

ARTICLES

The Application of the New York Convention by Egyptian Courts: An Empirical Analysis

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Abstract:

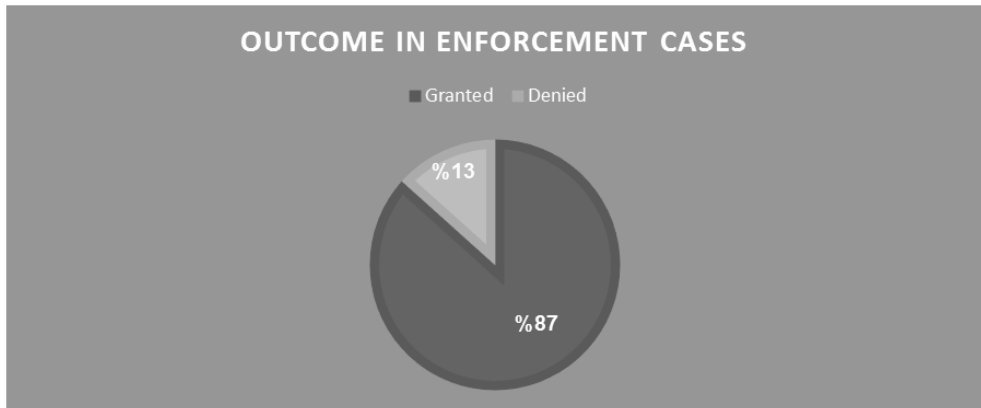
This article aims at offering clear insight regarding the application and interpretation of the New York Convention ("NYC") by Egyptian Courts. In principle, this article is exclusively concerned with judgments issued by Egyptian courts with respect to foreign arbitral awards and foreign arbitration agreements. After surveying roughly 500 judgments issued by Egyptian Courts in relation to arbitration, the author identified approximately 62 judgments concerning foreign arbitral awards and foreign arbitration agreements. Within this sample, the enforcement rate of foreign arbitral awards and foreign arbitration agreements was 87%. This article further delves into analyzing this sample of 62 judgments and tries to illuminate the positions taken by Egyptian Courts on a number of selected issues with respect to the application and interpretation of the NYC.

I. Statistics:

This article surveys roughly **500** judgments issued by Egyptian Courts on arbitration. Approximately **62** judgments concerning foreign arbitral awards and foreign arbitration agreements were identified. The diagram below shows that **44%** of these cases were cases

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where the applicants failed in their pursuit to set aside foreign arbitral awards. All of which were held to be inadmissible by the Egyptian Courts.



The remaining 56% were pertaining to the enforcement of foreign arbitral awards and foreign arbitration agreements. This 56% percentage equates to 35 Judgments. Out of which, the Egyptian courts granted enforcement in 26 cases, denied enforcement in 4 cases, and rendered the case as inadmissible in 5 cases (mainly for procedural reasons).

II. Enforcement of Foreign Arbitration Agreements:

1. Law Applicable to the Validity of Arbitration Agreements:

The starting point to determine the validity of the arbitration agreement is to pinpoint the law applicable to such validity. The Egyptian Court of Cassation has asserted on three occasions¹ - most recently in 2015 - that the law applicable to the validity of an arbitration agreement is the *lex arbitri* and not the *lex fori*. In these three instances, the Court of Cassation denied any arguments based on the *lex fori* (i.e., Egyptian Law) and upheld the validity of the foreign arbitration agreement. This is because the party challenging the enforcement of the foreign arbitration agreement in these cases failed to provide any evidence based on the *lex arbitri* (i.e., foreign law). Also, the Court of Cassation asserted that foreign arbitration agreements are presumed to be valid. Accordingly, the burden of proof for the invalidity of the foreign arbitration agreement lies solely with the party challenging the enforcement of such agreements.

1. Cassation, 27 December 1991 (547/ JY 51); 27 March 1996 (2660 / JY 59); 28 April 2015 (5000 / JY 78).

2. Short-Form Arbitration Agreements:

In numerous agreements - especially in international sale of goods - the arbitration agreement takes a short form. In an infamous case, the arbitration clause stated the following: only "arbitration in London." The Egyptian Court of Cassation² considered that this was not enough indication of the parties' agreement on arbitration. This is because the clause was too broad and vague. For instance, the clause did not mention which disputes are subject to arbitration or the method of appointing arbitrators. In this regard, the Court held that no arbitration agreement was concluded.

Under the NYC, it could be argued that the law applicable to the validity of the arbitration agreement depends on the timing of the enforcement as follows:

| Timing of the Enforcement | Relevant NYC Article | Law Applicable to the Validity of the Arbitration Agreement |
|---|----------------------|---|
| <u>Before</u> the Issuance of the Foreign Arbitral Award | Article (II)(3) | <u>Lex Fori or Lex Arbitri</u> |
| <u>After</u> the Issuance of the Foreign Arbitral Award | Article (V)(1)(a) | <u>Lex Arbitri</u> unless the parties have agreed on a law to be applicable to the Arbitration Agreement |

Therefore, the position taken by the Egyptian Court of Cassation could still be viewed as consistent with the NYC. This is because the timing of the enforcement of this case was before the issuance of the foreign arbitral award. Hence, the enforcement of the foreign arbitration agreement may be rejected on the basis of grounds rooted in the *lex fori*.

3. Multi-tier Dispute Resolution Clauses:

A question always arises as to whether a multi-tier dispute resolution clause would hinder the enforceability of the arbitral award. For instance, if the dispute resolution clause provides that a condition precedent has to be satisfied in advance before proceeding with arbitration, the question is whether the failure to satisfy such a condition could prevent the enforcement of the arbitral award.

2. Cassation, 27 March 2007 (607/ JY 63).

According to the Egyptian Court of Cassation³, the answer hinges upon the *lex arbitri*. In this regard, the party challenging the enforcement of an arbitral award alleged that the arbitration agreement required obtaining a report from the ICC International Centre for Expertise before submitting the dispute to arbitration. Given that no such recourse ever occurred, such party maintained that the enforcement of the award should have been rejected by the Court of Appeal pursuant to Article V(1)(d) of the NYC. The Court of Cassation rejected such challenge given that the party challenging the enforcement did not provide any evidence that the failure to comply with such condition precedent was inconsistent with the *lex arbitri* (i.e., foreign law).

4. Email Arbitration Agreements:

In this age of technology, many contracts are concluded via email. The question is whether an arbitration agreement embedded in an email contract would be enforceable before Egyptian courts. In this case, the answer was in the affirmative. In 2016, the Cairo Court of Appeal⁴ ruled that according to the NYC, the arbitration agreement is deemed to be written if it is contained in a written document signed by both parties. However, it may also be contained in an exchange of letters or telegrams or written or electronic communications between the parties, including their agreement to resort to arbitration.

In this regard, the Court based its conclusion upon its interpretation of Article (7) of the UNCITRAL Model Law, and Articles 10 and 12 of the Egyptian Arbitration Law. Further, the Court reasoned its decision on the basis that the rules of law set out under the NYC are the result of continued efforts to establish the international concepts and modern standards of arbitration, in recognition of its role with respect to safeguarding the vital interests of international commerce.

5. Seat of Arbitration Agreements:

a. Foreign Seat Option:

What if the arbitration agreement provides that the arbitration should be seated in Cairo, unless a foreign entity becomes a party to the agreement, in which case the seat should be Paris? How would Egyptian courts interpret such an agreement if such an option is actually triggered? This was the scenario in 2016 when the Cairo Court of Appeal⁵ acknowledged the validity of such an arbitration agreement.

3. Cassation, 1 March 1999 (10350/ JY 65).

4. Cairo Appeal, 7 February 2016 (31 / JY 133).

5. Cairo Appeal, 3 February 2016 (9 / JY 132).

In this case, the Court stated that the arbitral tribunal reached the conclusion that one of the partners in the joint venture was a company incorporated in Panama and which only had a branch in Egypt, and therefore, this triggered the foreign seat option under the arbitration agreement (i.e., France) and the foreign law applicable to the merits (i.e., English law). The court indicated clearly that it was not the duty of the court at the place of enforcement to review whether such interpretation was right or wrong but only whether such interpretation was well-rooted in the facts of the case.

b. Seat vs. Venue:

The distinction between the legal seat and the physical venue is instrumental in determining which court has jurisdiction to entertain an action for annulment concerning arbitral awards. In 2012, the Cairo Court of Appeal⁶ concluded that this was an action for annulment and hence it was inadmissible. It seems that the Court characterized the choice of Cairo as a merely physical venue rather than a legal seat of arbitration. The reason behind such an interpretation - according to the court - stems from the fact that this arbitration was an ICC arbitration.

Surprisingly, the Court mentioned in the recitals that the parties had chosen Cairo as the seat of arbitration; then, the Court stated in its reasoning that Cairo is a mere geographical venue for the arbitration since it was under the auspices of the ICC. Accordingly, the Court characterized the arbitration in question as a foreign one not to be governed by Egyptian arbitration law or to be subject to annulment proceedings before Egyptian Courts.

6. Nomination of Arbitrators under Arbitration Agreements:

In 1996, a party challenging the enforcement of a foreign arbitral award raised the argument that the arbitration agreement in question only determined the law applicable to the merits and the place of the arbitration without determining the names of the arbitrators or the arbitration body administering the dispute as is required by the NYC.

The Court of Cassation⁷ considered that Article II (1) of the NYC, together with Article I (2) of the NYC, indicate that international arbitration agreements are valid even if the parties do not appoint the arbitrators as long as the arbitration agreement explicitly or implicitly indicates that the parties intended that the arbitrators be appointed in accordance with the rules of a permanent arbitral body. According to the Court, the parties' agreement that the arbitration be held in Sweden and the nature of the lease contract

6. Cairo Appeal, 6 August 2012 (66 / JY 128).

7. Cassation, 27 March 1996 (2660 / JY 59).

necessarily indicated - even if in an implied manner - that the arbitration would be administered by the commercial arbitration center in Sweden. According to the court, this was sufficient to deem the arbitration agreement as valid.

7. Capacity to be a Party to an Arbitration Agreement:

a. Representative Powers vs. Capacity:

In 1990, the Court of Cassation⁸ held that the challenge that an entity lacked the proper representation powers to be a party to the arbitration agreement does not fall under any of the grounds for non-enforcement of an arbitral award under the NYC. In this regard, Bermann and Gaillard provide that:

"Although issues of proper representation and authority differ from that of capacity *stricto sensu*, commentators support the idea that the incapacity defense should extend to situations where legal entities allegedly act *ultra vires* their constitutional documents, or where the representative power is alleged to be invalid."⁹

The fact of the matter is that the Arabic translation of the NYC has failed to capture the different possible meanings of incapacity; for instance, the lack of authority or power to conclude the arbitration agreement. That is probably why the Court of Cassation has reached the above conclusion that the lack of proper representation powers does not fall under the grounds of the NYC.

b. Company under Liquidation:

A party challenging the enforcement of an arbitral award claimed that it was, in fact, a company under liquidation and therefore lacked the capacity to be a party to the arbitration enforcement proceedings. In addition, the party argued that a company under liquidation cannot be a party to arbitral proceedings, and the enforcement of such foreign arbitral award would be in violation of Egyptian public policy. The Court of Cassation¹⁰ rejected this argument on the basis that the board of directors' decision to liquidate the company lacked the requisite percentage (60%) - as indicated in its articles of association - to liquidate the company. Hence, the Court considered that the liquidation decision was null and void and should have no effects whatsoever on the enforceability of the foreign arbitral award.

8. Cassation, 16 July 1990 (2994/JY 57).

9. Bermann & Gaillard, "Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards", page 146.

10. Cassation, 23 May 2001 (25 / JY 116).

c. Unincorporated Joint Venture:

The party challenging the enforcement of the arbitral award claimed that the counterparty to the arbitration agreement lacked capacity to enter into such an agreement because it was an unincorporated joint venture ("JV").

The Cairo Court of Appeal denied such arguments.¹¹ The Court was of the opinion that the award debtor has dealt with the partners of the JV, each in its own capacity, and did not deal with the JV as an independent entity. According to the court, the arguments raised by the award debtor on this front were groundless.

8. Extension of Foreign Arbitration Agreements to Related Contracts:

The parties to this case concluded a construction agreement in 1974 ("**Construction Agreement**") containing an arbitral clause providing for Geneva as the seat of arbitration for any disputes "arising out of the execution, or interpretation of the Construction Agreement, or arising out as a result of the Construction Agreement or as a result of the suspension or termination of the Construction Agreement." In 1978, one of the parties ("**Party B**") issued a declaration of debt to the other party ("**Party A**") (an "IOU"). It can be inferred from the facts of the case that the IOU did not contain an arbitration agreement. Party A brought its case before the Egyptian Courts claiming that Party B should pay the amount declared under the IOU.

The Court of First Instance and the Court of Appeal rejected the claims of Party A on the basis that the wording of the arbitral clause under the Construction Agreement was broad enough to be extended to the IOU. The Court of Cassation¹² also ruled that the wording of the arbitral clause under the Construction Agreement was broad enough to be extended to the IOU. This is because the IOU arose as a result of the Construction Agreement. Hence, the Court determined that the arbitral clause contained within the Construction Agreement should be extended to the IOU.

9. Maritime Shipping Contracts:

The Court of Cassation¹³ held that Articles 246 and 247 of the Maritime Shipping Law No. 8/1990 (which are based on the Hamburg Convention) are mandatory rules and therefore any arbitration agreement in violation of such articles should be considered null and void. The parties in this case chose New York as the seat of arbitration, and US law in conjunction with

11. Cairo Appeal, 3 February 2016 (9 / JY 132).

12. Cassation, 27 February 1994 (52 / JY 60).

13. Cassation, 28 February 2006 (595 / JY 63).

the York Antwerp rules to apply to such an agreement. In this regard, the Court denied the enforcement of the foreign arbitration agreement for violating mandatory rules under Egyptian law. In the author's opinion, mandatory rules of the *lex fori* should not apply unless they are viewed by the Court as pertaining to international public policy. The Court of Cassation did not, however, clarify whether or not such mandatory rules pertain to international public policy.

10. Transfer of Technology Contracts:

The question as to whether transfer of technology contracts pertain to public policy was addressed by the Egyptian Court of Cassation in 2011.¹⁴ The Parties entered into a contract for the transfer of technology, which provided for the settlement of disputes by arbitration in Lugano, Switzerland, in accordance with the Rules of the International Chamber of Commerce (the "ICC Rules"). On 4 February 2002, an arbitral award was rendered under Swiss law ordering Engineering Industries Company and Sobhi A. Farid Institute (the "Claimants") to pay damages to Roadstar Management and Roadstar International. On 23 November 2003, the Claimants challenged the judgment of the Cairo Court of Appeal before the Court of Cassation, alleging that the Cairo Court of Appeal had incorrectly applied the law by deciding that it lacked jurisdiction over the Claimant's action even though the contract for the transfer of technology was governed by the New Commercial Code, which provides for the exclusive jurisdiction of Egyptian Courts over disputes arising from contracts for the transfer of technology.

The Court of Cassation dismissed the Claimants' challenge. The Court held that the dispute between the parties regarding the arbitration proceedings had to be submitted to the Swiss Courts and not to Egyptian Courts, given that the parties had agreed that their disputes were to be settled by arbitration in Lugano, and in the absence of any evidence establishing an agreement to apply Egyptian arbitration law. More importantly, the Court noted that only the provisions of the New Commercial Code that pertain to public policy apply retroactively. In this regard, the Court ruled that despite the fact that the provisions concerning transfer of technology are mandatory rules, they do not pertain to public policy. Therefore, these provisions do not apply to this dispute as the governing law was foreign.

III. Arbitral Tribunal & Arbitral Procedures:

1. Independence & Impartiality of Arbitrators:

A party challenging the arbitral award alleged that the ICC Rules had been breached because the chairman of the arbitral tribunal lacked independence and impartiality. The

14. Cassation, 28 March 2011 (1042 / JY 73).

Court of Cassation rejected such challenge given that the award debtor did not provide any evidence that the constitution of the arbitral tribunal was in violation of the parties' agreement or, in the absence of such an agreement, of the law of the seat of arbitration.¹⁵ In other words, the law applicable to the validity of the constitution of the arbitral tribunal was - according to the court - the *lex arbitri* and not the *lex fori*.

2. Notice of Arbitral Procedures:

Which law should apply to the validity of the notices of arbitration? Should it be the *lex arbitri* or the *lex fori*? The Court of Cassation held in 1990 that it should be the *lex fori*. However, in 1996, the Court of Cassation changed its stance and held that it should be the *lex arbitri*. In both cases, the Court granted the enforcement of the foreign arbitral awards.

In 1990, the Court rejected the award debtor's challenge given that, according to the arbitral award, the sole arbitrator was assured that the notice was sent to the award debtor and that the latter did not provide evidence establishing that it was not given notice in accordance with the *lex fori* (i.e., Egyptian Law).¹⁶

In 1996, the Court of Cassation held that Article 22 of the Egyptian Civil Code provides for a conflict-of-laws rule that indicates that the procedural rules are governed by the law where the action is brought or where such procedures are conducted. In this regard, the law applicable to the validity of the notices of arbitration was - according to the court - the *lex arbitri* (i.e., Swedish law). The Court considered that the Claimants provided no proper evidence that the notices provided to them, with respect to the appointment of arbitrators and of the arbitration proceedings, were not valid under Swedish law.¹⁷

3. Due Process:

In a recent case rendered in 2015, the party challenging the enforcement of the arbitral award claimed that the arbitral tribunal violated its due process rights as it relied in its award upon witness statements conducted in the absence of the party (*ex parte*). The Court of Cassation held that such a ground is not mentioned as one of the exclusive grounds under the NYC for denying the enforcement of foreign arbitral awards.¹⁸

In a second case from 2001, the award debtor made the argument that the enforcement of the award should be rejected for violating Egyptian public policy, for reasons of due process. The violations of due process comprised the following:

15. Cassation, 1 March 1999 (10350/ JY 65).

16. Cassation, 16 July 1990 (2994/JY 57).

17. Cassation, 27 March 1996 (2660 / JY 59).

18. Cassation, 28 April 2015 (5000 / JY 78).

- (a) Violating the right of defense;
- (b) Violating the Principle of Equality between the Parties; **and**
- (c) Violating the rule that the respondent should be the last party to speak (present its defense).

The Court of Cassation dismissed these allegations by referring to the arbitral award itself and how it was based upon logical reasoning. In addition, the Court observed that the award debtor raised counterclaims and that arbitration has a unique style that aims to resolve disputes in a timely manner.¹⁹ Further, in 2004, the Cairo Court of Appeal noted that it is clear from the arbitral award that the award debtor submitted a memorandum of defense before the arbitral tribunal, and therefore, its claims that its due process rights were violated were considered - by the court - to be groundless.²⁰

4. Effect of Criminal Proceedings upon Arbitral Proceedings:

The party challenging the enforcement of the arbitral award argued that the foreign arbitral award contravened Egyptian public policy because it violated the Egyptian legal rule that criminal proceedings should lead to the stay of civil proceedings concerning the same dispute. In this case, there were criminal proceedings in progress between the same parties concerning forgery and fraud allegations. The Court of Cassation²¹ rejected this argument on the basis that the scope of this rule - which is prescribed under Article 265 of the Criminal Procedural Law - has a different application in local disputes than in international disputes. Accordingly, the scope of this rule is much narrower in international disputes than it is in local disputes. Further, this rule is directed to the Egyptian Judge to avoid contradiction between national court judgments and is not directed to arbitral tribunals.

5. Signing of the Arbitral Award Requirement:

A party challenging the enforcement of a foreign arbitral award alleged that the Egyptian arbitration law was breached since the arbitral award was not signed by the arbitrator appointed by him, and the award included no explanation of the reasons behind such arbitrator's decision not to sign it. The Court of Cassation²² rejected such argument by reasoning that this requirement was not mandated under the NYC.

19. Cassation, 23 May 2001 (25 / JY 116).

20. Cairo Appeal, 28 January 2004 (41&15/JY 120).

21. Cassation, 23 May 2001 (25 / JY 116).

22. Cassation, 1 March 1999 (10350/ JY 65).

6. Time limit for issuing the Arbitral Award:

The Cairo Court of Appeal²³ rejected the argument regarding the violation of the time limit prescribed under the institutional rules governing the arbitration. The reason for such rejection is the award debtor's failure to submit an Arabic translation of the arbitral institutional rules governing such arbitration. In other words, the award debtor failed to provide admissible evidence (i.e., an Arabic translation of the arbitral institutional rules) that the arbitral tribunal violated the time limit prescribed under the arbitral institutional rules for issuing the arbitral award.

7. Substantive Law Issues:

a. Disregard of the Law Applicable to the Merits:

The party challenging the enforcement of the arbitration agreement raised the argument that the sole arbitrator failed to apply the Egyptian law that should have been applied to the merits of the dispute. The Court of Cassation asserted that such an argument cannot be raised as part of enforcement proceedings, rather than as part of annulment proceedings and therefore rejected this argument.²⁴

b. Delay Interest Rates & Public Policy:

Maximum Delay Interest Rate:

In 1990, the Court of Cassation²⁵ partially overruled the judgment of the Cairo Court of Appeal and granted enforcement of the award, ordering the award debtor to pay damages, arbitration costs and interest, after reducing the interest rate from 8% to 5%. The Court noted that according to Articles V(1)(c) and V(2)(b) of the NYC, Egyptian Courts should reject the enforcement of foreign arbitral awards where they contravene public policy in Egypt and not where they only contravene mandatory legal rules. It held that where only part of an arbitral award contravenes public policy, Egyptian Courts should enforce those parts of the award which are not in contravention of public policy. The Court found that the Egyptian legal rule allowing a maximum interest rate of 5% in commercial matters constituted a rule of public policy and granted enforcement to the order for payment of interest after limiting the interest rate to the 5% maximum.

In a similar instance, the Court of Cassation²⁶ held that Article 226 of the Egyptian Civil Code, which limits the rate of delay interest in civil disputes to a maximum of 4%, is a

23. Cairo Appeal, 28 January 2004 (41&15/JY 120).

24. Cassation, 23 May 2001 (25 / JY 116).

25. Cassation, 21 May 1990 (815/JY 52).

26. Cassation, 23 May 2001 (25 / JY 116).

rule of public policy. It thereby reduced the rate of interest ordered by the award from 8% to 4%. The Court observed that this should be the applicable rate as the parties failed to agree on an interest rate in their agreement.

Date when Delay Interest Rate should run:

In 1990, the Court of Cassation ruled that the Egyptian rules concerning the date when interest rates should start to run (the date of the final conclusive judgment) does not pertain to Egyptian public policy, and therefore the interest rate should run from the date determined by the arbitral award (in this case, this date was prior to the date of the issuance of the arbitral award).²⁷

Ordering Delay Fines + Delay Interest Rate:

The arbitral award in this case ordered damages amounting to an annual rate of 10% of the amounts ordered under the arbitral award to run from the date of 30 December 1978, in addition to any supplementary compensation to be ordered by the court. This Delay Compensation was ordered in addition to the interest rate. The award creditor has argued that under the applicable law to the merits of the arbitral dispute (i.e., English law), any debt that is of a defined amount, due, and evidenced by an official document should be paid within one month from the date of the arbitral award with no need to first secure an enforcement order from the Egyptian Court. In this regard, the award creditor argued that the non-payment was a default by the award debtor that is indicative of bad faith, entitling the award creditor to a supplementary compensation in addition to a delay interest rate.

The Court of Cassation²⁸ applied Article 231 of the Egyptian Civil Code to this argument with no reference to the applicable law to the merits of the arbitral dispute (i.e., English law). Under the Egyptian Civil Code, the Court will order supplementary compensation only when the claimant proves two conditions:

- (a) The occurrence of exceptional losses; and
- (b) The bad faith of the debtor.

The Court of Cassation ruled that the award creditor did not meet the two-pronged test under the Egyptian Civil Code and therefore denied its claim. It seems that the Court of Cassation refused to enforce the Delay Compensation in its entirety for violating Article 231 of the Egyptian Civil Code. The question is whether or not such article should be considered to be part of Egyptian public policy.

27. Cassation, 21 May 1990 (815/JY 52).

28. Cassation, 21 May 1990 (815/JY 52).

However, in 2008, the Court of Cassation²⁹ adopted a different approach. In this case, it was alleged that the fact that the arbitral award ordered fines for failing to discharge the shipment in addition to an interest rate of 5% and USD 50,000 violates Article 227 of the Egyptian Civil Code, a rule of public policy. This is because ordering delay compensation in addition to the interest rate would violate the statutory interest rate of 5% under Article 227 of the Egyptian Civil Code.

The Court found that ordering the delay compensation in addition to the interest rate did not violate Article 227 of the Egyptian Civil Code. This is because the order complied with Article 231 of the Egyptian Civil Code which allows the creditor to request supplementary compensation in addition to the statutory delay interest rate, as long as it is proven that the debtor has caused such damages (which exceed the statutory delay interest rate) in bad faith. This means - according to the court - that ordering delay compensation in addition to the interest rate does not violate Egyptian public policy.

8. Allocation of Arbitration Costs & Legal Fees:

The arbitral award sought to be enforced in this case ordered that 80% of the costs and legal fees of the arbitration should be borne by the losing party. The total amount of such costs and legal fees was equal to GBP 4216.59. The Court of Cassation³⁰ ruled that the part of the arbitral award concerning the actual fees of the arbitrators should be enforced. However, the arbitral award - according to the Court - did not mention the amount concerning the other fees (i.e., legal fees), and therefore, this part should not be enforced.

9. Settlement Agreements:

The Cairo Court of Appeal³¹ refused the argument that the settlement agreement should have the effect of terminating ongoing arbitral proceedings and prevented the arbitral tribunal from rendering an arbitral award. The Court reasoned that the settlement agreement did not provide for the revocation of the arbitration clause under the main agreement. According to the Court, the settlement agreement imposed mutual obligations upon both parties and the award debtor - upon reviewing the arbitral award - breached its obligation under the settlement agreement. Therefore, the arbitral tribunal had the authority - in the opinion of the Court - to proceed with the original arbitration proceedings.

29. Cassation, 22 January 2008 (2010 / JY 64).

30. Cassation, 21 May 1990 (815/JY 52).

31. Cairo Appeal, 28 January 2004 (41&15/JY 120).

10. Res Judicata & Implicit Waiver of Arbitral Awards:

The Court of Cassation³² denied the enforcement of a foreign arbitral award issued by the American Arbitration Association ("AAA") due to the fact that such award was issued in May 1997, but only submitted to the Court in October 2003. The Court acknowledged that foreign arbitral awards have *res judicata* once issued and as long as they are not set aside by a competent court. However, the facts of this case show that the award creditor did not submit the arbitral award for a considerable amount of time - despite the fact that a contentious litigation regarding the same subject matter was ongoing before Egyptian courts - and this was interpreted by the court to be an implicit waiver of the award by the award creditor.

IV. Enforcement of Arbitral Awards:

1. Time limit for Enforcement Lawsuit:

The Cairo Court of Appeal³³ held that Article 58(1) of the Egyptian Arbitration Law applies only to domestic arbitral awards or to awards made in arbitral proceedings that the parties have agreed to subject to the Egyptian Arbitration Law. The Court added that enforcement of the award is governed by the NYC, which does not set any time limits for enforcement lawsuits.

However, in an outlier judgment by the Cairo Court of Appeal,³⁴ the Court held that applying for the enforcement of a foreign arbitral award is not admissible until after the lapse of the time limit set for initiating an action to set aside the arbitral award.³⁵ This seems to be a flawed position given that foreign arbitral awards are not subject to actions to set aside before Egyptian Courts in the first place.

2. Mechanism of Enforcing Foreign Arbitral Awards:

a. Order on Petition:

The Court of Cassation noted that Egypt has acceded to the NYC by Presidential Decree No. 171/1959. The NYC is applicable as is any other law of the Egyptian State, and its Article (III) provides that the contracting States shall not impose substantially more

32. Cassation, 13 March 2007 (76 / JY 73).

33. Cairo Appeal, 28 January 2004 (41&15/JY 120).

34. Cairo Appeal, 19 January 2017 (15 / JY 132).

35. The time limit is set at 90 days under the Egyptian Arbitration Law from the date the arbitral award is notified to the award debtor.

onerous conditions on the enforcement of foreign arbitral awards than are imposed on the enforcement of domestic arbitral awards. The term "rules of procedure" mentioned in the NYC is not limited to the Code of Procedure but includes all laws organizing the proceedings such as the Arbitration Law, which is a procedural law falling under the term "rules of procedure." Given that the provisions of the Code of Procedure provide for more onerous conditions than those provided by the provisions of the Egyptian Arbitration Law, the latter should apply to the enforcement of foreign arbitral awards.³⁶

b. Challenging the Order on Petition:

Given that the provisions of the Arbitration Law provide for less onerous conditions than those provided by the provisions of the Code of Civil Procedures, the former should apply to the enforcement of foreign arbitral awards. Hence, requests for the enforcement of foreign arbitral awards should be made before the Cairo Court of Appeal. However, based on the Supreme Constitutional Court which amended the Egyptian Arbitration Law and permitted the challenge of an order granting the enforcement of an arbitral award, it should be noted that an order granting the enforcement of an arbitral award is required to be made in the form of an *ex parte* petition to the Chairman of the competent court (Referred to as an "Order on Petition"). The Court noted that the Supreme Constitutional Court decision acknowledged that there is a legislative gap with respect to the timeline and the procedures for filling a challenge against an order granting the enforcement of an arbitral award. Accordingly, the Court concluded that this gap should be filled by referring back to the Code of Civil Procedure. In this respect, a challenge to an Order on Petition should be made in the form of a regular lawsuit notified to the counterparty.³⁷

3. Notice of the Arbitral Award for Enforcement Purposes³⁸:

The Court clarified that if the award debtor is a juridical personality, the notice should be directed to its headquarters in Egypt to be received by such party's representative or assignee. If the bailiff is not able to find a person qualified to receive the notice or such a person refuses to receive the notice, the bailiff should evidence the delivery failure before handing it over to the district attorney. In this regard, the court denied the enforcement of this foreign arbitral award because the bailiff directed the notice to the administrative authority instead of the district attorney. In other words, the award debtor was not validly notified, which justified the Chairperson's refusal to grant Oakley Fertilizers, Inc. an *exequatur*.

36. Cassation, 23 May 2001 (25 / JY 116); Cassation, 10 January 2005 (966 / JY 73); Cassation, 8 May 2008 (945/ JY 69); Cassation, 6 April 2015 (15912 / JY 76).

37. Cairo Appeal, 27 February 2007 (43 / JY 122).

38. Cairo Appeal, 4 June 2013 (14/ JY 130).

4. Setting Aside of Foreign Arbitral Awards:

The Court of Cassation deducted from Articles III and V(1)(e) of the NYC that only the Courts of the State where the award was issued have jurisdiction to rule on requests for its setting aside. As Egypt acceded to the NYC by Presidential Decree No. 171/1959, the provisions of the NYC are applicable even when in contradiction with the Egyptian Code of Civil and Commercial Procedure and Arbitration Law. The rule that Egyptian Courts lack jurisdiction to rule on requests for the setting aside of foreign arbitral awards is a rule relating to jurisdiction and may be applied by the Court *sua sponte*.³⁹

5. Enforcement of Interim Measures & Arbitral Anti-Suit Injunctions⁴⁰:

In May 2018, the Cairo Court of Appeal issued an intriguing judgment concerning the enforcement of an arbitral interim measure.⁴¹ In the words of the Court, the arbitral tribunal issued a procedural order against Damietta International Ports ("DIP") ordering the latter to refrain from suing the guarantor bank regarding the liquidation of a letter of guarantee issued in favor of DIP ("Order"). The Order was in fact an anti-suit injunction. DIP raised three arguments against the enforcement of the Order as follows:

- (1) The Order is issued in favor of the guarantor bank which is a third party and is not a party to the arbitration agreement;
- (2) The Order is a temporary conservative order and is not a final and conclusive arbitral award, and therefore lacks the required *res judicata* effect to be enforced before Egyptian Courts;
- (3) The Order contravenes Egyptian public policy because it orders DIP to refrain from litigating against a non-arbitral party in Egypt.

39.

| Court of Cassation | Cairo Court of Appeal |
|---|--|
| 23 May 2001 (25 / JY 116); 23 February 2010 (913/ JY 73). | 19 March 1997 (68 / JY 113); 29 January 2003 (40 / JY 114); 26 February 2003 (23 / JY 119); 26 March 2003 (10 / JY 119); 29 June 2003 (129 / JY 118) ; 29 September 2003 (22 / JY 119); 28 January 2004 (41&15/JY 120); 26 May 2004 (7 / JY 121); 28 June 2006 (12 / JY 123); 28 June 2006 (13/ JY 123); 28 June 2006 (19/ JY 123); 16 January 2008 (92/ JY 124); 2 July 2008 (23 / JY 125); 2 December 2008 (54 /JY 125); 18 May 2011 (59/ JY 125); 29 May 2012 (57/ JY 127); 7 April 2014 (60 / JY 129); 4 January 2016 (77 / JY 132); 20 August 2016 (16 / JY 132); 21 December 2016 (82 / JY 129); 15 January 2017 (22 / JY 132); 6 September 2017 (88 / JY 133); 6 November 2017 (19 / JY 134). |

40. This part has first appeared in Kluwer Arbitration Blog in January 2019.

41. Cairo Appeal, 9 May 2018 (44/ JY 134).

The Cairo Court of Appeal held explicitly that interim orders are covered by the New York Convention, provided that:

1. The interim order is final;
2. The interim order is issued based on a valid arbitration agreement;
3. Both parties were offered the opportunity to present their case in the arbitration; and
4. The interim order does not violate Egyptian public policy.

Upon applying these criteria, the court determined that the Order satisfied all of these requirements. The question then becomes whether the Order in question was actually a final or a temporary one. In reciting the facts of the judgment, the Cairo Court of Appeal referred to the Order as a "procedural order providing for temporary and conservatory measures." However, it seems that the Court surprisingly reversed its opinion in its holding by considering that the Order was final rather than temporary.

As a side note, the final ICC award in this case was issued in January 2018, while the Cairo Court of Appeal reviewed the enforcement of the Order in May 2018. It is not clear whether or not the Order was later amended by the ICC arbitral tribunal in its final award. If the Order was in fact a temporary one rather than a final one, then we should begin by citing Mr. Bravin who indicates that:

"The New York Convention has an enforcement regime that applies to awards. National courts that have applied the Convention have pretty uniformly concluded that an order imposing a provisional measure for relief is not an award. National courts cannot look to the Convention for authority to enforce such interim orders. It is not there."⁴²

In this regard, an order imposing provisional temporary relief cannot be considered an award. Therefore, a clear distinction should have been made by the court between a temporary arbitral award that provided for temporary relief and an interim award that decides upon a certain issue in a final and conclusive manner. The reason that temporary arbitral orders are consistently considered not to fall under the scope of the New York Convention is because temporary arbitral orders are usually accompanied with fewer integral formalities than arbitral awards. For example, a temporary arbitral order can be issued by the presiding arbitrator solely and without any reasoning. Also, in the case of an ICC arbitration, a temporary arbitral order would not be subject to the typical scrutiny process followed by the ICC Court of International Arbitration with respect to arbitral awards. In a nutshell, temporary arbitral orders are not accompanied by the same

42. Ziyaeva, *Interim and Emergency Relief in International Arbitration* (2015), at p.147.

safeguards accompanying arbitral awards. Further, Article 298 of the Egyptian Code of Civil and Commercial Procedure (which concerns the provisions pertaining to the enforcement of foreign arbitral awards in Egypt) mandates that foreign arbitral awards have the *res judicata* effect and contain a decision upon the substantive matters of the dispute.

Furthermore, allowing an anti-suit injunction is still a blatant violation of the Egyptian Constitution and Egyptian public policy.⁴³ This is because the Order was restricting the right of an arbitral party to sue a non-arbitral party (a third party). This is, in fact, an extension of a benefit to a non-party to the arbitration agreement. Arbitral tribunals should not be considered to have any authority to create rights for third parties. The Cairo Court of Appeal concluded that it does not have the authority to delve into the merits of the Order. The fact of the matter is that public policy mandates the reviewing courts to delve into the merits of the arbitral award to a certain extent in order to verify their compliance with the public policy principles of the place of enforcement.

Furthermore, several other civil law jurisdictions have uniformly considered that arbitral anti-suit injunctions violate national public policy. In the words of a German Court dealing with an arbitral anti-suit injunction, it stated that, "such injunctions constitute an infringement of the jurisdiction of Germany."⁴⁴ Moreover, Jean-François Poudret and Sébastien Besson assert that it is unlikely that an arbitral anti-suit injunction would be enforced under the auspices of the New York Convention. This is because it is an order and not an award.⁴⁵ In this regard, a recent study reiterated the fact that anti-suit injunctions "will remain unrecognized under Egyptian law" unless Article 298 undergoes an amendment by the Egyptian Legislative Authority.⁴⁶

In conclusion, the Cairo Court of Appeal might have filled a void, but unfortunately, it did so at the expense of confusing temporary arbitral orders with interim awards under the New York Convention and also at the expense of fundamental rights under the Egyptian Constitution. Luckily, this is not a final and conclusive judgment, and it is currently in the process of being reviewed by the Egyptian Court of Cassation.

43. Article (97) of the Egyptian Constitution provides that "Litigation is a safeguarded right guaranteed to everyone."

44. Judgment of 10 January 1996, Re the Enforcement of An English Anti-Suit Injunction, 3 VA 11/95, [1997] I.L.Pr. 320 (Oberlandesgericht Düsseldorf).

45. Jean-François Poudret, Sébastien Besson, *Comparative Law of International Arbitration* (2nd edn, Sweet & Maxwell, 2007) para. 639.

46. Shalaan, Wael S. E. *Interim Measures in International Commercial Arbitration - A Comparative Study of the Egyptian, English and Scottish Law*.