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Political Risk Allocation in Egyptian PPP Projects

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Public Private Partnership has developed over the years to become one of the most important methods for building infrastructures. Hence, Egypt as a developing country demands more involvement of private sectors to help building economic infrastructure projects.

With the enactment of the new PPP law no. 67 for 2010 in Egypt, Public Private Partnership seems to be the suitable approach to take out this burden that falls on the public budget for financing such projects and transfer it to the private sector.

However, this type of partnership involves huge amount of risks for both the Public Authority and Investors that results in allocating the risks emerging from such projects between both parties with focusing on transferring most of the risks to the Investors’ end.

Nevertheless, with the existence of Lenders as an essential factor for financing the project, only certain types of risks are borne by the Project Company while the rest is re-allocated either on a back-to-back basis to Subcontractors or back to the Public Authority.
Declaration

I hereby solemnly declare that I have written this thesis by myself and without support from any other person or source, that I have used only the materials and sources indicated in the footnotes and in the bibliography, that I have actually used all materials listed therein, that I have cited all sources from which I have drawn intellectual input in any form whatsoever, and placed in “quotation marks” all words, phrases or passages taken from such sources verbatim which are not in common use and that neither I myself nor any other person has submitted this paper in the present or a similar version to any other institution for a degree or for publication.

Cairo, 1 November 2011

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Political Risk

Egypt has been recently suffering from several political changes since the revolution of the 25th of January and that has been jeopardizing the political stability required to encourage Investors to invest in financing infrastructures that is deemed to be crucial to help in the prosperity and welfare of the Egyptians. Therefore defining the types of political risks and efficiently allocating them is considered as one of the main keys to encourage more Investors to bid for the future coming PPP projects.

Political risks are risks that arise from the potential impact of governmental, legislative, judicial, and political acts.\(^1\) There is a general acceptance that Political risks are one of the few risks borne by the Contracting Public Authority because the Project Company will not be able to manage or avoid these kinds of risks and conventional insurance coverage may not be a practicable alternative and therefore the Project Company may always need special insurance in order to be able to cover this type of risk.

According to recommendation 13 of the UNCITRAL Model law for PPP, “the law should clearly state which Public Authorities of the host country may provide financial or economic support to the implementation of privately financed infrastructure projects and which types of support they are authorized to provide”.

And therefore the PPP law stipulates in Articles 14 and 15 that the Supreme Committee which is chaired by the Prime Minister and with the membership of the Ministers of Finance, Investment, Economic Development, Legal Affairs, Housing & Utilities, and Transportation as well as the head of the PPP Central Unit shall be the authorised authority to handle all matters related to PPP in Egypt which gives more guarantees to the Investors and Lenders. It should be also noted that all PPP agreements have to obtain the approval of the said committee in order to be officially executed.

Nevertheless, if a project's political risks are not sufficiently mitigated either by the Public Authority or the Project Company in a way that satisfies the lenders, the Project Company may be able to obtain:\(^2\) “

- **Guarantees or insurance for political risks** ("political risk cover"), thus leaving private-sector lenders with only the commercial risks on the project (e.g., project completion); or
- **Guarantees or insurance that cover all risks, both political and commercial**, thus leaving lenders to provide finance with no risk on the project itself ("full cover"); or
- **Direct loans to the Project Company from public-sector (national or multilateral) lenders that are prepared to accept political risks not acceptable to private-sector lenders; such entities may also accept the commercial risks involved in the project and thus take the full risk on the project, or require these to be wholly or partially covered by commercial bank guarantees.”

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1 Ibid., pg. 210
Lenders may be also prepared to take a certain amount of political risk according to the degree acceptable by insurance depending on the following:\(^3\) “

- the scope of “political risk”, including regulatory risk and administrative risk;
- whether or not political risk includes events in more than one country or different cities of the host country;
- the relationship between the political risk and other project’s risks such as Construction or Operation risks;
- the extent to which a shareholder (particularly a local shareholder) can influence events which comprise political risks;
- the consequences of a political risk event occurring and how it effects for example, shareholder obligations to achieve completion, or the basic liability of the borrower.”

Political risks can be divided into Competence and Legality; Change in Budget, Government, or Political Support; Expropriation & Nationalization; Change of Law; Sovereignty & Immunity; Source Country Political Risk; Political Violence; and Choice of Law.

### 1.1 Competence and Legality

According to Articles 4, 15 and 17 of the PPP law, new PPP projects shall be tendered and endorsed only by virtue of a decree that is issued by the Supreme Committee for Public Private Partnership Affairs upon a request form a Public Authority and following a presentation PPP Central Unit’s recommendations concerning the project. After issuing the decree, the competent minister of the requesting Public Authority is the competent representative to sign the PPP agreement in order to consider the agreement under the laws of Egypt.

However, a problem arises when the PPP agreement is not signed by the competent representative of the Public Authority or a decree is not issued by the Supreme Committee for Public Private Partnership Affairs and the contract is instead signed by the representative of the Contracting Public Authority. In this case the PPP agreement shall be considered invalid and void.

Hence, such nullification can be considered as a relative nullification which means that such fault can be amended through having the decree issued by the Supreme Committee or having the competent minister sign the agreement. However, unless such amendment is made, the PPP agreement shall be considered void.

Another problem arises when the PPP agreement requires the approval of another Public Authority in addition to the approval of the Contracting Public Authority such as the approval of the Ministry of Defence and the concerned Governorate in addition to the approval of the Ministry of Aviation for example in case the PPP project is related to a civil airport. In such case the Contracting Public Authority (which is the Ministry of Aviation in

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\(^3\) Ibid., pg. 88
this example) bears alone the whole risk to obtain the approval of the related Public Authority and to have the competent representatives to sign on the PPP agreement.

It should be noted that a Public Authority shall have the right to enter into the PPP agreement as long as the subject of the agreement is related to the functions of the contracting authority that it is authorised, expressly or impliedly, to perform such as the right for the Ministry of Transportation to enter in Road Concession agreements. The Investors on the other hand bear the burden to ensure that the Contracting Public Authority has the right to undertake the obligations involved in the project and determine the administrative or legal requirements that must be satisfied before the obligation becomes binding.4

Nonetheless, Lenders will also ensure that the documents of the PPP agreement are totally valid and are signed by the competent representatives before providing the Investors with the amount requested as a loan or any other kind of facilities. Therefore, they will examine all the documents and confirm that there is a legal document that is binding for both the Public Authority and the Investors or else they will not approve to assist the Investors in financing the facility subject to the PPP agreement.

1.2 Change in Budget, Government, or Political Support: As previously mentioned, political support for the project in general and the Investors in specific is one of the most important factors for the success of the PPP project. Once this type of support decreases, the project may face the risk of failure. Political support can change due to alteration in the political powers as for example a political party may oppose the Investors who won a PPP bid and supports their competitors for the reason that the Investors were foreigners and the competing bidders were local bidders or because some of the party members were bribed and therefore they oppose the winning bidders.

This can cause a lot of trouble if the members of the said party have a majority presentation in the new reformation of the government or a member of the said party becomes the head of the Contracting Public Authority. Change in political support can be revealed also from cutting in the public budget used for supporting the PPP project although one of the purposes for choosing the approach of PPP is removing the cost of financing infrastructure from the public budget.

However, for example sometimes the government may reduce the availability payments paid to the Investors as a result for reducing the amount of the service required to be served by the facility because the Public Authority has the authority by virtue of the law to amend such terms in the PPP agreement without prejudicing the right of the Investors to be compensated but still the compensation may not be enough to pay the lenders the interest of the loans and achieve an acceptable amount of profit.

Change in political support may also be due to change in the development policy such as the intervention of foreign investment in infrastructure may not be likely to be supported no more. An example for this type of risk was not experienced in Egypt till now but can be shown in Dhabol Power project case.\(^5\)

This type of risk is also managed by the Public Authority due to its ability to mitigate the risks resulted from such changes. However, allocating the risk at the Public Authority alone does not protect the interests of the Investors and other project’s participants and therefore it is advisable for the Investors to mitigate the risk in order to decrease the risk of political change through maintaining the project’s viability. Such mitigation can be conducted through considering:\(^6\)“

- the interests of the Contracting Public Authority, government and public policy before and after commencing to execute the PPP project and thus the government shall have an interest in the success of the project, and therefore shall benefit from it;
- the involvement of local lenders, shareholders, subcontractors, suppliers, and employees and accordingly this will help in benefiting local communities such as employment, housing, reinvestment in the community, making use of local supplies, services and financing, or providing some valuable training, service or investment;
- the involvement of other local governmental bodies because any failure to the project will affect the said local body and thus the interest of other local governmental bodies decreases this kind of risk. Multilateral organisations may also be involved since the interests of multilateral organisations cannot be easily ignored because organizations such as World Bank\(^7\) or European Investment Bank\(^8\) may be helping the government either in the present or in the future with financing other projects which makes it very efficient to involve such bodies in the PPP agreement.”

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\(^5\) A Huston, Texas-based firm of Enron that is located on the US has invested in the USD 2.5 Billion Dhabol Power Project in the state of Maharashtra, India. After change in the government of the state, the victorious right-wing nationalist alliance cancelled the project. The Dhabol project has since been renegotiated, at a lower price, and expanded. See article “Enron and On and On”, the Economist at 92 (14 June 1997).


\(^7\) PPIAF (Public Private Infrastructure Advisory Facility) which is a subsidiary of the World Bank provided support to two PPP transactions in Egypt in the wastewater sector: the New Cairo Wastewater Treatment Plant, the first PPP in Egypt, and the 6th of October Wastewater Treatment Plant. In 2006 PPIAF assisted with the preparation of the conceptual framework and transaction model for the New Cairo plant. As part of broader capacity building support to Egypt’s PPP Unit in 2008, PPIAF also analyzed options for the 6th of October plant relating to capacity, location, and design. A 20-year concession contract for the New Cairo Wastewater Treatment Plant was awarded in June 2009, worth $482 million. The 6th of October Wastewater Treatment Plant is currently in the bidding stage. With several other wastewater treatment plant PPPs, as well as PPPs in other sectors, under consideration by the PPIAF Unit, the New Cairo and 6th of October plants offer a replicable model for future PPPs in Egypt and throughout the region. See more http://water.worldbank.org/water/node/83686.

\(^8\) With lending amounting to about EUR 2.1 billion, Energy sector has been by far the largest beneficiary of EIB loans to Egypt. Over the last 30 years, EIB financing in Egypt has contributed to major investment in power generation, transmission and distribution as well as to the development, storage, export and bulk transmission of natural gas such as Damietta Liquefied Gas Plant. Also EUR 315 million has gone to finance projects in the wastewater sector and other key projects to improve drinking water supplies and irrigate desert lands, beside EUR 400 million has gone to port projects, major highways and the upgrading of air transport (modernisation and extension of airline fleet). See more FEMIP (Facility for Euro-Mediterranean Investment & Partnership) Financing Operations in Egypt, European Investment Bank, 2/2008.
Governmental support has to exist not only on the level of ministers but also on the level of entities related to the project because such entities shall have the right to intervene and may easily suspend working in the project until the Investors in the project obtain the licenses and permits required from those entities.

Therefore the Public Authority has to exert its utmost effort to assist the Investors and their subcontractors in obtaining the support and assistance of the said entities because opposing the project by governmental entities on this level can lead to the permits and licenses being issued very slowly or even to be never issued.

Thus it is important to obtain the support of the government on all levels and not just on the levels of commandership. Related entities in Egypt can be regulatory authorities such as the EEAA (Egyptian Environmental Affairs Agency), federations such as the EFCBC (Egyptian Federation for Construction & Building Contractors), Municipals such as Governorates, etc.

Hence, the Lenders will also make sure that the Investors have obtained the support of all governmental levels and that the risk of changing the level of support is low and that no one opposes the project or at least those who are opposing are a minority and have no chance for changing the level of support to be against the project and effecting the profitability of the project.

To assess the level of support, the lenders will evaluate the level of support by the government and the probability of continued support by studying the interests of the government and how the project has been received by the political establishment, who are the opposing groups and the level of volatility of the political structure.9

For these purposes, the Egyptian government will always have an obligation to enact and promulgate laws, regulations, guarantees, and incentives that encourage the Investors and lenders to invest in PPP projects and to assure the political stability of Egypt.

On the other hand and by comparing the abovementioned to the PPP law, we will find that the Egyptian legislature gave some political guarantees for the Investors bidding for a PPP project through obtaining a high level of political support because the Investors shall be required to obtain the approval of the Supreme Committee for Public Private Partnership Affairs and therefore the approval of the Ministerial Cabinet whatever the Public Authority requesting the PPP agreement whether it is a ministry, authority, agency, or municipal and whatever the type of the project whether it is a huge or a small project as long as the value of the project is not less than One Hundred Million Egyptian Pounds taking into consideration that the approval is within the financial budget and financial resources of the requesting Public Authority.

9 For further discussion see Host Country Legal Regime and its Relationship to the BOT Project, United Nations Industrial Development Organisation Guidelines for Infrastructure Development through Build-Operate-Transfer, 1996, pg. 41-72.
However, Article 7 of the PPP law gives the right to the Contracting Public Authority to modify and amend the specifications of the PPP agreement and the rules of operation and utilization within the limits agreed upon in the PPP agreement and after obtaining the approval of the Supreme Committee which may create a legal problem if the members of the Supreme Committee starts to oppose the PPP project. Thus, there is no guarantee for the Investors that no abusive decrees can be issued against them. It should be noted that Egypt still does not have any kind of bad reputation and it has not misused this Article in any of the PPP projects executed within the Egyptian territory.

Government support may also be influenced by the negative public perception towards the project which can lead to cancelling the whole project. The public may sometimes refuse that the idea that a public facility shall be managed by the public sector. This type of public perception depends on the type infrastructure which is likely to be positive for projects that the public need to believe that inserting advanced technology and management techniques is necessary for better product or service and that promoting this type of infrastructure cannot be provided by the Public Authority such as telecommunication, ports, and airports.

On the contrary, there are projects which can have negative public perception because impliedly they might believe that this will lead to an increase in the fees of the provided product or service or that infrastructure must be publicly owned and never be given to private investors under no circumstances or may be due to the bad reputation or nationality of the investors. Thus, the Public Authority must bear the risk to inform and convince the public with the reasons for tendering the PPP project and that the investors are qualified to handle the project adequately and providing a high level of products and services without highly affecting the official fees and that this project will benefit both the public users and authority from all aspects.

1.3 Expropriation & Nationalization: Expropriation means the right of the Public Authority to confiscate private assets for the public benefit for any reason the Public Authority may find suitable. There is a basic principle in the private international law that sovereignty gives the right for any government including Egypt to seize any private property within its territory for public purposes. However, Article 11 of the PPP law: “No seizure or any enforcement procedures may be undertaken on the facilities, tools, machinery, or equipment allocated for the execution, operation or utilization of the project subject to the PPP agreement”.

This Article is considered as an incentive or a guarantee for both the Investors and the lenders that their private properties shall not be confiscated for any reason. Hence, in my opinion this does not totally prevent any Public Authority from practicing its right to seize whatever it shall find suitable for public interest without prejudicing the right of neither the Investors nor the lenders to claim for damages and to be compensated whether the confiscating authority is the contracting authority or another authority. But the existence of a multilateral or an international organization in the project decreases the probability of expropriation because in the event such act is taken this will put international political pressure on the government.
In all events, expropriation is rare to happen because this decreases the opportunity to find an investor or a lender that accepts to bid for a PPP project with a possibility to have the assets expropriated. Moreover, neither a Concession nor a BOT project conducted in Egypt that has been previously expropriated.

But what if an expropriation was conducted during the term of the PPP agreement by a different Public Authority other than the contracting one?

Although expropriation is prohibited for all PPP projects and to be never be conducted by any Public Authority whatsoever, an answer for this question in my opinion will be that as long as the Project Company did not breach any of the PPP agreement’s clauses in a way that entitles the Public Authority to terminate the agreement with giving the right for the Project Company to claim for compensation, the contracting authority bears alone the risk to return back the seized assets to the Project Company in order to enable them to complete executing their obligations listed under the agreement.

This does not prejudice the Project Company’s right to claim for damages. In case it is impossible to return the confiscated assets, the Project Company shall be entitled for the Termination sum indicated in the PPP agreement for the remaining duration in the PPP agreement.

Additionally, if the confiscating authority is the contracting one, then an indication for the purpose of seizure should be known because unless the confiscation is for public interest or due to a crucial and fatal default from the company’s end, the contracting authority is also the one to bear the risk to return the confiscated assets without prejudicing the right to claim for damages.

Nevertheless, although there is a difference between the assets originally owned by the Project Company for the purpose of executing the project and the assets temporarily owned by the Project Company after being assigned by the Public Authority to the Project Company by virtue of the PPP agreement and although it was originally owned by the Public Authority, both types of assets are protected from confiscation by virtue of law and entitles the Project Company to claim for damages taking into consideration that if the PPP agreement was terminated and the confiscation was conducted to return the ownership of the second mentioned assets back to the Public Authority, then the Project Company holds no right to claim for any damages resulted from this kind of confiscation.

Nationalisation on the other hand is not that different from Expropriation. Nationalisation means changing the ownership of a company from private to a public ownership. A famous example is the nationalisation of the Suez Canal concession and converting the ownership of the canal into public ownership. Difference between Nationalisation and Expropriation is that Nationalisation means confiscating private companies and converting them to public companies, while expropriation is concerned with confiscating privately owned assets and
considering them as public assets. The concept of Nationalisation is a basic private international law principle giving the right for every state to nationalise whatever company for the public interest. The PPP law does not protect Investors from nationalisation through an explicit article or prohibit such action by the Public Authority. But in my opinion, Investors do not need such protection because of the nature of PPP.

PPP under the law is an agreement that is concluded for the purpose of constructing, financing, and operating an infrastructure that is owned temporarily by a private sector during the period of the PPP agreement and then is returned back to the Public Authority which means that the ownership of the infrastructure by a private sector is temporary ownership that ends once the PPP agreement is terminated for any reason. Therefore, there is no need for protecting Investors from nationalisation since it will be sufficient for the Public Authority to terminate the PPP agreement in order obligate the Project Company to return back the ownership of the infrastructure.

1.4 Change of Law: Egypt as a state has all the power and authority to change any of its laws and it is unlikely to have a clause under any of the terms of a PPP agreement that prohibits the Public Authority from changing the law because this is a matter of public policy and no agreement has the authority to deprive the legislature from such right. Change in law includes applicable laws existing during the life of the project either the laws already existed before signing the agreement or the laws enacted during the operation of the facility. Change means the enactment, promulgation, amendment and repeal of a law, and law means Constitution, Codes, Regulations, Ministerial and Administrative Decrees. It also means court decisions and the interpretation of the jurisprudence for the laws.

Projects in general and PPP in specific require the existence of a stable legal environment in order to be capable to operate the facility easily and therefore changing the law can affect the project in a variety of ways such as:

- **Imposition of new environmental requirements under which the Project Company has to incur the cost of investing in new equipment, or is prevented from using the planned fuel or other raw materials;**
- **Imposition of price controls on the Project Company's products or services;**
- **Increases in import duties or imposition of import controls on equipment for the project during construction, or on fuel or raw materials required during operation;**
- **Increases in general corporate or other tax rates;**
- **Imposition of special taxes or levies on the Project Company or the industry in which it operates;**

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10 Except for the BOO structure which does not require transferring back the ownership of the infrastructure to the public authority. However, this structure is not covered by the PPP law because transferring back the infrastructure to the public authority is a public policy requirement.

• Imposition of or increases in withholding taxes on dividend payments to Investors (which reduces their return), or interest payments to lenders (the cost of which usually has to be borne by the Project Company);
• Deregulation or privatization of a previously regulated or state-owned sector;
• Changes in employment, health and safety rules or other operating requirements that require more personnel to be employed to run the project, or otherwise increase operating costs Amendment or withdrawal of the Project Company's or its contractors' construction or operating Permits;
• Invalidation of Project Contracts.”

There are several arguments regarding which party should bear the risk of changing the law. Some might say that the Public Authority is the party who needs to bear the risk if the law is changed because the Public Authority as a part and a representative of the state should be responsible for the act of changing the law and therefore should compensate the Project Company for any extra expenditure incurred due to the change of law. On the other hand, it is argued that the Project Company should be the one to bear the risk of changing the law since the Project Company is similar to any other company that practices its activity within the territory and thus should not be protected from risks borne by other companies. In order to efficiently allocate this type of risk, a differentiation should be made between:¹² “

• Costs resulting from changes in the law which are specific to the type of facility being provided in the PPP project. In this case, the risk can be passed to the end-users in the “Operation Model” after the approval of the Supreme Committee or by the Public Authority in the “Utilisation Model” because the Public Authority will bear the same cost if the facility were being provided by them.
• Costs resulting from changes in law which are specific to PPP project companies or PPP facilities which are in effect discriminatory against PPPs. This risk should also be borne by the Public Authority.
• Changes in law that affect operation expenditure which should be borne by the Project Company because these are general costs for doing business and all Investors and lenders face these type of risk in their regular course of business. In the “Operation Model” these extra costs can be passed to the end-users if this is commercially sustainable on condition that the approval of the Supreme Committee is obtained in advance.
• Changes in the law that affect construction expenditure. This may cause a lot of difficult because the Project Company does not have any financial resources at this stage to fund any extra cost. The Lenders may ask from the Investors to establish a “Change in Law Reserve Account” in order to fund any extra costs incurred due to changing the law which may not be a suitable and efficient way to use the cash flow given that the change in law may never occur and in case it does there is a plenty of warnings which gives time to build up funds from regular cash flow. The Public Authority may find it as a

better Value-For-Money\textsuperscript{13} to agree an overall cap on the effect of a change in law in such cases, above which the risk transfers back to the Public Authority. Alternatively the Public Authority may accept funding a certain percentage of the capital expenditure cost resulted from changing the law (perhaps on a sliding scale where in tier 1 up to certain amount shall be 100\% funded and in tier 2 up to a higher amount shall be 75\% funded, and so on), which ensures that the Project Company has an incentive to fund any extra capital expenditure at the most economic cost.”

It is important to note that financing documents related to the PPP project will neither include “Change in Law” nor “Force Majeure” provisions. The obligation to repay the loans will continue in the event of a “Change in Law” or “Force Majeure” and the Lenders will also want to ensure that neither the “Change in Law” nor “Force Majeure” provisions is transferred on a back-to-back basis (as far as possible).\textsuperscript{14} In short, they will never bear the risk of changing the law under any circumstances.

1.5 Sovereignty & Immunity: Egypt as a state along with all its related entities and authorities has sovereignty and immunity from jurisdiction and execution before Courts and Tribunals.\textsuperscript{15} Sovereignty Immunity means that the state gains immunity from jurisdiction of courts or arbitral tribunals unless the government waives such right and accepts the jurisdiction under certain circumstances. It also means that the state gains immunity from execution as no state shall be allowed to seize the property of another state unless such right is waived by the concerned state itself.\textsuperscript{16}

For these reasons, an important question is raised regarding the mechanism of dispute resolution if a dispute arises regarding the interpretation or execution of a PPP agreement. As a general norm and practice in the field of Project Finance in general and PPP in specific, international arbitration is the adopted approach for dispute resolution. Such approach is adopted for many reasons including severability\textsuperscript{17}, speed in process, the right to choose the language of procedures, Res Judicata and enforcement of arbitral awards by virtue of the law\textsuperscript{18}, etc.

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\textsuperscript{13} The combination of risk transfer, whole-life cost and service provided by the facility, as a basis for deciding what offers the best value for the public authority.
\textsuperscript{14} Delomon, Jeffery, Op. Cit. pg. 88 and 239.
\textsuperscript{15} Ibid, pg. 183
\textsuperscript{16} O’Connell, International Law (2nd ed., 1970), pg. 864, 842, and 845
\textsuperscript{17} By virtue of Article 23 of the Egyptian Arbitration Law No. 27 for 1994
\textsuperscript{18} By virtue of Articles from 55 to 58 of the EAL but according to Article 52 of the said law provides that arbitral awards are viable for invalidation through a lawsuit that is filed before the Cairo Court of Appeal for any of the reasons listed in Article 53 of the said law. The reasons are: “...a) If no arbitral agreement exists, or if it is void, voidable or expired, b) If at the time of entering into the arbitral agreement one of the parties thereto was minor or incapacitated pursuant to the law governing his capacity, c) If one of the parties to the arbitration was unable to present his defence because he was not properly notified of the appointment of an arbitrator or of the arbitral proceedings, or for any other reason beyond his control, d) If the arbitral award fails to apply the law agreed to by the parties to the subject matter of the dispute, f) If the Arbitral Tribunal was constituted or the arbitrators were appointed in a manner contrary to law or to the agreement between the parties, g) If the arbitral award rules on matters not included in the arbitral agreement or exceeds the limits of such agreement. Nevertheless, if the parts of the award relating to matters which are not, then nullity shall apply only to the latter parts, h) If nullity occurs in the arbitral award, or if the arbitral proceedings are tainted by nullity affecting the award”, Paragraph 2 of the same Article states that “the court seized with the action for nullity shall rule sua sponte for the annulment of the arbitral award if its contents violate public policy in the Arab Republic of Egypt”
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However, arbitrators in PPP disputes have to be chosen carefully because such matter needs an intensive expertise not only in arbitration but also in financial and technical matters especially ones related to the project.

Arbitration according to the Egyptian Arbitration Law no. 27 for 1994 (EAL) may take one of three forms.\textsuperscript{19} The first is to draft the arbitration clause from the beginning in the agreement itself and determine all the conditions of settling any dispute which may arise through arbitration. This type of arbitration is considered as the main form preferred as it will guarantee that the Public Authority will be bound to refer to arbitration if a dispute arises.

The second form is to conclude an arbitration agreement after the dispute arises between the parties. This form is neither preferred by the Investors nor by the lenders since the Public Authority shall not be obligated to refer to arbitration as an approach for dispute resolution which endangers both the Project Company and Lenders’ rights to claim for any damages resulting from the Public Authority’s behaviour. This type of agreements is known as “Submission Agreement”.

The third form is to refer from the beginning in the original agreement to another document that obligates the parties to accept arbitration as a mean for dispute resolution. An example for such form is when the parties of a construction agreement refers to the FIDIC terms & conditions which explicitly obligate the parties to refer to arbitration in case of any dispute arises. This form can be found in the documents that are related to the original PPP agreement but is unlikely to be found in the original PPP agreement signed between the Investors and the Contracting Public Authority.

Nonetheless, Article 35 of the PPP law states that disputes arising under the PPP agreement can be resolved through arbitration upon the approval of the Supreme Committee which can also approve any other mean for dispute resolution such as Litigation or ADR. This means that both parties have to agree on the means of settling any dispute that arises between the parties and if in case the parties did not agree then litigation shall be the legal mean for settling any arising dispute.

Hence, including an arbitration clause in an administrative agreement such as PPP as a mean for dispute resolution and waiving the right of the State for any granted immunities is an important and impartial guarantee for the Investors that they shall have the right to claim for any damages and to be compensated for the actions of the State without fearing the

\textsuperscript{19} Article 10 of the Egyptian Arbitration Law states that: “…2) arbitral agreement may precede the occurrence of the dispute, whether such agreement exists independently or as a clause on a given contract in connection with all or some of the disputes which may arise between the parties…….The arbitral agreement may also be concluded after the occurrence of a dispute, even when such dispute is the subject of a court case”. Article 10 also states in paragraph 3 that “Any Reference: in the contract to a document containing an arbitral clause is deemed to be an arbitral agreement, if the reference expressly provides that such clause is an integral part of the contract”.
intervention of the Public Authority to prohibit such right. In addition, litigation is not acceptable by Investors anymore as a means for dispute resolution due to several reasons including the slow procedures and the inefficiency in the judge’s examination of the dispute.

However, Article 1 of the EAL stipulates that “In regard to administrative contract disputes, the arbitration agreement shall obtain the approval of the concerned minister or the official assuming his powers with respect to public juridical persons. No delegation of powers shall authorize therefore.”\(^{20}\) This means that signing the PPP agreement by the representative of the Contracting authority including the arbitration clause which is an integral part of the whole agreement and then approving it by the Supreme Committee is an important procedure to be able to validate the arbitration clause.

The problem with obtaining the approval of the concerned minister is that even though the basic principles of justice allocate the obligation to obtain such approval on the Contracting Public Authority, the law unfortunately does not have an explicit article that obligates the Public Authority to obtain the approval of the competent minister leaving it vague and hence if the Public Authority fails to do such obligation, then no liability shall be established and therefore the other party may not have the right to claim for damages under the Egyptian law.

It has to be mentioned that article 1 of the EAL explains that although signing the PPP agreement by a delegated representative other than the competent representative of the Contracting Public Authority nullifies the arbitration clause, such nullification is only partial as it may be corrected by having the competent representative of the Contracting Public Authority sign on the agreement.\(^{21}\)

Another legal requirement for considering the arbitration clause as a valid clause is obtaining the legal advice of the General Assembly of the Advisory and Legislative Sections of the Councils of State which must be secured before accepting arbitration when the Public Authority enters into an agreement that exceeds 5000 EGP.\(^{22}\) However, the advice of the assembly is not binding for the Public Authority and is used to clarify the legal and constitutional aspects of the arbitration agreement.\(^{23}\)

Regarding the enforcement of the arbitral awards under the EAL, awards are given the exequatur for the purpose of enforcement after fulfilling three conditions. One of which is not to be in contradiction with the public policy in the Arab Republic of Egypt.\(^{24}\) The public policy is a very complex dilemma and is flexible in its interpretation as there are no explicit

\(^{20}\) By virtue of the amendment no. 9 for 1997
\(^{22}\) According to Article 58 of the Egyptian Council of State Law no. 47 for 1972
\(^{23}\) Khalil, A. A., Administrative Contracts in Egyptian Law, Dar El Kutub, 2006, pg. 299
\(^{24}\) The other two conditions is that it is not contrary to a judgement previously issued by the Egyptian Courts on the same subject matter of the dispute and that it was properly notified to the party against whom it was rendered.
criteria for determining whether a certain issue is considered as a matter of public policy or not. It also differs from case to case and one state to another.

However, in terms of the PPP projects, an important question arises when a dispute arises between the Project Company and the Contracting Public Authority and an arbitration is convened in this matter ending with an award that is issued in favour of the Project Company and against the Public Authority, i.e. is the Project Company capable or not of obtaining an exequatur to be able to enforce the award and execute it against the Public Authority although such matter can be related to public policy since the subject of the agreement is related to an Infrastructure and that the action is taken against a State.

Enforcing an award is regulated by both the EAL and New York convention especially articles III, IV, and V of the convention. Enforcing an award against a Public Authority does not contradict with the public policy in Egypt and can be enforced against States. It has to be taken into consideration that no arbitral award against Egypt has been subject to execution till today’s date whether inside or outside Egypt as most of the enforced awards were amicably settled. The EAL has regulated only enforcement of arbitral awards while

25 Articles from 55 to 58
27 Article III of the NY convention states that: “Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards”.
28 Article IV of the NY convention states that: “1) To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply: (a) The duly authenticated original award or a duly certified copy thereof; (b) The original agreement referred to in article II or a duly certified copy thereof. 2) If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent”.
29 Article V of the NY convention states that: “1) Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or e) The award has not yet become binding, on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or b) The recognition or enforcement of the award would be contrary to the public policy of that country”.
31 Such as SIAG vs. Egypt, ICSID case no. ARB/05/15, where an award was issued in the favour of the claimants with an amount of 75 million USD plus additional expenses and interest amounting totally to about 133 million USD making it the largest award ever granted to an individual in an ICSID case. After obtaining the award, the claimants filed an order before the US District Court for the Southern District of New York to enforce the said award and an exequatur was granted to them on June 19, 2009. However, a Settlement Agreement was signed between both parties giving the claimants a compensation of 60 million USD and in return the
execution on the other hand was not as it was referred to in the provisions listed in Section 2 of the ECCPL\textsuperscript{32} which does not regulate the execution of awards or judgments against the State of Egypt nor does the Administrative law which considers such issue as a matter of Public Policy and thus is prohibited.

If an arbitral award was issued against the Egyptian authorities and the claimants wanted to enforce and execute it in Egypt, enforcement of the said award may practically face some procedural issues such as the incompetence of the officials providing the claimants with the exequatur due to their misunderstanding of the concept of enforcing against States but at the end it may be practically applicable to obtain such enforcement.

On the other hand, execution against the State’s assets is prohibited and considered as a matter of Public Policy.

It has to be mentioned that execution of an arbitral award against the State is prohibited under article 87(2) of the Civil Code stipulating that public property may not be disposed of, or seized, or adversely possessed.

In article 2 of the Minister of Finance Decree No. 745 for 2005 issuing the Executive Regulation of the Public Budget Law, it is stated that its rules are applicable to Public Service Authorities. And in article 1(3) of the said Executive Regulations it is stated that “the general budget of the State includes the budgets of public service authorities and the State shall cover the defect of their resources in relation to their expenses”. Article 9 confirms this and states that “the budget of the Public Treasury of the State determines the defect of the services authorities’ budgets and the Public Treasury’s budget funds this defect…”

In addition to that, Article 10 also acknowledges that extra provisions may be inserted in the expenses of the public budget for specific considerations justified by the public interest of the State. These provisions are granted to some authorities in case of imminent or incidental national obligations or expenses or commitments which had not been considered while preparing their draft of the budget. However, general provisions which shall be inserted in the public budget shall not exceed 5% of total liabilities of the budget (Article 12 of the said Executive Regulation).

According to the said, the public budget of the State covers specified liabilities for which the State is responsible. These include “the necessary provisions necessary for the authority to carry out its primary objective for which it was established...” (Article 52) and other expenses such as “what these authorities pay as compensation or penalties...” (Article 71).

\textsuperscript{32} Egyptian Civil and Commercial Pleading Law No. 13 for 1968
“after satisfying all the legal aspects pertaining to payment of compensation or penalty” (Article 150).

Accordingly, where Public Authorities are under an obligation to pay compensation or penalties (pursuant to a final arbitral award), such payment, if not covered by Public Authority’s financial assets and revenue, will then be funded from the public treasury, either by an interim financing from the Minister of Finance or in the following financial year.

Practically, the Competent Authority for Compulsory Execution in Egypt refuses to seize public properties considering that the State, the Government, Public Authority or any other public person is always a solvent debtor and shall execute voluntarily.33

But if the the public servant managing the public authority refuses to enforce a final judgement then the said servant is subject to Article 123 of the Penal Law which stipulates that: “any public servant who uses the powers of his position to suspend the execution of orders issued by the government; or the provisions of laws and regulations; or in delaying the collection of funds and fees; or in stopping the execution of a judgment or order issued by any court or competent authority; shall be penalized by imprisonment and removal from his office.

Any public servant who deliberately refrains from executing a judgment or order of the above mentioned after the lapse of eight days from serving a notice of execution via bailiff, shall be penalized by imprisonment and removal from his office, provided that the execution of such a ruling falls within his responsibilities.”

Although the said article is concerned with the execution of judgements, this article also covers execution of arbitral awards due to the res judicata of awards granted by virtue of article 55 of the EAL.34

However, claimants are always advised to seek both enforcement and execution abroad. Seeking enforcement is not difficult but is regulated according to the rules of the State where execution is sought. For instance, in the United States, Foreign Sovereign Immunities Act of 1976 or FSIA is the sole basis for the execution of foreign arbitral awards against States. It is stipulated that in Section 1610 of the FSIA that (a) the foreign state loses immunity if the: “1) the State property at issue is in the United States; 2) the State property at issue is used for (and not just closely related to) commercial activities in the United States; 3) the foreign state has by its own conduct irrevocably accepted the jurisdiction of the court.”

34. United States, Switzerland, Australia, Argentina and Ireland have designated judicial authorities for the purpose of executing arbitral awards against States including their states although Argentina has not experienced this matter practically as out of 5 arbitral cases filed against Argentina with final arbitral awards, two only were issued in the favour of the claimants which are CMS (awarded USD 133 million of USD 265 million claimed) and AZURIX (awarded USD 165 million of a claim of USD 566 or 571 million). But neither company have initiated any procedures before the courts of Argentina to claim payment pursuant to article 54 of the ICSID convention although Argentine government notified both claimants of following “a formal process before the competent Argentine authorities in order to obtain payment of their awards”. See more Summary of Roundtable discussions by the OECD Secretariat, 12th Round table on Freedom of Investment, Paris France, March 26, 2010, pg. 5
States; 35 3) application of one of the seven exceptions listed in 28 U.S.C. § 1610(a). However, when the claimants sought for enforcement in “LETCO vs. Liberia” 37 on certain bank accounts that were owned by Liberia before the District of Columbia, the execution was refused on the basis of diplomatic relationships.

The same matter is also regulated in Switzerland which requires that the arbitral proceedings be linked to the respondent State’s commercial activity. The award is derived from a legal relationship having “Sufficient Connections” with Switzerland which either means that “(i) the underlying obligations have been created, or were to be performed, in Switzerland, or (ii) the respondent State has undertaken actions which may locate the place of performance in Switzerland. The mere presence in Switzerland of the foreign State’s property or of the claimant’s domicile is not enough”.

Finally, the property subject to execution is an asset. In case the property is in the form of money (such as bank accounts), the Swiss Supreme Court has held that “Liquidities, whether in cash or in the form of debts against a bank, may only be withdrawn from the seizure when that have been clearly affected to concrete goals of public utility, which entails their separation from other property.” 38

In France, there is a difference between enforcement and execution. This was drawn in the “Benvenuti & Bonfant vs. Congo” 39, the Cour d’appel drew such differentiation and applied 35 Even though non-commercial agencies are not excluded from execution on condition that “the state agency is engaged in commerce in the United States and: (1) the agency waived immunity from attachment; (2) the underlying arbitration was based on the agency’s commercial activities in or affecting the United States; or (3) the underlying arbitration involved expropriation claims”. See Steele, M. & Heinlen, M. “Challenges to Enforcing Arbitral Awards Against Foreign States in the United States”, The International Lawyer, Vol. 42, No. 1, 2008, pg. 26

36 The property owned by a foreign state and is located in the United States shall lose immunity if one exceptions applies which are: “(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver; or (2) the property is or was used for the commercial activity upon which the claim is based; or (3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or has been exchanged for property taken in violation of international law; or (4) the execution relates to a judgment establishing rights in property — (A) which is acquired by succession or gift; or (B) which is immovable and situated in the United States: Provided, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission; or (5) the property consists of any employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment; or (6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement; or (7) the judgment relates to a claim for which the foreign state is not immune under section 1605A, regardless of whether the property or was involved with the act upon which the claim is based”.


38 Leroux, N., “Enforcing arbitral awards against foreign State assets in Switzerland - an effective tool?”, YIAG Newsletter, August 2009, pg. 16 and 17

the French law for the execution of the award as contemplated by ICSID articles 54 (3) and 55 which gives the right to States where the execution is sought to have the right to enforce their own applicable laws leading to the result that the claimants in Benvenuti & Bonfant were given the right of enforcement but failed to execute the award based on Sovereignty immunities granted to the assets of Congo and Public Policy. Even though, the Cour d’appeal on the contrary to the First Instance Court did not address Public Policy as a reason to refuse execution.

The same was recognised in “SOABI vs. Senegal”, where the French Courts also differentiated between enforcement and execution as Cour de Cassation accepted the separate nature of the ICSID provisions with respect to the enforcement but held that the source of law governing execution is the French national law especially in matters related to sovereignty and immunity of States.

The same approach was also taken by the English Courts in “AIG Capital Partners vs. Kazakhstan” as enforcement was granted to the claimants but execution was not due to State immunity even though paragraph 1 of article 9 of State Immunity Act 1978 explicitly states that a State loses immunity when it agrees in writing to submit a dispute to arbitration in respect to the proceedings in the Courts of the United Kingdom in relation to the concerned arbitration.

Another issue has to be taken into consideration in relation to the execution of arbitral awards, namely the bilateral treaties by virtue of which the State becomes a party of a bilateral or a regional treaty where there is an obligation on each contracting State to protect investments and assets of the other contracting states. This is also another case where execution on the assets of a certain State by virtue of an arbitral award will be impossible due to the immunity gained through these bilateral agreements.

In conclusion, when it is related to the execution of an arbitral award against particular assets of a State, the national laws shall be applicable and matters such as Public Policy and Sovereign immunity arises making it very difficult or sometimes impossible to execute the arbitral award.

40 The said article is read as “Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought”.
41 The said article is read as “Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution”.
43 “Société Ouest Africaine des Bétons Industriels (SOABI) vs. Senegal” ICSID Case No. ARB/82/1, Award, February 25, 1988, 6 ICSID Rev. — FILJ 125 (1991), 2 ICSID Rep. 114 (1994). The decision of the Tribunal de grande instance was not published. The Cour d’appel of Paris rendered its decision on December 5, 1989 and reports of that decision may be found at 2 ICSID Rep. 337 and 117 Journal du Droit International 141 (the English translations should be treated with caution). The decision of the Cour de cassation was issued on June 11, 1991 and is reported at 6 ICSID Rev. — FILJ 598 (1991), 2 ICSID Rep. 341 and 118 Journal du Droit International 1005.
44 Baldwin, E., Kantor, M., and Nolan, M., Op. Cit., pg. 10
Hence, if the enforcement and execution of an arbitral award that was issued against Egypt is claimed abroad, enforcement may be claimed. However, the execution shall depend on the above mentioned matters such as public policy, immunity of foreign states, and sometimes diplomatic relationships between Egypt and the State where the execution is sought as was the case in “LETCO vs. Liberia”.  

It should also be noted that Egypt as a member of the “Convention on the Settlement of Investment Disputes between States and Nationals of Other States” gives the Investors more guarantees by enabling them to resort to ICSID (International Court for Settlement of Investment Disputes) as a way to settle any disputes that may arise from the PPP agreement such as any abusive action that is conducted by the Public Authority.  

Nevertheless, any attack on an award issued by ICSID shall be excluded as article 53 (1) of the ICSID Convention states that ICSID awards “shall not be subject to any appeal”.  

States under the ICSID convention are obligated to provide successful claimants with the exequatur to enforce arbitral awards but unfortunately ICSID convention does not regulate execution of arbitral awards as it regulates enforcement but leaves the execution of the award and the matters of immunity to the laws of the State where execution is sought ending up to the same conclusion: depending on matters of Public Policy, Sovereign immunity, bilateral agreements, and diplomatic relations.  

It is argued that a solution for this problem is to resort to the ICJ (International Court of Justice) especially since by applying the ICSID convention we find that article 27 of the said convention explicitly states that it is forbidden for the contracting states to bring an international claim on behalf of an investor related to an ICSID dispute unless another “Contracting State shall have failed to abide by and comply with the award rendered in such dispute” and consistent with this provision, article 64 of the ICSID convention refers any dispute that arises from the “interpretation or application” of the ICSID convention to the ICJ.  

However, over the last 37 years, States with the ten most powerful economies have brought only two continuous cases. Another problem for the ICJ is that the statute of the ICJ does
not obligate the member states to perform certain acts as the authority of the ICJ is limited only to issue recommendations.\textsuperscript{53}

Nevertheless, in case both parties of a PPP agreement choose to settle their dispute through the Egyptian courts (which is very unlikely to happen and is likely to be refused by the Lenders), law no. 47 for 1972 explicitly gives exclusive administrative jurisdiction for the Council of State to decide alone on disputes concerning concessions, public construction work, supply contracts and any other administrative contracts which impliedly include PPP agreements.

Administrative courts in Egypt are classified into two distinctive types of courts: “Plenary Jurisdiction” (or Damages Jurisdiction) which is linked to personal rights of the injured person via the Public Authority and empowers the judge not only to invalidate the illegal administrative decrees but also to modify it to be consistent with the rule of law and can award compensation for damages resulting from illegal administrative decrees; and “Annulment Jurisdiction” which is objective and instituted against administrative decrees per se in order to examine its legality and invalidate it if it is found to violate the laws and regulations. The annulment judge does not extend to settle disputes that involve the rights of the injured party via the Public Authority\textsuperscript{54}.

However, whether the parties chose to approach litigation or arbitration as a way to settle disputes, a preliminary stage can be coursed by the investors. Article 39 of the PPP law states that a Petition Committee shall be formed and chaired by the Minister of Finance and with the membership of two deputies to the President of the State Council to be selected by the President of the State Council, and the head of the PPP Central Unit, as well as a non-government member expert to be selected by the Chairman of the committee.

The purpose of this committee is to consider all petitions and complaints submitted by the investors during the procedure of tendering, entering into and executing the PPP agreement which means that the investors have to file a complaint before the Petition Committee before commencing any judicial or arbitral procedures against the Public Authority. The decision of the committee shall be binding on the Public Authority whatever it may be.\textsuperscript{55}

Moreover, if the petition or complaint is submitted because of an administrative decision, the petition has to be filed within thirty days of its notification or becoming aware of the decision and no claim for cancelling the administrative decision shall be admitted by the court before the petition is filed by the said committee.

\textsuperscript{53} Baldwin, E., Kantor, M., and Nolan, M., Op. Cit., pg. 21
\textsuperscript{54} For further discussion, Khalil, Adil A., Op Cit., pg. 255 to 288.

\textsuperscript{55} By virtue of Article 94 of the Executive Regulations of the PPP law
1.6 **Source Country Political Risk:** This type of risk is borne by the Project Company. It means that the risk applies in case the plant, equipment, materials and specialised labours to be used in the project are sourced from a state that is facing certain political risk which affects the project directly such as if there is a change in the an embargo, change in the tax or custom regime, change in or refuse for export licensing, a war between the two states or any other type of political risk. Therefore, the Project Company needs to efficiently allocate such risk and manage to have more than one source country.56

1.7 **Political Violence:** Any state faces the risk of political instability which differs from one state to another according to the type of violence and threats. Political instability can be in different forms such as civil disturbance, revolution, war, sabotage, terrorism and power vacuum. This may also be known as “Political Force Majeure”.

Such type of risk is borne by the Public Authority alone. The Contracting authority must guarantee in the PPP agreement that an amount of compensation that covers the incurred costs and lost in profit shall be paid in case of Political Violence. This clause also acts as a guarantee for the lenders and may also be included in the Direct Agreement in case the Contracting authority is also a party in the said agreement. Nevertheless, there is always a risk that the Public Authority will fail to compensate the Project Company if such risk occurs. Therefore, this risk may be covered by insurance instead of having the Contracting authority guarantee compensating the Project Company and the Lenders.57

1.8 **Choice of Law:** The PPP law was very clear in Article 35 when it stated that the PPP agreement shall be subject to the Egyptian law and any agreement to the contrary shall be null and void. This means that the legislature did not want to leave a space for the parties of the PPP agreement to negotiate which law shall be applicable because the subject of the agreement is an infrastructure which accordingly relates to public policy. If the Investors are foreigners, they may find it difficult to understand the Egyptian legal system and the applicable legal norms and rules.

But this rule applies only to the main PPP agreement which means that all other documents related to the PPP project such as finance or supply agreements can be subject to a legal system that is familiar to the investors unless otherwise stated either in the law or the parties’ agreement that the Egyptian law shall be the applicable law to those agreements. However, having more than one applicable legal system may cause a lot of legal issues and problems and may lead to conflict of laws and this will appear in back-to-back risk allocation.58

It has to be noted that there are certain mandatory rules in the Egyptian law that obligate the parties to apply the Egyptian law in certain fields or sectors even if the parties agree on

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56 Delmon, J., Op. Cit., pg. 186
57 Principles of Project Finance, Op. Cit. pg. 223
an another legal system. An example for that is “Transfer of Technology” regulated in the Egyptian Commercial Law no. 17 for 1999 which stipulates that any transfer of technology to the Egyptian territory shall be subject to the jurisdiction of the Egyptian Courts and subject to the Egyptian and any other contrary agreement shall be null and void.

In my opinion it is recommended to have all the documents related to the PPP project subject to the Egyptian law because conformity to protect any conflict between the laws and the Public Authority will not bear this type of risk under circumstances that exist since the investors are the one who chose a foreign legal system to be the applicable law and thus they should be the one to bear this risk.

But the lenders on the other hand will generally insist that the rules that govern the financing of the project will be subject to their own local law. A way to solve this issue is to have Egyptian banks or banks that are located within the Egyptian territory to finance the PPP project.
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