RECENT JUDGMENT HIGHLIGHTS POTENTIAL PITFALLS IN TECHNOLOGY TRANSFER AGREEMENTS IN EGYPT

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On 17 November 2021, the Egyptian Court of Cassation (Court of Cassation) issued its judgment in Case No. 10305/83, in which it confirmed that disputes arising out of technology transfer agreements cannot be resolved in foreign-seated arbitration proceedings and any clause purporting to refer such disputes to foreign arbitration is null and void.

BACKGROUND

Articles 72 to 87 within Chapter 1, Part II of Law No. 17 of 1999 (the Egyptian Commercial Code) contain specific provisions relating to the transfer of technology.

Article 72 provides:

1. The provisions of this chapter shall apply to each contract for the transfer of technology to be used in the Arab Republic of Egypt, whether such transfer is international, lying across the regional borders of Egypt, or inland. No criterion in both cases shall be observed as regards the nationality of the parties to the agreement or their places of residence.
2. The provisions of this chapter shall apply to each agreement on transfer of technology to be concluded by virtue of a separate contract or within another contract.

Pursuant to Article 73, a transfer of technology contract is an agreement in which the supplier of technology undertakes to transfer, against payment, to the importer of technology know-how to use in a special technical way, whether 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 will not be considered a transfer of technology unless it is set forth as part of, or is connected with, the transfer of technology contract.

Although these provisions apply to national and international transactions, the explanatory memorandum to the law (known as the Travaux Preparatoires of the Egyptian Commercial Code) states that the underlying purpose of these provisions is to protect the national interests of Egypt and ensure that local companies have access to imported technology as an instrument for developing the national economy.

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Consistent with this purpose, Article 87 of the Egyptian Commercial Code provides that the Egyptian courts shall have jurisdiction over disputes arising out of technology transfer agreements and arbitration is permitted only if it is held in Egypt according to the provisions of Egyptian law.

There has historically been some debate regarding whether Article 87 is a mandatory rule—limiting contracting parties' general freedom to agree to the governing law of the contract and dispute resolution mechanism—or a default position in the absence of a specific agreement to the contrary.

COURT OF CASSATION CASE NO. 10305/83

In Case No. 10305/83, the Court of Cassation considered the governing law and dispute resolution provisions of a transfer of technology contract concerning importing into Egypt know-how relating to a medical device. The contract contained an agreement to resolve disputes in arbitration seated in Stockholm, by a panel of three arbitrators, in accordance with the rules of the Chamber of Commerce in Stockholm.

In its judgment of 17 November 2021, the Court of Cassation held that, because the dispute arose out of a technology transfer agreement, the mandatory rule provided in Article 87 of the Egyptian Commercial Code applied. Accordingly, as the parties had agreed, contrary to Article 87, to resolve disputes in arbitration outside of Egypt, the clause was invalid. In the absence of a valid arbitration agreement, the Egyptian licensee was entitled to file a claim in the Egyptian courts for damages arising out of the foreign licensor's alleged unlawful termination of the contract.

In reaching this determination, the Court of Cassation confirmed that the purpose of Article 87 of the Egyptian Commercial Code is to protect national interests, without prejudice to the legitimate interests of the party supplying the technology (usually, a foreign licensor). The judgment explained that, given that arbitration is the preferred method for resolving cross-border disputes, the legislator was concerned about the foreign licensor compelling the Egyptian licensee to agree to resolve disputes in arbitration in an unsuitable place, at great expense, and subject to an unknown law, which may prevent the Egyptian party from claiming its rights. The legislator therefore decided to establish a balance between the interests of the opposing parties by requiring disputes to be resolved by arbitration in Egypt, be decided by Egyptian law, and to nullify any agreement to the contrary.

The Court of Cassation recognized that this rule is a departure from the general principle that parties to commercial contracts are free to choose the place of arbitration and the law to be applied, but it noted that the Supreme Constitutional Court had already confirmed the constitutionality of Article 87.

Finally, it is of note that, while the Court of Cassation confirmed that Article 87 is a mandatory rule, it arguably went further and stated that the Egyptian licensee's submission that a breach of Article 87 of the Egyptian Commercial Code is a matter of public order was correct. If this was the intention of the Court of Cassation, this would be a clear departure from the position taken by the Court of Cassation in 2011 in Case No. 1042/73, where it was held that it was not a matter of public order and, as such, did not apply to contracts that predated the introduction of Article 87 of the Egyptian Commercial Code. If it is considered a matter of Egyptian public order, this could give rise to a defense to the recognition and enforcement of any arbitral award rendered pursuant to a noncompliant arbitration agreement pursuant to Article V(2)(b) of The Convention on the Recognition and

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Enforcement of Foreign Arbitral Awards (also known as the New York Convention) (i.e., the recognition and enforcement of the award would be contrary to the public policy of the enforcing country).

CONCLUSION

The judgment of the Court of Cassation in Case No. 10305/83 confirms that if a foreign licensor insists upon a foreign governing law and seat of arbitration in a transfer of technology contract with an Egyptian counterparty, such provision is likely to be declared null and void by the Egyptian courts, and it may be expected that the Egyptian courts will seize jurisdiction over the dispute. Further, any foreign arbitral awards rendered pursuant to such agreements are unlikely to be unenforceable in Egypt, but they may be enforceable in another jurisdiction in which the licensee has assets, depending on the specific facts and circumstances.

It is worth noting that there is a particular risk that an arbitral award rendered pursuant to an arbitration agreement that is not compliant with Article 87 may not be enforced in a foreign jurisdiction if the parties have agreed on Egyptian law as the substantive governing law of the contract. In such circumstances, it may be argued that, by having selected Egyptian law, the parties agreed that the relevant provisions of the Egyptian Commercial Code, including Article 87, would apply. This argument was made before the Dubai Court of Cassation in Case No. 240/2020 Commercial as a ground for objecting to the enforcement of a Dubai International Financial Centre-seated arbitral award, but the court concluded, in its judgment of 3 June 2020, that the contract was not a technology transfer agreement and so it did not rule on this argument.

If a foreign licensor is likely to need to enforce against the licensee's assets in Egypt, but wishes to avoid litigation in the Egyptian courts, this recent decision of the Court of Cassation suggests that the licensor should ensure that its arbitration agreement complies with Article 87 of the Egyptian Commercial Code.

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