Transfer of Technology Agreements & the Arguably "Mandatory" Egyptian Seat

Introduction

The issue of transfer of technology agreements whereby an Egyptian Seat could be mandated has long been highly debated by the Egyptian literature and courts. Contradicting decisions from the Supreme Constitutional Court and the Court of Cassation has exacerbated the debate even further. In this regard, this article tries to shed light on the practical consequences of this conflict and how parties in the international transfer of technology agreements related to Egypt should address this matter in their contractual negotiations. Further, the article illuminates the potential scenarios that could arise in practice and how the competent Egyptian Courts could tackle them.

The Issue:
Arbitration Law No. 27 for the Year 1994 (the "**Law**") does not contain any mandatory provisions that certain disputes should be seated in the Egyptian jurisdiction. However, the Egyptian Trade Law No.17/1999 has a special provision for transfer of technology disputes whereby article (87-1) provides the following:

> "The Egyptian courts shall have the jurisdiction of deciding the disputes arising from the technology transfer contracts referred to in Article 72 of this law. An agreement **may be reached on settling the dispute amicably or via arbitration to be held in Egypt according to the provisions of the Egyptian law."** [emphasis added]

Determining the nature of this provision was highly debated amongst Egyptian arbitration practitioners. Based on the wording of this provision, some practitioners view it as a mandatory norm, while others view it as a default rule that could be evaded by the parties. In our opinion, the wording is not very clear. It is not required to consider a rule to be a mandatory norm only when the legislator explicitly states that any agreement to the contrary would be null and void. When the legislator does so, it could be an indication that the provision pertains to public policy at the time when the legislation was enacted.

There seems to be even a debate between the Egyptian Courts on this issue. For example, the Supreme Constitutional Court has expressly considered that this provision pertains to public policy. On the other hand, the Court of Cassation did not follow the same approach. The Court has implied that such a provision might be considered as a mandatory rule but does not pertain to Egyptian public policy. In this case, the parties have entered into an arguable transfer of technology agreement at

a time before the enactment of the Egyptian Trade Law No.17/1999. Therefore, extending the application of article (87-1) of this law retroactively would only be allowed if the Cassation Court deemed such provision as a public policy provision. The Court decided that such a provision might be a mandatory norm but does not attain the attributes of Egyptian public policy. Accordingly, the Court allowed for the enforcement of the foreign arbitral award in question.

Following this decision, the question then becomes what would be the Cassation Court approach if a transfer of technology agreement was entered into after the year 1999. Does this mean that the parties to such an agreement have to choose Egypt as the seat for their arbitration as long as the conditions of the Egyptian Trade Law No.17/1999 have been triggered? Determining whether an agreement meets the definition of a transfer of technology agreement is very tricky. In this regard, article (73) of the Egyptian Trade Law No.17/1999 reads as follows:

> "The transfer of technology contract is an agreement in which the (supplier of technology) undertakes to transfer, against payment, **technical know-how** to the (importer of technology) t**o use it in a special technical way, for the production or development of a specific commodity, the installation or operation of machines or equipment, or for the provision of services**. The mere sale, purchase, lease, or rental of commodities or trademarks shall not be considered a transfer of technology **unless this is set forth as part of, or is connected with the transfer- of - technology contract."** [emphasis added]

The above definition is quite broad and could apply to various contractual agreements. The problem arises primarily in the context of complex transactions. For example, would a franchise agreement satisfy this definition if it is related to a computer manufacturer? According to this definition, there could be an argument that such an agreement could be termed as a transfer of technology agreement. In this regard, the Court of Cassation has recently, in 2019, considered that a supply of electronic control panels would qualify as a transfer of technology agreement as long as the agreement provides for the provision of technical support services. What if the arbitral tribunal has interpreted the agreement like this one not to meet the statutory definition of transfer of technology agreements; would Egyptian Courts review this interpretation? In our opinion, this should not be the case. The Egyptian Court should not review whether an arbitral tribunal has erred in interpreting or framing a particular agreement, even in the context of the transfer of technology agreements.

Scenario #1

Let us assume that there is an agreement that falls within the scope of this statutory definition without any doubts, even in the eyes of the arbitral tribunal. What would be the fate of an arbitral award that is issued abroad concerning a dispute arising from such an agreement? Does article (87-1) entail that Egyptian Courts would be entitled to ignore the foreign arbitral seat chosen by the parties and proceed with reviewing an annulment action concerning such a foreign award? In our opinion, this scenario presents a conflict between the provisions of the Egyptian Trade Law and the New York Convention, whereby the latter should prevail. This position is consistent with article (1) of the law itself. As for rejecting the enforcement of such a foreign award, it seems that the Court of Cassation has settled this debate by refraining from deeming this issue as a public policy one. Accordingly, Egyptian Courts may not use the public policy defense for rejecting the enforcement of foreign awards under this scenario.

Scenario #2

Let us assume a different scenario where there is an agreement that falls within the scope of this statutory definition without any doubts, and the parties have chosen London as their arbitral seat under such an agreement. A dispute arises, then one of the parties file a case before the Egyptian Courts trying to nullify the arbitration agreement itself for violating a supposedly mandatory rule under the Egyptian Trade Law (i.e., article (87-1)), before the issuance of the arbitral award itself. In our opinion, the Egyptian Court is entitled to reject the referral of the dispute to arbitration based on article (II-3) of the New York Convention as the agreement could be considered as null and void in the eyes of the reviewing court. The Egyptian Courts might accordingly nullify the arbitration agreement itself for failing to adhere to the requirements of Article (87-1) of the Egyptian Trade Law.

Following this decision, the arbitral tribunal might either elect to terminate the arbitral proceedings or just ignore the Egyptian judgment that nullified the arbitration agreement. The arbitral tribunal might view that the law applicable to the validity of the arbitration agreement is not the Egyptian law but rather the law of the seat (i.e., English law) as per article (V-1(a)) of the New York Convention. Hence, the Egyptian Court has erroneously applied the New York Convention. If the arbitral tribunal decided to ignore this Egyptian judgment, then the concerned party might try to enforce the Egyptian judgment itself before the English Courts in this case. However, the enforcement of the Egyptian Court's decision in England in this example might be quite tricky, considering that there is no reciprocal treaty for mutual enforcement of judgments between both countries. However, the Egyptian judgment would still prove to be useful, at least in hindering the enforcement of the resulting English award in Egypt. This is because it is considered to be a matter tantamount to public policy to enforce a foreign judgment or arbitral award that violates the res judicata of a prior Egyptian judgment