

International Technology Transfer Contracts In Egypt: Practical Considerations From The Perspective Of A Foreign Licensor In Relation To Arbitration And Applicable Law

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Abstract

In Egypt the parties' autonomy in a technology transfer contract is subject to the restrictions imposed by the Egyptian Commercial Code, which contains a specific chapter on the transfer of technology. One of the most relevant restrictions is Article 87, according to which Egyptian law shall apply to the contract and arbitration is permitted only if held in Egypt and in accordance with Egyptian law. Nevertheless, it can be observed how part of the legal profession interpret the restrictions of the Egyptian Commercial Code not as mandatory but as permissive. For example, according to some law firms, it may be possible to agree to arbitration with seat in an arbitration-friendly third country. This article examines the risks of a permissive interpretation and considers, in particular, the reasons why an Egyptian court would be unlikely to enforce an arbitration award rendered abroad in violation of Article 87. The recommended course of action is to adopt a pragmatic approach; a foreign licensor should assume at the outset that all technology transfer provisions of the Egyptian Commercial Code, including the restrictions on applicable law and arbitration, are mandatory, when structuring the commercial deal and drafting the contract.

1. Introduction: The Diverging Legal Advice on Technology Transfer

In an attempt to improve the international competitiveness of Egyptian companies, in 1999 the Egyptian legislator enacted a new Commercial Code, the Law No. 17/1999, which includes specific provisions on the transfer of technology. Chapter 1, Part II of the Commercial Code (Technology Transfer) imposes a series of restrictions on the contractual autonomy of the parties. The underlying assumption is that the licensee is the weaker party and deserves protection. The licensee is defined as the "importer of technology," implying that the technology is usually "imported." The Technology Transfer provisions apply equally to national and international transactions. However, the *Travaux Préparatoires* of the Commercial Code clarify that their purpose is to protect national interests, ensuring access by local companies to tech-

nology as a tool to develop the national economy.¹

The Technology Transfer provisions have been the subject of numerous articles already.² This article therefore only considers them briefly and focuses instead, from a practical perspective, on one of the major issues that foreign companies face when concluding contracts in Egypt: the application of Article 87 of the Egyptian Commercial Code, pursuant to which Egyptian law applies to the substance of the contract and arbitration is allowed only if held in Egypt and in accordance with Egyptian law.

Article 87 represents a clear and substantial restriction on the parties' contractual autonomy, in spite of the fact that Egypt has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 and that parties to a contract in Egypt normally have the freedom to agree to the governing law of their contract.

Notwithstanding its clear wording, parts of the Egyptian legal profession read Article 87 as being permissive and not mandatory. In fact, it can be observed how some law firms advise their foreign clients in a technology transfer matter that it may be possible to agree to international arbitration with seat in an arbi-

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1. From the *Travaux Préparatoires* of the Egyptian Commercial Code: "The draft aims to protect national interests, [...], and at the same time ensuring that the Egyptian importer realizes technology, which is an instrument for developing the national economy and maximizing its competitiveness in international trade markets."

2. Kanaan Al-Ahmar, "The new transfer of technology rules in Egypt," *International Review of Intellectual Property and Competition Law*, 2011.

tration-friendly neutral country. More frequently, the issues raised by the restrictions imposed by Article 87 are simply not brought to the attention of foreign clients, who may therefore enter into contracts with arbitration clauses that are likely to be declared invalid. The same applies to the other restrictions contained in the Technology Transfer provisions.

Even if it is true that in some cases the foreign licensor may still decide, for strategic, practical or other considerations, to include in the technology transfer contract clauses that may not be upheld by a court or by an arbitral tribunal, the decision should be taken in full cognizance of the risks. The purpose of this article is to examine those risks, by shedding light on the Technology Transfer provisions and especially their Article 87.

The fundamental observation is that an Egyptian court is unlikely to enforce an arbitration award rendered in an international arbitration with seat abroad, when the underlying contract contains elements of technology transfer. The foreign party will need to balance the advantages and disadvantages of a (probably invalid) arbitration clause with seat in an arbitration-friendly country versus the advantages and disadvantages of a (valid) arbitration with seat in Egypt.

However, the foreign party is not left completely exposed to the risks deriving from the specificities of the country's legal system; this article proposes a pragmatic solution that goes beyond any academic discussions on the various interpretations of Article 87. When structuring the commercial deal and drafting the contract, the foreign party should assume at the outset that all Technology Transfer provisions are mandatory and it should not rely on the enforcement of an arbitration award. This article concludes with a series of drafting suggestions.³

2. Brief Considerations on the Egyptian Legal System

Egypt is a civil law system. Its commercial law is well developed and based broadly on the French civil code. The Shariah, *i.e.* the system of jurisprudence associated with Islam, plays almost no role in Egypt's commercial law.⁴ However, foreign licensors normally welcome any legal advice that enables them to avoid the application of Egyptian law and—in particular—to avoid any litigation in Egypt. This is understandable; a high level of bureaucracy, lack of resources and an inefficient judicial system are often the cause of delays,

3. This article expressly refers to licensors of technology only, but the same considerations apply to the foreign parties in other types of contracts, such as manufacturing and sale, distributorship and franchising if they fall within the scope of the Technology Transfer provisions.

4. Sarah Rizk, Ashraf Ali, "Egypt, Litigation and Dispute Resolution," *Global Legal Group*, 2017.

so that it is not uncommon for civil cases to last several years in each instance of judgement.⁵ In its report "Enforcing Contracts, 2017" the World Bank ranks Egypt at place 160, with an average duration of proceedings (from the filing of the suit to the recovery of the money) of 1010 days and a quality of judicial process index ranking of 5.5 (where zero is the minimum and 18 is the maximum).⁶ In addition, Egyptian law is perceived as being excessively in favor of the local contracting party.

For these reasons, the law applicable to the contract and a neutral seat of arbitration are often points on which the foreign party is not willing to compromise. Besides concerns of independence and impartiality of arbitrators, they fear possible interference by the ordinary courts that may affect the proceedings or negate the effect of an arbitral award.

In fact, for a broad typology of international commercial contracts the parties in Egypt have the freedom to choose the law applicable to the contract as well as the seat of the arbitration.⁷ This is not the case in relation to technology transfer contracts, which are subject to major restrictions in this respect.

3. Transfer of Technology in Egypt: the Egyptian Commercial Code

As discussed, technology transfer contracts are regulated by the Technology Transfer provisions of the Egyptian Commercial Code, Articles 72 to 87. It is not the purpose of this article to review them in detail and reference can be made to the Technology Transfer provisions themselves.⁸ This paragraph will limit its considerations to their scope of application and to the debate on their mandatory character. Article 87 (Arbitration and applicable law) will be dealt with separately in the next paragraph.

Scope of Application

The combined definition given by Articles 72 and 73 of the Commercial Code to "transfer of technology" is very broad. It includes any agreement, whether

5. Radwa Elsaman, "Factors to be Considered Before Arbitrating in the Arab Middle East: Examples of Religious and Legislative Constraints," *International Commercial Arbitration Brief 1*, No. 2, 2011.

6. "Enforcing Contracts 2017—Egypt," *Doing Business*, The World Bank, accessed on August 2017, <http://www.doingbusiness.org/data/exploretopics/enforcing-contracts>.

7. This does not apply to government contracts which are subject to the exclusive jurisdiction of the State Council. See Mohammed O. Taha, George Sadek, "Egypt, Legal Framework for Arbitration," *The Library of Congress*, 2014; www.loc.gov.

8. A non-binding English translation of the Egyptian Commercial Code by the WIPO can be found at: http://www.wipo.int/wipolex/en/text.jsp?file_id=312040.

9. Article 72, second paragraph, Egyptian Commercial Code.

stand-alone or part of another contract,⁹ whereby “*the supplier of a technology undertakes to transfer, against consideration, certain technology or technical know-how to be used by the importer of technology in a technical manner to produce or develop a specific product, to install or operate machines or other equipment or to provide certain services.*”¹⁰ The Technology Transfer provisions apply also when a contract includes the transfer of technology as an ancillary element.¹¹ On the basis of the wording of Article 73, the provisions of Technology Transfer do not seem to apply to transfer of know-how when the know-how is not technical (business know-how, marketing and financial strategies etc.).

Mandatory vs. Non-Mandatory

Due to the scarcity of case law and some unclear wording of the Technology Transfer provisions in this respect, there is no common opinion on their mandatory or non-mandatory character as a whole.

In general, the Egyptian Commercial Code recognizes a broad contractual freedom of the parties. The provisions of the Egyptian Commercial Code normally apply only where no agreement of the parties exists and where no trade practices or trade customs apply.¹² There are two exceptions to the general rule and namely when: (i) a specific provision is expressly said to be mandatory, and when (ii) the agreement between the parties contradicts with the public order of the Arab Republic of Egypt.

Only few of the restrictions of the Technology Transfer provisions contain wording that indicate their mandatory character: Article 74, for example, states that the contract must be concluded in writing; according to Article 75 “*Any stipulation in a contract for transfer of technology that restricts the freedom of the importer of technology [...] may be declared void upon the request of the importer of technology.*”¹³

10. Article 73, Egyptian Commercial Code.

11. This is often the case in commercial contracts that involve the transfer of non-essential technical know-how, (e.g. in relation to the use of equipment supplied by the foreign supplier).

12. Article 2, second paragraph, Egyptian Commercial Code.

13. Article 75 contains a non-exhaustive list of clauses that can be declared void upon request of the licensee. The following, inter alia, may be declared void: (i) the prohibition for the importer to introduce improvements or other modifications to suit the local market; (ii) the prohibition for the importer to acquire any other technology which is “similar or competitive” to the licensed technology, (iii) the obligation imposed on the importer to use specific trademarks to designate the products of the technology; (iv) any limitations on the importer in relation to volume, price, method of distribution and export of the products; (v) the right of the supplier of the technology to participate in “running the establishment of the importer”; (vi) the obligation imposed on the importer to purchase raw materials, machinery, equipment, or spare parts necessary for operating the technology exclusively from the supplier or from establishments designated by the supplier, or (vii) restricting the sale of the production exclusively to the supplier.

On the other hand, other substantive restrictions are not expressly said to be mandatory. For example:

- (a) Articles 76, 77 and 78 of the Egyptian Commercial Code, and Article 83, paragraph 2, which impose specific obligations on the licensor, such as the obligation to provide technical assistance and improvements, equipment and spare parts, and to keep confidential improvements made by the licensee; and
- (b) Articles from 84 to 86, which contain additional restrictions on the contractual freedom of the licensor, for example granting to the licensee the right to terminate the contract after an initial period and imposing certain liabilities on the licensor.¹⁴

According to general principles of Egyptian law and the general provisions of the Commercial Code, it may seem, therefore, that at least some of the Technology Transfer provisions can be derogated. This view seems to be reinforced by an incidental statement of the Court of Cassation in the judgement CA 1042 of 73J (that will be considered in more detail with reference to Article 87), according to which “*some of the texts and provisions of the new Commercial Code with respect to contracts of technology transfer are mandatory.*”

Such interpretation involves certain risks. First of all, even if some of the articles do not contain any express mandatory language, at least some of them contain provisions that may be considered of public interest. Secondly, as seen in the Introduction, the declared purpose of the Technology Transfer provisions as a whole is to protect the economic interests of Egyptian companies and of the Egyptian economy in general. This is stated both in the Travaux Préparatoires of the Commercial Code and in the judgement of the Egyptian Supreme Constitutional Court 253 of 24J (also considered in more detail below). The right of the parties to derogate from the Technology Transfer provisions would render them ineffective in achieving their objective. There is therefore a distinct possibility that, in case of dispute between the parties, an Egyptian court would regard at least some of these provisions as mandatory on the grounds of public order.

14. In particular: (i) the licensor and the licensee shall be severally liable for any damages caused to any persons or property, which might arise in connection with the use of the know-how or the products produced with the know-how; and (ii) either party to the technology transfer contract may, upon the lapse of five years from the date of its conclusion, “request its termination or the reconsideration of its terms by adjusting the agreement to the general current economic conditions.”

4. Arbitration and Choice of Governing Law

4.1 Article 87 of the Egyptian Commercial Code

There are two major restrictions under the Technology Transfer provisions, namely in relation to jurisdiction and the choice of the governing law of the contract.

Article 87 of the Egyptian Commercial Code states the following:

1. *“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. 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.*
2. *In all cases, deciding the subject of the dispute shall be according to the provisions of the Egyptian law and all agreement to the contrary shall be null and void.”*

The wording of Article 87 seems straightforward. In practice, Article 87 has raised several issues.

First, the imposition of Egyptian law as the law applicable to a technology transfer contract may be considered to be in violation of both the well-established Egyptian constitutional principle of party autonomy in commercial transactions, as well as the internationally recognized principle of freedom of the parties to an international commercial contract to choose the law applicable to that contract.¹⁶ Secondly, the restriction on the ability of the parties to choose arbitration with seat outside Egypt (e.g. in a third-party country), seems to violate the New York Convention on the Recognition and Enforcement of Foreign Awards, which Egypt has ratified without restrictions. Thirdly, only a few years before the entry into force of the Egyptian Commercial Code in 1999, the Egyptian Arbitration Law (Law No. 27/1994 Concerning Arbitration in Civil and Commercial Matters) was enacted, recognizing the right of the parties to choose the seat of the arbitration also expressly in relation to technology transfer contracts.

Also the reluctance of foreign companies to agree to Egyptian law and to arbitration with seat in Egypt may play a role trying to interpret Article 87 in a permissive way, as considered in the Introduction.

The issue of the constitutionality of Article 87, second paragraph (applicable law), and the issue of the mandatory character of Article 87, first paragraph (arbitration in Egypt and in accordance with Egyptian law), have been brought to the attention of the Supreme Constitutional Court in 2007 and the Court of Cassation in 2011, respectively.

16. Article 2 of the Hague Principles on Choice of Law of International Commercial Contracts (Hague International Conference on Private International Law, 2015).

4.2 The Constitutionality of Article 87

The issue of the constitutionality of Article 87 was raised in 2007, when the Cairo Court of Appeal submitted to the Supreme Constitutional Court the question of whether Article 87 violates the constitutional principles of party autonomy and of freedom to dispose of private property. With regards to party autonomy, Article 87 was challenged on the grounds that it limits (a) the party autonomy in terms of language, venue and seat of arbitration, as well as governing law; and (b) the parties' constitutionally protected freedom of choice. As for the private property right, Article 87 was challenged on the grounds that it limits the property owner's constitutionally protected financial rights over said property.

The Supreme Constitutional Court rejected both challenges and affirmed the constitutionality of the restrictions imposed by Article 87, based on the following reasoning:

Party Autonomy

According to the Supreme Constitutional Court, the legislator is entitled to impose by law the limitations necessary to maintain public order, and particularly to restore the economic balance of contracts and protect the weaker party. The Technology Transfer provisions of the Commercial Code protect national interests, ensuring that the Egyptian importer obtains technology, which is an instrument for developing the national economy and maximizing his competitiveness in international trade markets. For this reason, the legislator has (a) applied the provisions of the law irrespective of the parties' nationalities, and (b) attributed to the Egyptian Courts jurisdiction over any disputes arising from technology transfer contracts as a general rule, subject only to arbitration in Egypt and in accordance with the laws of Egypt. In order to protect national interests, any agreement to the contrary is null and void. The Court confirms that this is compliant with the legislator's authority.

Private Property

According to the Supreme Constitutional Court, private property is an individual right which also serves society as a whole. On this basis, the right can be limited.

It must be noted that the entire decision of constitutionality is based on public interest considerations so that the judgement seems to imply that, in the view of the Supreme Constitutional Court, the entire Technology Transfer provisions are mandatory (whether or not mandatory on the grounds of public policy). The mandatory nature of the Technology Transfer provisions, however, was not part of the question that the Court was called to decide, and accordingly the opinion of the court can be considered an *obiter dictum* and does not formally bind lower courts.

4.3 Arbitration Agreements and the Restrictions of Paragraph 87.1

As seen above, Paragraph 87.2 (applicable law) does not require to be interpreted as its wording is clear. Egyptian law is the substantive law governing the contract. The provision is mandatory; any agreement to the contrary is null and void.

Paragraph 87.1 (jurisdiction and arbitration), on the other hand, has been the subject of differing interpretations. First, the jurisdiction of the Egyptian courts is not expressly said to be exclusive. Secondly, the clear mandatory wording of Paragraph 87.2 in relation to the applicable law (“*any agreement to the contrary shall be null and void*”) is missing from Paragraph 87.1 in relation to the jurisdiction of the Egyptian courts and the possibility to agree to arbitration only under certain conditions.

However, even if the attempt to find legal ways to avoid the mandatory application of the provisions of Article 87 is understandable, the interpretations according to which Paragraph 87.1 (jurisdiction and arbitration) is not mandatory go far beyond the wording itself of the Article.

In fact, the general rule clearly stated by Paragraph 87.1 is that Egyptian courts have jurisdiction on all disputes arising out of a technology transfer contract, whereas, and only as an exception, the second sentence of Paragraph 87.1 allows for the parties to agree to arbitration under specific conditions. The fact that the possibility to agree to arbitration, with its limitations and restrictions, is foreseen as an exception to the general rule implies, on the face of it, that no other exception is possible beyond what is expressly permitted under Paragraph 87.1. This means, in turn, that the entire Paragraph 87.1 is mandatory.

This interpretation has been confirmed by the judgement of the Court of Cassation which, in Case No. 1042 of 2011, affirmed that Paragraph 87.1 (jurisdiction and arbitration) is mandatory, albeit not on the grounds of public order. In the case in question, the parties to a technology transfer contract had agreed to arbitration in Switzerland. The contract was subject to Egyptian law. The contract had been signed prior to the enactment of the Egyptian Commercial Code and the arbitration proceedings were brought after its enactment. The Court of Cassation considered Egypt’s international obligations as a signatory State of the New York Convention and affirmed that arbitration agreement, with arbitration seated abroad, was enforceable as it was concluded before the entry into force of the Egyptian Commercial Code. According to the Court of Cassation, despite the fact that some of the Technology Transfer provisions of the Egyptian Commercial Code are mandatory, they

cannot be applied retroactively, as they (*i.e.* some of them) are not mandatory on the grounds of public order. It seems that the Court impliedly recognized that, had the arbitration agreement been concluded after the entry into force of the Technology Transfer provisions, it would not have been enforceable.

On a different aspect of Paragraph 87.1, it has been argued that the wording “*arbitration to be held in Egypt according to the provisions of the Egyptian law*” could be read as referring to the venue only and not to the seat of the arbitration, in the sense that the physical location of the arbitration must be Egypt but the seat, *i.e.* the procedural law, could be that of a foreign jurisdiction.¹⁷ And, in fact, the Egyptian courts seem to recognize that, in accordance with international principles of arbitration, the venue does not necessarily have to coincide with the seat.¹⁸

However, this interpretation is contradicted by the wording itself of Paragraph 87.1. First of all, the Egyptian Arbitration Law uses the term “place of arbitration” to refer to the seat of the arbitration. This becomes evident considering that the award must indicate the “place in which the arbitration was made,” clearly referring to the seat of the arbitration that determines the jurisdiction of the courts of the revision or of the validity action. Secondly, Paragraph 87.1 states that the arbitration must be held in accordance with the laws of Egypt (*i.e.* in accordance with the Egyptian Arbitration Law). There is an intrinsic connection between the seat of an arbitration and the procedural arbitration law of the country where the arbitration is seated. Unlike the procedural rules of specific arbitral institutions that can apply irrespective of the seat, the application of a national arbitration law in a different country gives rise to considerable difficulties and doubts and it is almost never found in practice.¹⁹

In conclusion, an interpretation of Paragraph 87.1 according to which the parties could agree to arbitration with seat abroad does not seem sustainable. This was also the view of the Supreme Constitutional Court that, deciding on the constitutionality of Paragraph 87.2, stated incidentally that the Commercial Code extends the jurisdiction of Egyptian courts over the disputes arising from technology transfer contracts as a general rule, whereas as an exception, the second sentence of Paragraph 87.1 allows the parties to resort to arbitration, provided that it is held in, and in accord-

17. César R. Ternieden, Tarek Badawy and Sarwat Abd El-Shahid, “Arbitrability and Choice of Law in Transfer of Technology Agreements Under Egyptian Law”; *Journal of International Arbitration* 34, no. 1. (2017): 55–78.

18. C7, Cairo Appeal 46 and 47 of 132], points 29-30.

19. American International Law Cases, Oxford University Press, Jan 6, 2011, p. 1249-1250.

ance with the laws of, Egypt. The court incidentally added that any agreement to the contrary would be null and void. Even though, as seen in the preceding paragraph, the view of the Constitutional Court on Paragraph 87.1 is *obiter dictum* and not formally binding on the lower courts, it has an indisputable persuasive effect.

5. Practical Consequences: Obtaining and Enforcing the Arbitral Award

The preceding paragraph has shown that a permissive interpretation of Article 87 is not supported by the case law and that it goes beyond the words of the article itself.

This paragraph considers, from a practical point of view, what is likely to happen in circumstances where a foreign licensor and an Egyptian licensee agree in their technology transfer contract to arbitration abroad (and to subject it to the substantive law of a third country).

This choice has a few obvious advantages for the foreign licensor, such as fewer difficulties in obtaining management approvals for executing the contract and contained legal costs, both at the negotiation stage and during the performance of the contract.

Let's assume that a dispute arises and that the foreign licensor commences arbitration proceedings against the Egyptian licensee in compliance with the dispute resolution clause of their contract. It is very unlikely that the Egyptian licensee will join the arbitration proceedings without raising any issue of competence and that it will willingly comply with an unfavorable arbitral award. Even if parties to arbitration do sometimes comply with awards, it is obviously never advisable to rely on this.

It is more likely that the Egyptian licensee will undertake one or more of the following actions: (a) challenge the jurisdiction of the tribunal in front of the tribunal, (b) start legal proceedings in relation to the same dispute in front of an Egyptian court,²⁰ (c) file a recourse for annulment of the arbitral award ruling on the merits in front of the competent Egyptian court; or (d) object to licensor's request to obtain the leave to enforce the arbitral award in front of the competent Egyptian court.

(a) Challenging the Jurisdiction of the Tribunal in Front of the Tribunal

An arbitral tribunal seated abroad would have a broad discretion in deciding the question of its own jurisdiction. It is possible that the tribunal rejects the objection and proceeds with the decision on the mer-

20. While Egyptian courts do recognize in principle the concept of competence-competence, this is limited in practice by the broad powers of the Egyptian courts to decide on the validity of the arbitration agreement.

its. It may in fact consider Paragraph 87.1 as a matter of procedural law and the arbitral tribunal would normally apply the procedural laws of the place in which the arbitration has its seat (*lex arbitri*), disregarding Egyptian procedural law.

But it is also possible—even if less likely—that the tribunal declines its jurisdiction. An arbitrator has a duty to issue an award that is enforceable and he may tend to interpret the Technology Transfer provisions in line with the interpretation that the enforcement courts may give.²¹

(b) Starting Legal Proceedings in Relation to the Same Dispute in Front of an Egyptian Court

Article 13 of the Egyptian Arbitration Law sets forth that: “the court before which an action is brought concerning a disputed matter that is the subject of an arbitration agreement shall hold this action inadmissible [...]”. However, the Egyptian court may deem that the violation of the provision of Article 87 is obvious and that there is therefore **no valid arbitration agreement in place**. In this case, the court will proceed on the merits and this will prevent the enforcement of any arbitral award.

The seat of the arbitration under Paragraph 87.1 is certainly an essential element of an arbitration clause. If a court finds that an arbitration clause lacks this essential element, the entire clause is likely to be considered void. **An arbitration clause with seat abroad will therefore be struck out in its entirety. The foreign party would therefore lose any right to arbitration, even to arbitration seated in Egypt, and the dispute will be subject to the jurisdiction of the ordinary courts.**

(c) Filing a Claim for Annulment of the Arbitral Award Ruling on the Merits in Front of the Competent Egyptian Court

Let's assume that the tribunal did issue an award abroad in favor of the foreign licensor and that the award survived any challenge mechanism available in the country in which the award was rendered. In order to enforce the award in Egypt the foreign licensor will need to notify the award to the Egyptian licensee and to obtain a leave to enforce under Article 58 of the Egyptian Arbitration Law.

According to Article 58 “Application for the enforcement of an arbitral award shall not be admissible before the expiration of the period during which the action for annulment should be filed in the court registry.”

21. The assumption made in this entire paragraph 5 is that, a certain point, the arbitral award will need to be enforced in Egypt. If this was not the case, the considerations of this paragraph would not apply, as no conflict with mandatory Egyptian laws arises.

It is not clear whether the action for annulment of Articles from 52 to 54 of the Egyptian Arbitration Law applies to arbitral awards rendered abroad in violation of a mandatory Egyptian law. Most commentators indicate that in this case the annulment procedure does not apply as the Egyptian Arbitration Law, with few exceptions, only applies to arbitral awards rendered in Egypt. This view is also supported by the Court of Cassation.²² However, there is at least one precedent in which a court has accepted jurisdiction in the annulment procedures.²³ Egyptian courts have decided that Articles from 55 to 58 (recognition and enforcement) of the Egyptian Arbitration Law apply to the recognition and enforcement of foreign awards²⁴ but are silent in relation to the application of Articles from 52 to 54 (annulment action) when the arbitration should have been subjected to the Egyptian Arbitration Law (because it should have been seated in Egypt) but it was not.

According to Paragraph 1, letter (a) of Article 52, an action for the annulment may be started if “*there is no arbitration agreement, if it was void, voidable or its duration has elapsed.*” The court would judge the validity of the arbitration agreement under Article 52 on the basis of Egyptian law, irrespective of the fact that the parties may have chosen a different law as substantive law applicable to the contract or to the arbitration agreement.

The court will declare the arbitration agreement void if it is in breach of a mandatory law of the Arab Republic of Egypt: under Article 53 of the Egyptian Arbitration Law, which specifies the requirements for the annulment, it is not necessary that the arbitration agreement breaches a law that is mandatory on ground of public order.

(d) Objecting to the Leave to Enforce the Arbitral Award

Even if the action for annulment was not available to the Egyptian licensee, he may still challenge the leave for enforcement on the basis of Article 58, paragraph 2, letter (b), of the Egyptian Arbitration Law. Under letter (b), the application to obtain permission to enforce the arbitral award shall not be granted if the arbitral award violates “*the public order of the Arab Republic of Egypt.*”²⁵

22. Civil Appeal No. 913 of 73J—hearing of 23/2/2010, technical office No. 61, part 0, page 282.

23. Civil Appeal No. 5000 of 78J—hearing of 28/4/2014.

24. See Cairo Court of Appeal No. 29 of 125J—hearing of 5/5/2009.

25. Article 58, third paragraph, of the Egyptian Arbitration law, sets forth that “The order granting leave for enforcement is not subject to appeal.” This prohibition was held unconstitutional by the Supreme Constitutional Court of Egypt (Case No. 92 of the judicial year 21, Session of 6 January 2001) violating the right of the parties to be treated equally. As the order refusing enforcement may be subject to appeal, the debtor may challenge it as well within thirty days of the date of the decision.

It is important to note that the Egyptian courts, with very few exceptions,²⁶ do not normally make any substantive distinction between “mandatory” provisions and provisions that are “mandatory on grounds of public order/public policy,” not even when the law makes such distinction. Also the concept of “public order” is interpreted very broadly and sometimes even refers to mere “public interest.”

In addition, even if Egyptian authors²⁷ do distinguish between “national public order” and “international public order” for the purpose of enforcing foreign arbitral awards, Egyptian courts do not normally do it and tend to strike any contractual stipulation or any arbitral award that is contrary to an Egyptian mandatory law.²⁸ The consequence, in relation to the enforceability of foreign arbitral awards, is that the “public policy/public order” referred to in Article 58 is likely to be considered equivalent to the national public order. This is in contrast with the approach adopted by most of the countries that have ratified the New York Convention but it is not uncommon among the Arab countries.²⁹

However, in compliance with Article 5 of the New York Convention and in addition to the public policy considerations of Article 58, there are other two serious grounds on the basis of which the Egyptian courts could not/would not give enforcement to an arbitration award rendered abroad, even if not expressly mentioned in Article 58 (unlike equivalent provisions in other legislations)³⁰:

(i) The Nullity/Invalidity of the Arbitration Agreement

Even if the nullity of the arbitration agreement under Egyptian law is not expressly mentioned as one of the grounds for refusing enforcement under Article 58 of the Arbitration Act (while it is expressly mentioned in Article 53 in relation

26. Court of Cassation, CA 1042 of 73 J, hearing of 28/03/2011.

27. Hesham Ali Sadeq, “Lessons in Private International Law,” *Al Entessar for Offset Printing*, 2004, p.199

28. According to the general principles of Egyptian law, the declaration of unenforceability of one provision by a court does not extend to the entire contract, unless it is established that the parties would not have concluded the contract without such unenforceable stipulation.

29. Typical is the case of interests that are above the interest rate cap. The cap is applied by the courts also when recognizing foreign court decisions and arbitral awards, although—according to legal commentators—it is not part of the international public order.

30. Interesting enough, while Egypt has broadly adopted the UNCITRAL Model Law on International Commercial Arbitration, the Egyptian Arbitration Act does not expressly mention as ground for rejecting the enforcement the fact that ‘the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State’ (section 36.1 (b)(i) of the UNCITRAL Model Law).

to the annulment procedure), the fact that a valid arbitration agreement exists is a pre-condition for the applicability of Article 58: Article 58 can obviously only apply to an “arbitral award” that is valid and binding. A court could deem that an award is not valid and therefore not enforceable if it was made by a tribunal without substantive jurisdiction. And a tribunal constituted under an invalid arbitration agreement would clearly lack substantive jurisdiction.

(ii) The Lack of Arbitrability

Paragraph 87.1 of the Technology Transfer provisions, by stating that “*the Egyptian courts shall have the jurisdiction of deciding disputes arising from the technology transfer contract,*” declares first and foremost that the matter is not arbitrable, except in the limits set forth by the paragraph itself. It is a pre-condition of the applicability of the New York Convention that the dispute subjected to arbitration is “*capable of settlement by arbitration.*”³¹ Given that the New York Convention does not better define the concept of arbitrability, the national courts have interpreted it in very different ways, sometimes referring to the law applicable to the arbitration agreement,³² sometimes referring to the *lex fori*.³³ In either case an Egyptian court could find that the matter lacks arbitrability. In fact, arbitration agreements in relation to technology transfer contracts must be subjected to Egyptian law under Paragraph 87.2 of the Technology Transfer provisions, being any provision to the contrary being void. This means that, in either case, the arbitrability of the dispute would be decided on the basis of Egyptian law, with the consequences that have been considered above.

Irrespective of the procedure chosen by the party resisting enforcement (either under Article 52 or Article 58 of the Egyptian Arbitration Code, or under the Egyptian Civil Procedure Code), we do not see how an award rendered abroad in violation of Paragraph 87.1 could be enforced in Egypt.

The very purpose of the mandatory restriction of Paragraph 87.1 of the Technology Transfer provisions is to attribute exclusive jurisdiction to the Egyptian courts in technology transfer matters and, as an exception to the jurisdiction of the courts, to oblige the parties to a technology transfer contract to arbitrate in

31. Article II(1)(c) of the New York Convention.

32. *Misr Insurance Company v. Alexandria Shipping Agencies Company*, Court of Cassation, Egypt, 23 December 1991, 547/51.

33. New York Convention Guide 1958: www.newyorkconvention1958.org.

Egypt. **If the Egyptian courts did not have the power to reject the enforcement of the arbitral award rendered abroad in violation of Article 87, Article 87 would be meaningless.** The parties to a contract could simply avoid the application of Article 87 just by violating it; the breach of Article 87 would not have any consequences. This is a conclusion that would go against not only the spirit of the law but also against any logic.

6. Conclusion: Drafting Contracts for Doing Business

As noted, it is very unlikely that an arbitral award relating to technology transfer, issued in an international arbitration with seat outside Egypt would be recognized and enforced in Egypt. A foreign licensor should balance the pro and contra of a likely invalid arbitration agreement against a binding and enforceable domestic arbitration agreement.

In fact, there are cases in which the foreign party may still benefit from entering into an (invalid) arbitration agreement with seat outside Egypt:

- (a) notwithstanding the invalidity issue in Egypt, the arbitration agreement and its perceived high associated costs, may still work as deterrent against frivolous claims brought by the Egyptian counterpart;
- (b) for policy or practical reasons, some companies operating worldwide may opt for a central arbitral tribunal to deal with all disputes brought against them (*e.g.* suppliers in large international distribution systems), irrespective of validity issues in few specific countries;
- (c) an invalid arbitration clause may still protect the foreign party from being sued in front of an ordinary court, for example in the country of residence of the foreign party the foreign court would normally decline jurisdiction based on the existence of an arbitration clause, without entering in the merits of its validity in the enforcement country;
- (d) for the same reason, an invalid arbitration clause may protect against the enforcement abroad of a court decision obtained in Egypt; the foreign court would refuse the enforcement as in violation of an existing arbitration clause.

In most of the cases, however, a foreign licensor would want to make sure that the arbitration agreement (and the choice of law) is valid and enforceable.

Therefore, in most of the cases, the licensor would be best advised to assume that all the Technology Transfer provisions are mandatory and, in particular, to accept the idea that the contract must be subject to Egyptian law and that any arbitration must be seated in Egypt. In fact, almost all restrictions imposed

on foreign licensors by the Technology Transfer provisions, irrespective of the debate on their mandatory character, can be overcome or mitigated by properly structuring and wording the contract. In particular, the following points should be considered:

(i) Care should be taken in drafting any clauses that limit the freedom of the local licensee to use the technology and ensuring that any such limitation falls within one of the legal exceptions.³⁴

(ii) The contract should be drafted keeping in mind that any enforcement of an arbitral award may be extremely difficult and time consuming. This means that the foreign licensor should carefully build in the contract express remedies against the risk that the licensee does not perform so that, in case of non-performance, the real remedy of the licensor would be the commercial pressure that it could put on the licensee.

(iii) Performance and payment obligations should be structured in such a way to minimize any financial exposure.

(iv) Particular consideration should be given to Article 86 of the Technology Transfer Provisions under which either party to the technology transfer contract may, upon the lapse of five years from the date of its conclusion, “request its termination or the reconsideration of its terms by adjusting the agreement to the general current economic conditions.” This provision needs to be carefully taken into consideration by the foreign licensor as a failure to deal with it in the contract (e.g. by qualifying it) may have substantial financial consequences.

(v) Technical and other practical solutions should be adopted in order to protect the confidentiality of the technology. The licensor should not rely on the con-

tractual obligations, the violation of which may have little or no legal consequences.

(vi) Care should be taken in the arbitration clause as to the procedure for nominating arbitrators, in order to ensure their independence and impartiality. In fact, if the parties do not agree to a mechanism for the appointment of arbitrators, the Egyptian Court of Appeal appoints them under Article 17 of the Egyptian Arbitration Law. Even under the restrictive provisions of Article 87 of the Commercial Code, the parties are free to choose the procedure applicable to the arbitration as well as the appointing authority. For instance, there is no obstacle to the parties choosing the International Chamber of Commerce either as appointing authority in an arbitration administered, for example, by the Cairo Regional Center for International Arbitration. In addition, even if some authors have questioned this possibility,³⁵ the Egyptian Arbitration Law itself reserves to the parties the right to choose different institutional arbitration rules (subject to the mandatory provisions).

A foreign licensor of technology will depend on accurate legal advice in order to take an informed decision in line with its business strategy and goals, also considering that the enforcement of an arbitral award in Egypt may be more time consuming than in other countries and may involve unexpected challenges.³⁶ While an award is normally obtained after 18 to 24 months from beginning of the proceedings, the enforcement of the award may take an additional six to 12 additional months, which may extend to 18 months due to delaying tactics of the defendant.³⁷ ■

Available at Social Science Research Network (SSRN): <https://ssrn.com/abstract=3164556>

34. As the provisions of Article 75 can be also considered anti-competitive, it may also be useful to refer to western anti-trust laws and their exceptions such as to the EU Technology Transfer Block Exemption and the relevant Guidelines. In fact, as competition law is an area relatively new in Egypt, Egyptian courts tend to consider the case law of more experienced countries such as France.

35. Mohamed S. Abdel Wahab, “International commercial arbitration and constitutional court review: contemporary trends and national policies,” *International Arbitration Law Review*, 2008.

36. Fatma Youssef, “Egypt: New Decree Organising Deposit Of Arbitral Awards—A Stab In The Back Of Arbitration”; *International Arbitration Law Review*, 2001.

37. The nullity action does not normally suspend enforcement but courts do sometimes stay execution. See: Khaled El Shalakany, Adam El Shalakany, “Arbitration Guide Egypt,” *International Bar Association*, 2013; accessed in August 2017, www.ibanet.org.