. We are starting to take the bitter medicine. We will have to bear it.⁷

Although most Egyptians appear to agree with President Mubarak's diagnosis, there is less agreement as to the appropriate prescription of medicine, or the appropriate dosage.

Legal History

In contrast to some of the other jurisdictions in the Middle East, the present Egyptian legal framework of laws, regulations and court decisions provide a relatively well-developed and accessible jurisprudence, and therefore a relatively more "certain" legal environment for foreign companies planning commercial arrangements.

Modern Egyptian history often is considered to have begun in 1952, when the "Free Officers" (including Gamal Abdul Nasser and Anwar Sadat) deposed King Farouk. By the time of that coup, however, the modern Egyptian legal system was mostly in place.⁸

In fact, approximately 75 years earlier, in the latter part of the 19th Century, foreign interests had pressured the Egyptian government into establishing the so-called "Mixed Court" system. In general, these Mixed Courts were special courts, staffed with foreigners, and responsible for hearing disputes which involved foreigners. (A parallel national court system, for use by Egyptians alone, was established in 1883.) At that same time, codes of law were enacted, including a national civil code based on French, Italian and Swiss codes, although including some significant provisions relating to Islamic law and customary Egyptian law.⁹

In 1949, a revised civil code (also along European lines) became effective, the same year in which the Mixed Courts were finally abolished and merged into the national court system.¹⁰

The 1952 "Free Officers" coup did not have significant immediate consequences for the prevailing Egyptian economic system or Egyptian commercial laws. In 1956, however, President Nasser nationalized the Suez Canal and, at the outbreak of the Suez War (between Egypt and Britain, France and Israel), the Egyptian government nationalized all British and French companies in Egypt. In subsequent years, similar measures were not only directed at other European commercial interests, but also at Egyptian and other Arab private sector business.¹¹ This resulted in state ownership of all major industrial enterprises and stricter government regulation of the remaining private sector.

In the middle 1970s, President Sadat pushed Egypt into a new "open door policy" in order to obtain foreign capital, goods and technology. In furtherance of this policy, the "Investment Law" (often referred to as "Law 43") was enacted, and other laws were subsequently liberalized, such as the commercial agency, companies, income tax and exchange control laws.

Today, President Mubarak is in the midst of an "economic rationalization" movement in Egypt, partially a backlash from the perceived conspicuous consumption and other abuses of prior government policy. This gives rise to debate and tension (both within the Egyptian government and the private sector) on the proper role of government in the Egyptian economy.¹²

Some Current Issues on Trade and Investment in Egypt

My development of the following list of current Egyptian issues on trade and investment is subjective and personal, and tends to emphasize recent legal developments. To the extent possible, I have tried to provide, along with my list of issues and problems, some suggestions which may help to reduce financial risks

to foreign companies. In Egypt, as elsewhere, often the best advice is to carefully analyze and document the parties' specific rights and obligations.

1. Bureaucracy

Bureaucracy is a problem throughout the world, but particularly frustrating in Egypt.¹³ Some historians believe that the Egyptian bureaucracy is over 4,000 years old, and developed by the Pharaohs. Others blame foreign occupation -- the French and the British -- for creating the modern bureaucracy. Still others fault the state socialism of President Nasser.

The citadel of modern Egyptian bureaucracy, called al-Mogamma, is a large building dominating the south end of Cairo's main square. (Imagine a building like Chicago's Merchandise Mart, but dedicated to government administration, not commerce.) There was a rumor several years ago that Libyan terrorists were planning to blow up al-Mogamma. The Egyptian public reportedly applauded the idea.

There are no easy "solutions" to the Egyptian bureaucracy and, therefore, patience is recommended. If the Egyptian market appears attractive, then a foreign company should be prepared to make a commitment of time to it.

If a foreign company is bidding or negotiating for a specific government contract, it should review and consider those aspects of the contract which require government approvals, involvement and the like (for example, in areas such as preliminary and final inspection, and certifications for payment). A foreign company might reduce the potential for government delay by carefully defining and limiting necessary government supervision and approvals. For example, we are aware of at least one foreign company which now includes a "draw down" clause in most of its contracts -- requiring the government to open a letter of credit from which that company can obtain payment after invoicing.¹⁴

2. Customs Department

One particular portion of the Egyptian bureaucracy, the Customs Department, warrants a separate place on my Top Ten list. When I was living in Cairo, customs issues were the primary topic of many meetings of the U.S. Chamber of Commerce in Egypt and the American Businessmen's Group.¹⁵ A few years ago, the Egyptian Businessmen's Association prepared a memorandum on problems which its members faced with the customs department. These Egyptian businessmen emphasized, among other things:

- (I) the failure of the customs department to provide justification for its administrative decisions;
- (ii) failure to recognize and accept the stated invoice value of imports;
- (iii) failure to announce new administrative circulars and instructions;
- (iv) insufficient numbers of responsible officials to meet the workload; and
- (v) complicated and unclear customs categories and sub-categories for imported products.¹⁶

Some of these problems have begun to be addressed by the Egyptian government,¹⁷ and there are a few preventative measures which a foreign company can take. For example, a foreign seller should seek to shift responsibility to its Egyptian customer for customs clearance of all imports. Alternatively, the foreign seller should demand an express contract provision, whereby the company is excused from liability in the event of delay or impossibility of performance caused by the Egyptian customs administration.

3. International Convention for Sale of Goods

Both Egypt and the United States have (relatively recently) signed the United Nations Convention on Contracts for the International Sale of Goods (also known as the "Vienna Convention"). Thus, the Vienna Convention, which is based on elements from both common law and civil law, would generally apply to many contracts between a U.S. seller and an Egyptian purchaser. The scope of the Vienna Convention is fairly broad, and covers matters such as:

- (I) obligations of the seller and the buyer;
- (ii) conformity of goods;
- (iii) remedies for breach of contract;
- (iv) passing of risk; and
- (v) damages.

Some rules in the Vienna Convention concerning contract and contract interpretation differ from U.S. contract rules. Therefore, a U.S. company selling products to Egypt should either

expressly "opt out" of the Vienna Convention for its sales contract or else carefully review its sales contract in light of the Vienna Convention.

4. Special Protection for Commercial Agents?

Unlike a number of other countries in the Middle East, Egypt has no special legislation that obligates a foreign company to pay termination or non-renewal compensation to its commercial agent. In general, therefore, the provisions of the Egyptian commercial agency agreement govern and define the rights of the parties upon termination or non-renewal.¹⁸

When the current Egyptian Commercial Agency Law was being prepared, in the early 1980s, some Egyptian businessmen unsuccessfully advocated provisions which would protect against termination or non-renewal of their commercial agencies by foreign companies. In the past year, such arguments have been revived by Egyptian businessmen, and the topic has been the subject of meetings by a committee of the American Chamber of Commerce in Egypt.

Although it does not appear that any special protective legislation for commercial agents is imminent in Egypt, a foreign company should not simply rely on the current favorable rules. We recommend that commercial agency agreements state the detailed obligations of the commercial agent, as well as the specific circumstances which will constitute breach of the agreement sufficient to justify the foreign company's termination or non-renewal of the arrangement. The use of such provisions may make difficult litigation less likely.

5. Investment Law

A particular goal of the Egyptian Investment Law was to increase investments of a trilateral nature: projects bringing together Arab capital, Western technology and Egyptian manpower and resources. When the Egyptian Investment Law was under consideration, the government realized that foreign capital and technology would not be attracted to Egypt without provision of certain incentives. Therefore, the Investment Law grants specific exemptions to approved investors, such as exemption from certain taxes, customs duties, foreign exchange regulations, and company law and labor law rules.

The Egyptian government has been disappointed with the quantity and, in general, the quality of foreign investment into the country.¹⁹ However, any attempt to attract additional foreign investment by additional incentives or exemptions from Egyptian law seems politically unacceptable.²⁰

In addition to the "primary" Investment Law, Law 43, other laws exist for investment in so-called "new communities", in hotels and tourism, and in land reclamation. One of the recurring complaints of potential foreign investors is the confusing multiplicity of Egyptian investment laws, regulations, and administrative authorities and procedures. As a result, the Egyptian government has prepared a draft "unified" investment law, which Investment Authority deputy chairman Mohieddin el-Gharib reports is to go before the Peoples' Assembly for approval this month.²¹ The proposed law apparently will not contain additional incentives for foreign investors, except to simplify and centralize the current regulatory system.

6. Social Security Tax

The Egyptian Social Insurance Law requires employers to withhold fourteen percent (14%) of an Egyptian permanent employee's salary, which is paid to the social insurance authorities along with the employer's contribution of twenty-six percent (26%) of that salary. Most foreign companies performing work in Egypt are subject to special rules, however, because their Egyptian staff are not considered "permanent employees". Thus, the Egyptian social insurance authorities should notify such a foreign company of the percentage of the contract's value to be withheld for social insurance payments. Under a strict application of the Social Insurance Law, only the labor portion of the contract should be subject to social insurance withholding. In many instances, however, when a foreign company has failed to reach an agreement with the social insurance authorities, the latter have assessed social insurance withholding based on the total value of the contract being performed, inclusive of amounts spent outside Egypt for equipment, material and labor. It is therefore important for a company to agree with the social insurance authorities, in advance, on the portion of the contract value subject to withholding and the percentage to be withheld.

Under Egyptian law, certain government departments (including the social insurance authorities) have the power to collect debts through administrative attachment. Thus, without a court order, the social insurance authorities may attach bank accounts and other property of a company to satisfy an amount claimed for social insurance; the government department may sell any attached property by public auction.

7. Bank Guarantees (Letters of Credit)

Under the Egyptian Government Tender Law, there are three types of bank guarantees generally required in Egyptian government contracts: the bid (or provisional) guarantee, the performance (or

final) guarantee, and the advance payment guarantee. Each of these guarantees must be unconditional, payable on first demand, and issued (or confirmed) by a qualified bank in Egypt. There have been some abuses by the government beneficiary of such guarantees, sometimes the unreasonable demand to extend the duration of the guarantee or else pay it.

For example, we have heard of an instance where a government purchaser left a foreign supplier's machines and equipment in storage for a number of years, without inspecting or accepting them, because the government purchaser had failed to erect the necessary buildings to house such equipment. Nonetheless, the foreign supplier was required to extend its performance guarantee throughout that lengthy delay, under the threat that the guarantee would otherwise be drawn upon.²²

We recommend that a foreign company seek to negotiate certain modifications to such guarantees, to undercut their unconditional nature. For example, performance guarantees might be payable only if the government beneficiary presents a certificate to the issuing or confirming bank, stating that the contractor has failed to supply the materials and/or the work in accordance with specifications.

8. Preparation of Contracts

Problems over contract interpretation are to be expected when at least one of the parties is working in a foreign language. These problems are exacerbated in Egypt, where many contracts are poorly written, with ambiguities, contradictions and omissions. The results are inevitable delays, protracted disputes, and additional costs to all parties. Among the most frequent complaints arising from poor drafting of contracts, foreign contractors are being denied timely provisional or final acceptance of their work, which in turn delays the start of their warranty period and, eventually, the release of retention monies and performance guarantees. Poor drafting also has caused numerous problems during the warranty period, as to the duty of contractors to repair or replace parts that fail or need service, even if attributable to normal wear-and-tear.²³

9. Ex Parte Attachments

Under Egyptian law, a party may appear before a judge on an "urgent" basis and obtain temporary attachment of another person's property through ex parte proceedings (*i.e.*, where the opposing party does not have notice or opportunity to appear). Although such urgent measures may be necessary, for example, to prevent someone from illegally removing property from Egypt, we have seen

recent instances where the ex parte proceedings have been abused, particularly in attachments against assets of foreign parties. In one recent example, an Egyptian commercial agent made unjustifiable demand on a foreign company for sales commissions in excess of US\$1 million. The foreign company had other business operations in Egypt, including bank accounts, automobiles and office equipment, which the Egyptian commercial agent attached in ex parte proceedings. Although the matter was eventually resolved in favor of the foreign supplier, it faced significant legal expense and interruption to its business during the six (6) month court proceedings to remove the attachment.²⁴

10. Islamic Law

In Egypt today, "[t]he mood of the masses is religious". Ali Dessouki, the Director of Cairo University's Center for Political Studies observed: "The Egypt of the 1980s is more conservative, and Islamic fundamentalism has proved to be a main vehicle for the expression of this conservatism."²⁵

This trend is reflected in existing Egyptian law. The Civil Code, effective in 1949, instructs a judge to decide a dispute on the following basis:

- 1) according to the applicable specific provision of law, if it exists;
- 2) in the absence of an applicable provision of law, then according to custom;
- 3) in the absence of custom, then according to Islamic law; and
- 4) in the absence of Islamic law, then according to principles of natural justice and rules of equity.

This order of precedence was not expressly altered by the 1971 Egyptian constitution, which provided that the principles of Islamic law are a principal source of legislation in Egypt. The constitution was specially amended in 1979, however, and now provides that Islamic law is the principal source of Egyptian legislation. This issue is not simply a matter of semantics. More than ever, modern Egyptian commercial law cannot be judged without an assessment of the influence of Islamic law.

For example, in a recent but already-famous case which went before the Egyptian constitutional court, officials at Al-Azhar (the most revered institution of Islamic learning in Egypt) challenged provisions of the Civil Code which allow a court to assess interest against a defendant debtor.²⁶ (As you may know,

interest charges are generally prohibited under Islamic law.) The constitutional court ultimately reached a politic (if not entirely logical) conclusion: the Civil Code should be judged under the constitution in effect when the Civil Code itself was enacted. At that time, 1949, Islamic law was only one of many sources of Egyptian law -- and therefore, the constitutional court refused to strike down Civil Code provisions which allow interest charges.

Nonetheless, most observers believe that Islam will play an increasingly more important role in Egyptian society and government in the immediate future and, if so, many other provisions of Egyptian "secular" law will undoubtedly be subject to criticism and attack.²⁷

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Endnotes

1. See, e.g., Egypt Investment Review (October 1985), at p.2.
2. Horn, "Egypt's Economy", p.7, in Cairo Today supplement "Business in Egypt" (Fall 1986), at p.10.
3. For recent articles on (and photographs of) the new and old Opera House, see the October and November 1988 issues of Cairo Today.
4. See, e.g., Middle East Economic Digest (3 August 1985), at p.6 (population estimate by Egyptian Agency for General Mobilization and Statistics); American Embassy (Cairo), "Economic Trends Report: Egypt," pp. 1-2 (December 1986) (import statistics).
5. Among the more "infamous" recent attempts to resolve the chronic shortage of foreign exchange, the Egyptian government established "rationalization committees" who were responsible for deciding which imports would be allowed. See Ministry of Economy and Foreign Trade Decision Nos. 3, 4 and 5 (1985). These requirements were strongly opposed by most business sectors, particularly certain foreign banks operating in Egypt and many importers and merchants, and have subsequently been repealed or significantly amended. More recently, the government has taken other measures in an attempt to reduce the gap between the approved and "black market" exchange rate for the Egyptian pound, in an effort to bring more funds into regular banking channels.
6. Recently the price for important building materials, cement and steel reinforcing bars, has risen dramatically. See "Egypt: building material prices soar", Middle East Economic Digest (January 27, 1989), p.12.
7. Michael Georgy, "Dry Nebraska means costlier bread in Cairo", World Paper, p.5, in Cairo Today (October 1988).
8. This section relies, in part, upon Salacuse, "Foreign Investment and Legislative Exemptions in Egypt: Needed Stimulus or New Capitulations?", Chapter 7 of Social Legislation in the Contemporary Middle East (1986), p.241; Chahata, "Egypt", International Comparative Law Encyclopedia;

Hoyle, "Law in the Modern Arab World: A Personal View", International Business Lawyer (February 1987), pp. 45-47.

9. The degree of Islamic law influence on the 1883 Egyptian Civil Code, as well as on the 1949 Civil Code, is subject to some debate. See, e.g., Anderson, "The Shariah and Civil Law", 1 The Islamic Quarterly (1954), p.29.
10. In 1956, the Islamic law courts were merged into the national court system.
11. Hansen and Nashashibi, Foreign Trade Regimes and Economic Development: Egypt (1975), p.7.
12. For many years, the Egyptian government has sought to encourage foreign investment and technology transfer by streamlining or eliminating bureaucratic procedures and approvals. Aspects of the Egyptian government's economic policy, however, reflect other, "protected market economy" elements -- the policy is termed a "production-oriented Open Door policy, with due regard to avoiding adverse social implications." See Hamza and Stovall, "Proposed Law To Regulate Technology Transfers", Middle East Executive Reports (November 1986), at footnotes 25-26 and accompanying text. Of course, this phenomena has been seen at least since the early days of Mr. Mubarak's presidency. See, e.g., Romano, "Egypt Evaluates Its Trade With West, Mulls Closing Door on Luxury Imports", The Wall Street Journal (26 January 1982), p.25.
13. Some of this section is based on Ignatius, "Egyptian Bureaucracy Galls Both the Public and Foreign Investors", The Wall Street Journal (March 24, 1983), pp.1 and 19.
14. See Mohammed, "Payments Delays -- A Chronic Ailment", Business Monthly (September 1987) (a publication of the American Chamber of Commerce in Egypt), at p.12.
15. The Wall Street Journal told the story of 39 John Deere road graders shipped to Egypt as part of a U.S. Agency for International Development project to supply heavy equipment to Egypt's governorates. The graders were impounded by customs officials, who apparently believed the graders might be sold to private buyers. Customs officials released the graders for an acceptance ceremony attended by the U.S. ambassador to

Egypt but, after the ceremony, immediately impounded the graders again. The equipment was finally cleared five months after arrival. See Ignatius, supra note 13.

16. The Egyptian Businessmen's Association, "Memoranda and Recommendations Concerning Various Sectors of the Egyptian Business Environment" (December 1984), translated by Ronald G. Wolfe, photocopy available in the Chicago Office of Baker & McKenzie.
17. See, e.g., "U.S. AID Contracting in Egypt: American Firms List Their Complaints -- I", Middle East Executive Reports 9 (October 1988), at p.13.
18. See Hamza and Stovall, "Egyptian Commercial Agency and Distributorship: Law and Practice", 20 Law & Policy in International Business 63 (1988).
19. See, generally, Davies, "Joint Ventures In Egypt: New Trends, New Issues", Middle East Executive Reports (January 1989), p.14.
20. The Egyptian Investment Law has been critically examined and analyzed in a number of academic and legal periodicals. See, e.g., Salacuse, footnote 8, supra; Bishop, "Closing the Open Door: A Reappraisal of Foreign Investment in Egypt", Brigham Young University Law Review 537 (1985); McLaughlin, "Infitah in Egypt: An Appraisal of Egypt's Open-Door Policy for Foreign Investment", 46 Fordham Law Review 885 (1978); Salacuse and Parnall, "Foreign Investment and Economic Openness in Egypt: Legal Problems and Legislative Adjustments of the First Three Years", 12 International Lawyer 759 (1978).
21. See Middle East Economic Digest (3 February 1989), p.12.
22. See Gopfrich, "Bank-Guarantees in Egypt", introductory lecture in Symposium of the German-Arab Chamber of Commerce (19 December 1984, Nile Hilton, Cairo), photocopy available in the Chicago Office of Baker & McKenzie.
23. See, e.g., Testimony of the Associated General Contractors, Subcommittee on Foreign Operations, Committee on Appropriations, US House of Representatives, 10 April 1987.

24. Certain arbitration problems have also arisen recently in Egypt. Despite the substantial basis under Egyptian law for the enforceability of arbitration agreements, some Egyptian courts have ruled that arbitration clauses are unenforceable if the arbitrators are not specifically named in the relevant arbitration clause. See Article 502 of the Egyptian Code of Civil Procedure (1967). (Under such reasoning, for example, an arbitration clause would be unenforceable if it authorized the International Chamber of Commerce or the American Arbitration Association to designate one or more of the arbitrators.) A proposed Egyptian law on international commercial arbitration, being prepared to overcome this legal difficulty, is still undergoing review and revision.
25. Both the first quotation (from an "authority on Egyptian politics") and the second quotation are from Michael Georgy, "Left of Center", Cairo Today (November 1988), pp.74-75.
26. See "Legal Brief", Business Monthly (September/October 1986) (a publication of the American Chamber of Commerce in Egypt), at pp.64-65. See generally Abulmagd, "The Application of the Islamic Shari'a", in Arab Comparative & Commercial Law-The International Approach (Proceedings of the International Bar Association first Arab Regional Conference, Cairo) (1987), Volume I, p.27.
27. For example, Islamic law issues were indirectly relevant in the government's recent efforts to impose controls on Islamic investment companies. See generally "Al-Sharif opens its books", Middle East Economic Digest (January 13, 1989), p.21; "Badr fall foul of the law", id. (January 20, 1989), p.13.