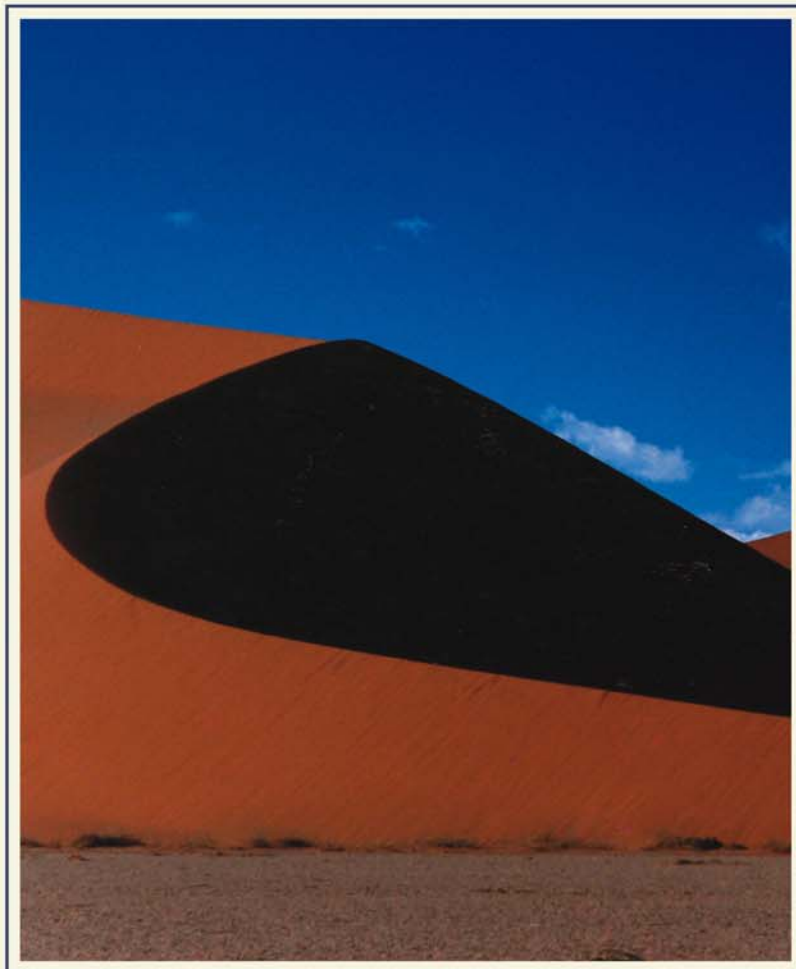


AMRELLER



**INVESTING IN RENEWABLE ENERGIES IN EGYPT**

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## Investing in Renewable Energies in Egypt – The Legal Framework



Zafarana Wind Farm, Red Sea, Egypt (360 MW), the largest wind farm on the African continent.

### The Market

Egypt has a tremendous potential for renewable energies: the coastal areas on the Red Sea are among the world's finest wind regions and the vast desert areas in the country enjoy an intense solar radiation. The Government, moreover, has supported the development of renewable energies for a long time. In 1986, the New and Renewable Energies Authority (NREA) was set up as a specialized government entity, also acting as a project developer, and in 1993 the first wind farm was installed near the beach resort of Hurghada on the Red Sea Coast. At present, the 360 MW wind farm in the Zafarana area (also on the Red Sea Coast) is the largest project of its kind in Africa and the first

Egyptian concentrated solar power (CSP) plant recently commenced operation in Kuraymat, south of Cairo.

While the early projects were exclusively financed through international development cooperation, in 2009 the Egyptian Government has started to tender privately financed wind farms based on a BOO model. It is generally held that private financing will be the key for the future development of the renewable energy industry. The Government has set the target that by 2020 renewable energies shall provide 20% of the growing electricity demand in Egypt. In addition, the promotion of renewable energies will help to develop an indigenous renewable energy industry.

The Egyptian renewable energy market attracts international suppliers, developers, operators and financial institutions in addition to consultants. In addition, there is a number of Egyptian renewable energy companies, some of them with a strong regional/African focus.

### **Investment Climate**

Recent political changes have not affected Egypt's long term commitment to renewable energies. Whereas the January 25 Revolution, in the short term, has resulted in a significant decline of foreign direct investment flowing into the country, in the medium and long term a political transformation also provides opportunities: in the field of energy, most importantly, the energy subsidies may be alleviated in relation to energy intensive industries such as tourism, cement and aluminium. This is expected to create substantial opportunities in the field of auto-production. In addition, the promotion of renewable energies is a political aim that is shared across the political spectrum. Renewable energies and climate change will continue to provide an attractive area for economic and development co-operation, irrespective of future political trends.

Any investment, however, will require to analyse and monitor closely the development of the investment climate. This applies in particular to long term investments such as renewable energies.

### **Energy Law**

So far there is no specific regulatory framework for renewable energies. Nevertheless, the Egyptian Government has adopted a number of measures in order to enhance wind and solar energy.

In 2009, a new draft Electricity Law was put up for discussion, which for the first time included specific incentives for the generation of electricity from renewable energy sources. The draft defines the term "renewable energies" broadly to comprise all "non fossil energy sources which are used for electricity generation".

The key provisions of the draft law relate to an opening of electricity production from renewable energy sources to the private sector:

- The grid operator is obliged to connect renewable energy plants to the grid.
- A competitive bidding procedure permits the award of concessions for the construction and operation of renewable energy plants to private sector investors.
- The grid operator may, subject to approval by the Cabinet of Ministers, set a feed-in tariff.

It is planned that a feed-in tariff will be set as soon as the competitive bidding process has provided some clarity on the pricing level. Interestingly, the prices are expected to be at a “near commercial” level, so that renewable energies - after alleviating energy subsidies – will soon be a commercially viable alternative to fossil fuels, also from the perspective of the Government buyer. The feed-in tariff will be targeting particularly smaller plants with a capacity of up to 50 MW. For an interim period at least, state administered developments will complement private sector projects.

At present, it is uncertain if and when the draft law will be enacted. It is important to note, however, that the Government has nevertheless tendered the first private financed wind farms in the Red Sea Area in 2009. The legal framework is provided by the general provisions governing concessions under the Tender Law (Law 89/1989) which also provides a basis for IPPs. The delay in enacting the draft Electricity Law, therefore, does not affect the implementation of privately financed projects. The tender documents normally foresee that a private investor is allocated a certain piece of land for the construction and operation of a wind farm, in connection with a power purchase agreement to be entered into with the grid operator, a wholly state-owned entity. It is further envisaged that the revenue flow will be backed by a state guarantee.

### **Public Tenders**

Public tenders are governed by the Tender Law (Law 89/1989). The Tender Law by and large conforms to international standards and government projects normally are awarded on basis of a public tender. The Tender Law however is not in all respects tailored to the requirements of large scale projects:

- The Tender Law does not explicitly permit deviations from the tender documents, although in practice bids will often contain certain deviations and this has been accepted by the tendering authorities in the past. In particular with regard to the legal conditions of a tender, there often is only limited room for amendments. This makes a proper risk analysis upfront even more important.
- The Tender Law does not foresee contract negotiations with the successful bidder. However, it is customary to hold a “clarification session” where certain contractual terms are also discussed.

- A tenderer without a legal presence in Egypt must appoint an Egyptian “tender agent” which acts as point of contact for the tendering authority.

If and to the extent the project is financed through international development co-operation, the procurement rules of the respective financing institution will apply in addition to the Tender Law. Often, the financing institution would also support the tender process, e.g. through a consultant.

### **Contracting with the Public Sector**

Under Egyptian law, special rules apply to “administrative contracts” which are, broadly speaking, all contracts which are entered into with the Government and government agencies and are related to a public good or service. The rules on administrative contracts are contained in the Tender Law and are supplemented by the case law of the Egyptian administrative courts. The rules applicable to administrative contracts can differ substantially from the provisions governing private contracts:

- Administrative law provides for certain “privileges” of Government, including the right to terminate the agreement “in its discretion.” If the termination is not based on “just reasons”, the private partner must be compensated. In addition, Government may impose certain fines in case of delay and there are rules which permit for an adjustment of the contract in the light of “changed circumstances”.
- Contracts with government entities are reviewed and must be approved by a special entity of the State Council.
- Disputes arising out of administrative contracts fall within the competence of the administrative courts.

In renewable energy projects, many agreements qualify as administrative contracts, be it because the project as such is carried out by a state developer (NREA) or because the Government is a party to the concession and land use agreements.

### **Land Use**

Most of the land used for renewable energy projects is Government owned. The allocation process can be lengthy, in particular if several Government entities are involved. Regularly, the land is allocated to the investor on basis of a usufruct (manfa’). The usufruct is a real right attached to a piece of land permitting the beneficiary to use and exploit the land. It is advisable to register the manfa’ in the land register, although in remote rural areas this tends to be a difficult process.

## **EPC Contracts**

EPC and supply agreements regularly are based on the FIDIC models, supplemented by Egyptian law. The rules on supply and construction contracts are contained in the Egyptian civil and commercial codes, which are derived from French law. Egyptian law, in particular, provides for “decennial liability” attaching a 10 year warranty to the design and construction of “fixed installations.” Although it is questionable whether a wind farm or CSP plant which will be dismantled at the end of the contractual period qualifies as a “fixed installation”, there is no court precedent that would support this view. The rules on decennial liability are mandatory. Egyptian courts apply them to all projects located in Egypt, irrespective of the law determined as the proper law of the contract.

## **Project Finance**

Egypt has a long history of project finance. The structures and techniques developed in the oil and gas sector can be applied, with certain modifications, also to renewable energy projects. Large projects tend to be financed (and syndicated) on the international market, with documentation based on the LMA model. Smaller projects also can be financed locally, on basis of credit agreements governed by Egyptian law. Egyptian law sets caps on interest rates. Egyptian courts hold that the respective provisions are mandatory and that they also apply in case foreign law has been determined as the proper law of the contract.

Taking security can raise complex issues, among them:

- There are restrictions on the mortgaging of government land. This means that in many instances the project site cannot be used as security.
- Direct agreements are fairly common but can take long to negotiate, depending on the counter party.
- Under Egyptian law, a pledge over assets normally requires possession. This also can be constructive possession which is exercised through a trustee. This structure, however, makes enforcement of the security more difficult.
- A retention of title provision provides limited protection to a supplier. The supplier risks losing its rights over an asset when the asset is firmly and permanently attached to a piece of land. In addition, a retention of title does not always have effect vis a vis third parties if the buyer becomes insolvent.
- Egyptian law does not object to an assignment of future claims. The law however requires that the claims assigned can be precisely determined.
- Shares in a project company can be pledged. Enforcement proceedings, however, can be cumbersome.

Designing an acceptable security package thus requires careful planning.

### **CDM (Kyoto Protocol) and Export of Green Electricity**

Both the CDM and electricity export can provide additional funding for renewable energy projects.

Egypt ratified the United Nations Framework Convention on Climate Change in 1994 and appointed the Egyptian Environmental Affairs Agency as DNA. The number of CDM projects however is low. Even in times where carbon prices still were high, the bureaucratic hurdles made the use of the CDM in Egypt not very attractive.

The concept of producing solar electricity in the Mediterranean “sun-belt” and to then export it to Europe is intrinsically linked with the DESERTEC initiative. The idea is to generate the green electricity at the place where the natural conditions are best – and to permit producers from non EU member states to sell green electricity at attractive prices. The EU Renewable Energies Directive 2009/28 for the first time permits the “import” of green electricity from non-member countries and to offset it against the national quotas imposed under the Directive. The import into the EU however requires a *physical* interconnection and it does not permit virtual trading schemes or barter structures (e.g. “gas swaps”). So far no connection to the European grid exists and Egyptian projects therefore cannot benefit from exporting electricity to Europe.

### **Investment Protection**

Egypt has ratified the ICSID Convention and has entered into bilateral investment treaties with many countries, including Germany (2005), Denmark (1999), Italy (1989), Spain (1994) and the UK (1975).

### **Dispute Resolution**

Disputes arising out of administrative contracts fall into the competence of the administrative courts. Civil disputes are heard by the civil courts. In 2008 specific Economic Courts were set up as a specialized branch of the judiciary, also competent to hear commercial disputes.

Arbitration clauses are widely used. In administrative contracts, an arbitration clause requires the consent of the competent Minister. Many agreements with the Egyptian state foresee arbitration according to the rules of the Cairo Regional Centre for International Commercial Arbitration (CRCICA). The CRCICA rules of arbitration are by and large based on the UNCITRAL Model.

Egypt has ratified the New York Convention (1958).

## Amereller Legal Consultants

### The Firm

AMERELLER LEGAL CONSULTANTS is an international law firm with offices throughout the Middle East and Germany. The firm specializes in corporate and commercial law in the Middle East and is one of the few law firms with a direct presence in key markets in the region. This enables us to keep our finger on the pulse of this dynamic legal environment and provide tailored advice to clients consistent with evolving practices in the Arab World.

We have had leading roles in some major transactions in the Middle East, especially in the UAE, Egypt, Libya, Iraq, Saudi Arabia, Syria, Oman and Qatar. Clients consult us for expert advice and commercial guidance that we provide. Our personalized focus on supporting clients across country borders and industry sectors is central to our firm's culture. We aim to provide our clients with the professionalism, depth of expertise and quality offered by top-tier international law firms, together with the personal attention and practical knowledge available only through on-the-ground presence.

AMERELLER LEGAL CONSULTANTS has offices in Cairo, Damascus, Dubai, Ras Al Khaimah, Baghdad, Basra and Erbil, as well as in Berlin and Munich. Our six partners lead a team of 30 internationally trained, multilingual and experienced lawyers, who are sensitive to the cultural and legal nuances of conducting business successfully in the Arab World. Through our network of best friend firms we cover all jurisdictions in North Africa and the Middle East - including Iran and Afghanistan.

### Renewable Energies and Climate Change

We regularly advise project sponsors, contractors, suppliers and financial institutions on renewable energy projects across the region and were involved in most of the significant projects to date. Due to this experience we are at the forefront of legal developments in the field of renewable energies. Among our clients are initiatives such as DESERTEC, that aim at promoting the large scale installation of renewable energy projects across North Africa or investors active in MASDAR City and other eco-friendly mega projects.

We are regularly called by international organizations and governments to advise on renewable energy regulation and related legal issues. We follow policy debates closely and are familiar with both the international standards and local business customs. Our regional presence provides us with contact to government authorities and regulators.

We further advise clients on the legal aspects of the CDM (Kyoto Protocol).

## Recent Transactions

AMERELLER LEGAL CONSULTANTS have been active in the MENA markets for many years. Our recent experience in the field of renewable energies and climate change includes:

- Advising Desertec Industrial Initiative (dii) GmbH across the MENA region;
- Advising an international technology company on the bid for a 300 MW Windfarm located on the Egyptian Red Sea;
- Advised a German solar company in relation to the bid for a 100 MW photovoltaic plant in Abu Dhabi;
- Advised the Regional Centre for Renewable Energies and Energy Efficiency in Cairo on the organisational structure, international legal status and financing structure (donor coordination);
- Advised a Middle Eastern government entity on legal issues arising in connection with the tendering of wind farms on a BOO basis;
- Advised an international construction company on the bid relating to the construction of a barrage on the Nile financed by an international development bank;
- Advised a consortium of energy companies on the structuring of gas swaps for the export of green electricity;
- Advised an international technology company on trade law aspects of importing components for solar plants in various Middle Eastern jurisdictions;
- Advised an international chemical company on complying with the ecological standards in connection with setting up in Masdar City.

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