

Arbitrability and Choice of Law in Transfer of Technology Agreements Under Egyptian Law

César R. TERNIEDEN^{*}, Tarek BADAWEY^{**} & Sarwat ABD EL-SHAHID^{***}

This article analyses the mandatory provisions of Article 87 of the Egyptian Trade Law of 1999 concerning the arbitration of disputes on transfer of technology agreements, and attempts to shed light on this problematic topic of Egyptian law, particularly in light of the dearth of relevant Egyptian jurisprudence. This article demonstrates the contradiction between the Egyptian Supreme Constitutional Court's view of the 'mandatory' nature of the Arbitration Provision of Article 87(1) and the plain language of the statutory provision, that is not synchronized with the current Egyptian Arbitration Law. Most importantly, the Supreme Constitutional Court's judgment of 2007 is not yet finally conclusive with respect to the 'mandatory' nature of the arbitration provision, as it did not issue an interpretive decision. Absent the full legal consequences of an official interpretative decision by that Court, the Supreme Constitutional Court's view should be considered obiter dictum, and parties should carefully consider pursuing the argument that the clear language of the statute dictates that they remain free to refer disputes related to transfer of technology agreements to arbitration with the seat of their choice, particularly in light of the ambiguities in the Egyptian Arbitration Law.

1 INTRODUCTION

On 17 May 1999, the Egyptian legislator enacted a new trade law ('Trade Law'),¹ replacing in its vast majority the previous trade law of 1883 ('1883 Trade Law').²

^{*} César R. Ternieden is admitted to the State Bar of Arizona, U.S.A. He is Senior *Of Counsel* at the International Business Law department at Shahid Law Firm. Email: cesar.ternieden@shahidlaw.com

^{**} Tarek Badawy is a licensed Barrister and Solicitor of the Superior Court of Justice and the Court of Appeal for Ontario, Canada, as well as a member of the Egyptian Bar Association and a senior member of Shahid Law's International Business Law Department. Email: tarek.badawy@shahidlaw.com

^{***} Counsellor Sarwat Abd El-Shahid is the Chairman and Founder of Shahid Law Firm. He is a former judge and counsellor of the Egyptian State Council (Conseil d'Etat), and is a registered patent attorney. Counsellor Abd El-Shahid received an LL.B and an LL.M in Public Law and International Private Law from Ain Shams University. See www.shahidlaw.com. The authors wish to thank Shahid Law Firm attorneys Inji Fathalla and Mohamed Sherbini, as well as Miss Ola Nagy, for their invaluable assistance and insights in the underlying research necessary in the drafting of this article. Email: sarwat.shahid@shahidlaw.com

¹ Egyptian Commercial Code, Law No. 17 of 1999.

² Trade law as promulgated by royal edict dated 13 Nov. 1883; Law enacting the Trade Law, Art. 1 (stating that 'all provisions of the 1883 Trade Law were superseded by the new legislation, with the exception of Chapter 1 of Part 2 of the 1883 Trade Law concerning partnerships, which remains valid, as amended').

Even though the Trade Law left some issues unaddressed³ several of the newly codified provisions reflected already controlling principles established by jurisprudence and prevailing industry practices. The Trade Law was welcomed and viewed as a step towards the modernization of Egyptian trade relationships.

Articles 72–87 (i.e. Chapter 1 of Part II of the Trade Law) address matters concerning the transfer of technology (ToT). Article 87 of the Trade Law addresses Egyptian court jurisdiction, the parties' choice to subject disputes related to a ToT agreement to arbitration and the mandatory provision that such disputes must be subject to substantive Egyptian law.

This article concentrates on the arbitration provisions of Article 87 and its mandatory provision, particularly in light of the dearth of relevant jurisprudence, a problematic issue in Egyptian law.

The Egyptian legislator has imposed the application of Egyptian *substantive* law, which has ambiguously extended jurisdiction to Egyptian courts, and granted the parties freedom to refer ToT agreement disputes to arbitration in Egypt according to the Egyptian Arbitration Law (EAL) and pursuant to the arbitration provision of Article 87(1) of the Trade Law. This article will demonstrate that, by applying the general international statutory construction provisions and reviewing the *travaux préparatoires*, the arbitration provision of Article 87(1) of the Trade Law does not necessarily result in Egypt becoming the exclusive seat of arbitration, but instead, allows parties the freedom to determine the seat of their choice pursuant to the provisions of the EAL.

This article demonstrates that the Supreme Constitutional Court's view of the 'mandatory' nature of the arbitration provision of Article 87(1) contradicts the plain language of the statutory provision. Further, it is difficult to synchronize the Supreme Constitutional Court's view with the current application of the EAL. There are legal consequences to be considered when the Supreme Constitutional Court refrains from issuing an interpretative decision; this results in situations similar to the Supreme Constitutional Court's judgment of 2007 which is not yet final with respect to the 'mandatory' nature of the arbitration provision. Indeed, absent the full legal consequences of an interpretative decision, the Supreme Constitutional Court's judgment of 2007 on the 'mandatory' nature of the arbitration provision should be considered *obiter dictum*.

As a result, parties should consider pursuing the argument that under the arbitration provision of Article 87(1) of the Trade Law, the language of the statute dictates that they remain free to refer their ToT agreement disputes to arbitration, with the seat of their choice.

³ Consider e.g. the then-already well-established use of e-communication in businesses and the already growing Internet or e-trade, bankruptcy provisions, not-for-profit organizations, secured lending, etc.

2 GENERAL TOT PROVISIONS OF THE EGYPTIAN TRADE LAW

Pursuant to Article 72 of the Trade Law, the ToT provisions of the Trade Law are drafted in an expansive manner as they apply to ToT agreements in Egypt, irrespective of whether the ToT is domestic, cross-border, or international in scope.⁴

Pursuant to Article 73 of the Trade Law, a ToT agreement is one in which (1) a party (a 'supplier' of technology⁵), (2) transfers,⁶ (3) technical know-how,⁷ (4) to another (an 'importer' of that technology⁸), (5) for consideration, (6) to be used in a special technical way for the production or development of a specific commodity, installation or operation of machines or equipment or for the provision of services.⁹

⁴ Trade Law, Law No. 17 of 1999, Art. 72, is unusually broad and appears on its face to encompass international ToT agreements. Such provisions are perhaps only limited practically by the factual aspect of importation of such technology into Egypt, raising questions as to the effective applicability of such a long-arm statute.

⁵ We note that the term 'supplier' is not defined in Trade Law. See Law No. 67 of 2006, promulgating the Egyptian Consumer Protection Law (CPL) (defining a 'supplier' as any person 'who provides a service or produces or imports, distributes, exhibits, circulates or trades in any product or carries out any transaction in respect thereof with the purpose of offering it to the consumers or conclude an agreement or deal in it any way'). The CPL does not define the term 'to produce', however. In turn, Trade Law, Law No. 17 of 1999, Art. 67(3) (defining a 'producer' as 'a manufacturer of a product who transforms it in the final shape in which it was ultimately displayed for circulation', while defining the term 'distributor' as 'the importer, and a merchant distributing the product in the local market, except an end retailer, unless the retailer is aware, or should have been aware, of the defect'. There appears, therefore, to be a contradiction in that a 'supplier' under the CPL and the Trade Law, taken together, appear to include the producer, distributor, as well as the very 'importer' in the definition of the term 'supplier', while the ToT provisions of the Trade Law envision to discern mutual relationships between the 'supplier' as opposed to the 'importer' of that ToT. This apparent contradiction will, no doubt, be resolved on a case-by-case basis and in light of each individual ToT agreement).

⁶ Trade Law, Law No. 17 of 1999 (does not define the term 'transfer' compounding the overall ambiguity described *infra* n. 9).

⁷ Trade Law, Law No. 17 of 1999 (does not define the term 'know-how'. Further, the Egyptian courts have not defined the term 'know-how'. However, the explanatory notes to Art. 73 of the Trade Law state that the term refers to: 'whether this know-how is relevant to either what is known as "the product technology", meaning the knowledge aimed at the production of a certain product; or "the production technology", meaning the technology for the means of production process').

One scholar has sought to define it as: 'the collective knowledge, methods, and information, used in industrial production, with innovative characteristics and confidential nature ... that is also not covered by special legal protection'. Dr Hani Salah Sarie El-Din, *Transfer of Technology Contract Under the provisions of the New Trade Law with Particular Reference to Transfer of Technology Contracts Not Covered by Patent Protection*; The Law and Economics Review, issued by Law Professors of Cairo University, Issue No. 72, Ed. 2002, 352.

⁸ Trade Law, Law No. 17 of 1999 does not define the term 'importer'; however, the Executive Regulations to the Import and Export Law No. 118 of 1975, in Decree No. 770 of 2005, define this term as 'the natural or juridical person in whose name the customs manifest is drawn up for the commodities the final release of which is required by means of the import duty, and who is in charge of fulfilling the import rules'.

⁹ A full review of the uncertainties in the definitions and application of the several terms is beyond the scope of this article, which the authors hope to fully tackle in the future. For now, we note that the definition of a 'ToT agreement' has been applied overly broadly even in cases when a base product containing an industry secret is provided in its core form to then be assembled or mixed with common components by the 'importer', as well as when the underlying technology is not open sourced and delivered fully packaged only for final assembly; even though such transfer should have fallen under the term 'commodity' of the exceptions to a ToT agreement in apparent violation of the black letter language of Art. 73 of the Trade Law.

Despite the above-mentioned uncertainties, Article 73 of the Trade Law indicates that agreements that provide for the ‘supply’ of ToT, that (1) are not against payment, or that (2) relate to the mere sale, purchase, lease, or rental of commodities, are not considered ToT agreements. Further, the same article expressly states that the sale of the trademarks, commercial titles, and licensing in-and-of themselves, are not considered related to ToT, unless such a sale or licensing is part of, or is connected with, a ToT agreement.

The Trade Law imposes several mandatory provisions relating to ToT agreements, such as (1) the requirement that such agreements be in writing¹⁰, (2) that they may not restrict the freedom of the importer to use, develop, acquaint itself with, or announce the production of, commodities using the relevant ToT¹¹, and (3) that the adjudication of disputes related to ToT agreements ‘shall be according to the provisions of the Egyptian law’.¹² The Trade Law further states that any agreement to the contrary may be invalidated (with respect to item 2 above) or shall be null and void (with respect to items 1 and 3 above).¹³

Further, the ToT provisions under the Trade Law set out a number of other requirements, rights, duties, and obligations concerning ToT, such as disclosure obligations¹⁴; supply of spare parts¹⁵; employment of Egyptian technical experts¹⁶; sharing of information concerning national legislation related to ToT¹⁷; assignment¹⁸; payment¹⁹; confidentiality and secrecy of the technology²⁰; exclusivity and territoriality²¹; compliance with documentation²²; several liability²³; and termination.²⁴

¹⁰ Trade Law, Law No. 17 of 1999, Art. 74(1).

¹¹ *Ibid.*, Art. 75.

¹² *Ibid.*, Art. 87(2).

¹³ *Ibid.*, Arts 74(1), 75 and 87(2). As one scholar observed: ‘[T]he null and void contract is not a judicial action (*acte juridique*), it is however a material act (*acte materiel*) or a judicial incident (*fait juridique*) ... the invalidated contract is deemed to be invalidated from the beginning, making it equal to the null and void contract. While the final outcome of the two provisions converge, the “may be invalidated” formulation requires a court’s judicial review, consideration of the overall circumstances and the listed requirements under Article 75, and finding of a listed violation, and is not necessarily meant to lead to automatic and strict mandatory invalidation; as opposed to the term “null and void” which necessarily leads to a finding that the contract is “null and void”, and for which the court’s role is only to determine that it indeed amounts to, or is under the purview of the listed violation.’ Abdel Razak El Sanhoury, *Intermediary In Explaining Civil Law, Part 1: Sources Of Obligation* 401 (2004).

¹⁴ Trade Law, Law No. 17 of 1999, Arts 76 and 77.

¹⁵ *Ibid.*, Art. 78.

¹⁶ *Ibid.*, Art. 79.

¹⁷ *Ibid.*, Art. 80.

¹⁸ *Ibid.*, Art. 81.

¹⁹ *Ibid.*, Art. 82.

²⁰ *Ibid.*, Art. 83.

²¹ *Ibid.*, Art. 84.

²² *Ibid.*, Art. 85(1).

²³ *Ibid.*, Art. 85(2).

²⁴ *Ibid.*, Art. 86.

3 ANATOMY OF ARTICLE 87 OF THE TRADE LAW

Article 87 of the Trade Law states:

- (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 [(‘jurisdictional provision’)]. 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 [(‘arbitration provision’)].
- (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 [(‘choice of law provision’)].²⁵

Thus, at first reading, and from the promulgation of the Trade Law, it appeared that the Egyptian legislator had:

- (1) granted Egyptian courts concurrent jurisdiction to address all disputes related to a ToT agreement;
- (2) allowed parties to agree to refer any and all disputes related to ToT agreements to arbitration according to the procedural rules under the EAL; and
- (3) clearly imposed Egyptian substantive law to any and all disputes related to ToT agreements.

Such interpretation held until 2007 when the Supreme Court for the first time addressed the constitutionality of Article 87. The history and interpretation of Article 87 of the Trade Law has become remarkable in a number of ways as discussed below.

4 EGYPTIAN JURISPRUDENCE ON ARTICLE 87 OF THE TRADE LAW

4.1 SUPREME CONSTITUTIONAL COURT’S DECISION ON ARTICLE 87 OF 2007

In 2007, the Cairo Court of Appeal referred to the Supreme Constitutional Court the question of the constitutionality of Article 87 of the Trade Law.²⁶ The appellant had raised allegations of encroachment on the constitutional freedom of contract (first aspect) and the right to private ownership (second aspect), and a

²⁵ *Ibid.*, Art. 87.

²⁶ Supreme Constitutional Court, Case No. 253 of the (Constitutional) Judicial Year 24, dated 15 Apr. 2007.

party to a commercial dispute involving a ToT contract challenged the constitutionality of Article 87.

The challenge was reviewed by the Supreme Constitutional Court, which stated that, for policy reasons and for the protection of the interests of Egyptians, limitations may be imposed on the freedom to contract, notably with respect to the choice of law, and that such limitations are not necessarily in violation of the Constitution. The Supreme Constitutional Court provided examples of when such interference could occur, notably in cases of mandatory laws (e.g. rectifying the economic imbalance of a contract,²⁷ contracts of adhesion,²⁸ and employment contracts²⁹) and public interest or public order/policy; however, the Court refrained from establishing that Article 87 is expressly *per se* a matter of Egyptian public policy.

The Supreme Constitutional Court surprisingly then stated the following in summary form:

Moreover, the Trade Law extends the jurisdiction of Egyptian courts over the disputes arising from the said contracts as a general rule. Nevertheless, [Article 87] allows an agreement on resolving such a dispute amicably or through arbitration, which it requires in all cases to be held in Egypt and pursuant to the provisions of Egyptian law, and if the agreement is made otherwise it shall be deemed null and void, seeking as such the protection of the national interests in the said contracts. This falls under the scope of the discretionary power of the legislator in relation to the matter of regulating rights in light of the comparison made thereby between different alternatives, which indicates the invalidity of the argument that the said provision contradicts with Article (41) of the Constitution and accordingly shall be disregarded.³⁰ (Emphasis added)

After dismissing the appellant's second aspect of appeal, the Supreme Constitutional Court concluded that the imposition of Egyptian law as the substantive governing law of ToT agreements is constitutional and trumps the parties' agreement to the contrary.

However, the subjective aspect of that Supreme Constitutional Court decision is that it stated that, in addition to the mandatory choice of law provision of Article 87(2) of the Trade Law, any arbitration of a ToT agreement must be in Egypt, despite the lack of any mandatory language in Article 87(1) (relating to procedural aspects), when compared to the express language of the choice of law provision in Article 87(2) of the Trade Law.

²⁷ Egyptian Civil Code, Law No.131 of 1948, Art. 147(2) (making the Egyptian concept of hardship mandatory).

²⁸ *Ibid.*, Art. 149 (making the Egyptian concept of contracts of adhesion mandatory).

²⁹ Labour Law, Law No. 12 of 2003, Art. 5 (setting out minimum rights and requirements for the treatment of employees as mandatory).

³⁰ Supreme Constitutional Court, Case No. 253 of the (Constitutional) Judicial Year 24, dated 15 Apr. 2007.

The Supreme Constitutional Court's decision unnecessarily conflated the choice of law provision of Article 87(2) and the arbitration provision of Article 87(1), and determined that *both* are mandatory laws in juxtaposition to the clear language of Article 87(1).

It is important to note that the Supreme Constitutional Court did not need to mandate the arbitration provision of Article 87(1) in order to determine if Article 87 was constitutional. It would have been sufficient to state that the legislator was within its legislative constitutional power to determine that, as an exception to the extended jurisdiction of the Egyptian courts, parties were free to agree to arbitration, so long as the procedural arbitration provisions under Egyptian law were respected. Such a posture would have rendered Article 87 constitutional. Therefore, it was unnecessary for the Supreme Constitutional Court to go beyond the language of Article 87(1) and comment that, even if the legislator had mandated arbitration be in Egypt, such a legislative act would nonetheless have been constitutional. In this context, the Supreme Constitutional Court's discussion on the mandatory place of arbitration is inherently beyond the scope of that Court's mandate to determine the constitutionality of Article 87 and is in fact *obiter dictum*. (See further discussion at section 6.2 below concerning the distinction between the Supreme Constitutional Court's different mandates to determine on the *constitutionality* of a legislative act as opposed to *interpreting* a statutory provision).

Therefore, in the view of the Supreme Constitutional Court, both the place of arbitration of ToT agreements, if any, and its governing law must be Egyptian law, and any agreement with respect to both that is contrary to Article 87 is null and void.

4.2 COURT OF CASSATION'S DECISION ON ARTICLE 87 OF 2011

More recently in 2011, the Court of Cassation³¹ ruled on the parties' ability to agree to subject their ToT agreements to the jurisdiction of a foreign-seated tribunal ruling under a foreign law, in breach of Article 87 of the Trade Law as the ToT section of the Trade Law (including Article 87) does not constitute public policy despite being mandatory norms.

A review of the Court of Appeal's record in that case demonstrates that the dispute goes back to a ToT agreement that was entered into prior to the enactment of the Trade Law of 1999. Since the 1883 Trade Law did not contain provisions on the ToT, the parties subjected their dispute to both Swiss law and arbitration seated in the Swiss city of Lugano, which at the time of entering into the agreement was valid. Ultimately, the losing parties in the arbitration challenged

³¹ Court of Cassation, Case No. 1042 of the Judicial Year 73, dated 28 Mar. 2011.

the award on the basis that it breached Article 87 of the then-‘new’ Trade Law, which had been enacted following the signature of the contract yet before the issuance of the award, and argued before the Court of Cassation that only Egyptian courts or tribunals seated in Egypt could hear disputes involving ToT agreements.

The Court of Cassation held that the agreement could not be covered by the Trade Law since it was entered into before the Trade Law’s enactment, and that the only instance in which Article 87 of the Trade Law could have been applicable to the agreement was if Article 87 were one of, or involved, a public order nature. In light of this, the Court of Cassation held that ‘[d]espite the fact that some of the texts and provisions of the New Trade Law with respect to contracts of technology transfer are mandatory; however, they are not related to public order.’

The Court of Cassation, confirmed that while some provisions of the Trade Law relating to ToT agreements are *mandatory*, not all are. Further, the provisions relating to ToT agreements under the Trade Law could be varied by the parties while enjoying immunity against nullity. The only the provisions that amount to public policy norms could be imposed retroactively on the pre-Trade Law agreements.

5 DISPUTE RESOLUTION PROVISIONS UNDER ARTICLE 87 OF THE TRADE LAW

Needless to state, the Egyptian legal community was surprised by these developments, particularly in light of the Supreme Constitutional Court’s conflation of the choice of law with the arbitration provisions, making the latter also mandatory, despite the clear language of the statutory provision.

Thus, we set out a review and analysis of the statutory provisions of Article 87 of the Trade Law, applying standard statutory construction principles. Certain portions of the analysis are supported by the discussed jurisprudence above. Yet, some are in contradiction.

In light of this difficult jurisprudence, the authors draw an analysis and seek to demonstrate how Article 87 can be alternatively interpreted to lead to a coherent statutory result.

5.1 MANDATORY CHOICE OF LAW PROVISION IN ARTICLE 87(2) OF THE TRADE LAW

We begin the statutory construction analysis with the clearer provision of Article 87(2) of the Trade Law (the ‘choice of law provision’), which states:

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

The language of this provision is defined and clear: first, it indicates that the choice of law provision shall apply to 'all cases'. Then, it specifically qualifies that it applies to the *substantive* legal provisions of a ToT agreement and imposes that Egyptian law shall be the governing law, as opposed to procedural issues. Finally, it makes it mandatory, to which no contractual derogation is allowed, by stipulating that any agreement to the contrary shall be automatically null and void.³²

A remarkable aspect of the choice of law provision is that it demonstrates that the drafters were attuned to the distinction between the *substantive governing law* of an agreement and the *procedural law* applicable to arbitration proceedings. In Article 87(2), the legislator expressly referred only to the law governing the *substantive* aspects of ToT agreements and imposed Egyptian law as the substantive governing law; while in the arbitration provision, the legislator referred to the EAL, which provides a set of default procedural rules for arbitrations under that law, as well as the process for nullification and enforcement of awards.

In light of the clear language of the choice of law provision, there can be no doubt that the Egyptian legislator has imposed Egyptian *substantive* law with respect to disputes related to ToT agreements. Egyptian jurisprudence supports this conclusion. This will be discussed more thoroughly below.

5.2 JURISDICTION OF EGYPTIAN COURTS ON DISPUTES RELATED TO TOT AGREEMENTS

Unfortunately, Article 87(1) of the Trade Law is not as clear, its ambiguity has been further clouded by contradicting and difficult jurisprudence.

The first sentence of Article 87(1) states that '[t]he Egyptian courts shall have the jurisdiction to decide the disputes arising from the technology transfer contract referred to in Article 72 of this law' (the jurisdictional provision).

At the outset, it should be noted that this jurisdictional provision is not expressly mandatory in nature. It does not state that any agreement otherwise shall be 'null and void' or 'may be invalidated', unlike the choice of law provision in Article 87(2) and the provisions of Articles 74(1) and 75.

As this provision does not expressly state that Egyptian courts are to have *exclusive* jurisdiction over matters concerning ToT agreements, it must be read in the context of Articles 28, 30 and 298 of Law No. 13 of 1968 promulgating the Egyptian Code of Civil and Commercial Procedures (ECCCP).

Article 298 of the ECCCP states that:

³² See *supra* ns 10–13 and accompanying text.

Egyptian courts may not enforce a foreign judgment unless it ensures, that [*inter alia*] Egyptian courts have no jurisdiction over the dispute and that the foreign court that issued the decision has jurisdiction.

Thus, the Egyptian Court of Cassation has explicitly stated that the purpose of the first paragraph of Article 298 of the ECCCCP is to preclude Egyptian courts from enforcing foreign judgments when Egyptian courts had ‘*exclusive* jurisdiction’ over a dispute. In other words, Article 298 of the ECCCCP does not prevent Egyptian courts from enforcing a foreign judgment if they have *concurrent* jurisdiction over a dispute along with a foreign court absent clear exclusivity of Egyptian courts.³³

Further, the language of Article 298 of the ECCCCP demonstrates when the Egyptian legislator has otherwise indicated when a court ‘has no jurisdiction’ over a matter. In other words, the Egyptian legislator has created a statutory distinction between establishing jurisdiction (even if concurrent jurisdiction) and other cases when it wishes to deny jurisdiction (by stating when a court has ‘no jurisdiction’).

Consider, in the context of the venue of a dispute before Egyptian courts, albeit informative to the case at hand, Article 191 of the Trade Law, in which the Egyptian legislator used language such as ‘in exception to the jurisdiction rules as prescribed in the Procedure Code’. Thus, in this alternative formulation, the Egyptian legislator has demonstrated the ability to exclude other jurisdictional rules to the exclusive preference of another (concerning the venue of a dispute).

This distinction indicates that, applying principles of statutory construction, the jurisdiction provision has *not* been drafted so as to completely deprive all other courts of jurisdiction over disputes related to ToT agreements.

Further, Article 28 of the ECCCCP states that Egyptian courts ‘shall have jurisdiction’ over cases brought against Egyptians even if they do not reside or have a domicile in Egypt except for cases involving real estate located abroad. The Court of Cassation³⁴ has held that Article 28 of the ECCCCP does not give *exclusive* jurisdiction to Egyptian courts, and that a foreign party is free to resort to its national courts if the contract provides for the jurisdiction of those courts. Thus, Article 28 of the ECCCCP is meant to ensure that Egyptian courts have *automatic*, albeit *concurrent*, jurisdiction, as opposed to *exclusive* jurisdiction, over Egyptian nationals, including juristic persons, in the event they are respondents in a civil or commercial dispute.³⁵

³³ Court of Cassation, Case No. 1136 of the Judicial Year 54, dated 28 Nov. 1990.

³⁴ See Court of Cassation, Case No. 1136 of the Judicial Year 54, dated 28 Nov. 1990, 821–822, and Case. No. 952 of the Judicial Year 71, dated 12 Jan. 2003.

³⁵ In addition to the Court of Cassation referred above, see also Mostafa Harga, *Civil and Commercial Procedures Law in Light of Jurisprudence and Law No. 18/1999* vol. 1, 343 (Dar Mahmoud Publishers 2001–2002); Mohamed Kamal Abdelaziz, *Civil and Commercial Procedures Legislation in Light of Judgments and Jurisprudence* vol. 1, 282–283 (1995); Ahmed Meligui, *A Commentary on the Civil and Commercial Procedures Law Along with Jurisprudential Opinions and Cassation Judgments* vol. 1, 760.

Article 30 of the ECCCCP states that Egyptian courts ‘shall have jurisdiction over disputes initiated against a non-Egyptian party that is not domiciled or has a place of residence in Egypt’ when the dispute relates to money that is located in Egypt, or an obligation that originated, was implemented or is due in Egypt, or relates to bankruptcy that is declared in Egypt, despite any agreement to the contrary. The Egyptian Court of Cassation has held that Article 30 is a public policy norm, which cannot be deviated from.³⁶

Further, the explanatory note and the *travaux préparatoires* of the Trade Law do not provide any further specific indication that Egyptian courts were to have *exclusive* jurisdiction, and to the exclusion of any other foreign court agreed upon by the parties.

Indeed, we are reminded that the Supreme Constitutional Court clearly stated in the 2007 decision that Article 87 only ‘*extended* the jurisdiction of Egyptian courts over the disputes arising from the [ToT agreements] as a general rule’ (emphasis added). The resulting ambiguity of the term ‘extended’ demonstrates an intentional overlapping or concurrent jurisdiction, while the Supreme Constitutional Court could have clarified any exclusivity if it understood it as such.

Consequently, nothing in the jurisdictional provision necessarily imposes exclusive jurisdiction over ToT agreements, other than indicating that Egyptian courts do have jurisdiction over such agreements. This is supported by the Supreme Constitutional Court decision of 2007.

Therefore, a strict statutory reading of the jurisdictional provision of Article 87(1) of the Trade Law demonstrates that it establishes only *concurrent* jurisdiction in Egyptian courts in addition to any other forum determined or agreed by the parties over disputes arising out of ToT agreements, as opposed to establishing *exclusive* jurisdiction. Consequently, the parties to a ToT agreement remain free to determine their choice of mode of dispute resolution, i.e. courts versus arbitration (as more thoroughly discussed below). In conclusion, in the case of an agreed upon choice of forum and venue, Egyptian courts should continue to have *concurrent* jurisdiction over disputes related to ToT agreements.

³⁶ Cairo Court of Appeals, Commercial Circuit 62, Appeals No. 2616 and 2661 of the Judicial Year 125, dated 8 Apr. 2010; *see also* Court of Cassation, Case No. 1932 of the Judicial Year 51, Technical Office 33, Part 1, 470, dated 3 May 1982. We note, however, that parties to a dispute effectively circumvent this jurisdictional provision granting Egyptian courts concurrent jurisdiction under ECCCCP, Art. 30 by subjecting their dispute to arbitration instead of court adjudication. In such case, they will be in a position to resolve their dispute by means of an arbitral tribunal located outside of Egypt. This exemption to the general rule is pursuant to Art. 13 of Arbitration Law, Law No. 27 of 1994. *See* Cairo Court of Appeals, Commercial Circuit 62, Appeal No. 1641 of the Judicial Year 127, dated 3 July 2012; and Appeals No. 5029 and 5098 of the Judicial Year 123, dated 6 June 2007.

5.3 ARBITRABILITY OF TOT AGREEMENTS UNDER ARTICLE 87(1) OF THE TRADE LAW

The second sentence of Article 87(1) of the Trade Law states that an '[a]greement may be reached on settling the dispute ... via arbitration to be held in Egypt according to the provisions of Egyptian law' ('arbitration provision').

As a preliminary note, by placing the arbitration provision immediately after the jurisdiction provision, it is clear that the Egyptian legislator expressly recognized in the arbitration provision the parties' freedom to agree to subject their disputes under a ToT agreement to amical resolution or to arbitration, a matter well-settled under Egyptian Arbitration Law No. 27 of 1994, as amended ('Egyptian Arbitration Law' [EAL]).

Further, to be clear, pursuant to Article 1 of the EAL, any arbitration proceedings taking place in Egypt are subject to the *procedural provisions* of the EAL, unless otherwise agreed between the parties.

At this juncture, it is important to point out that in Article 87(1), the Egyptian legislator makes neither the jurisdictional nor the arbitration provisions mandatory. In clear contrast to the mandatory terms of the choice of law provision ('any agreement to the contrary shall be null and void'), Article 87(1) is an ordinary law and not mandatory.

Thus, the language of the arbitration provision appears ambiguous as to whether it should be read as:

- (1) limiting all arbitration of a ToT agreement to arbitration (a) that is held in Egypt, and (b) according to the *procedural* and *substantive* provisions of Egyptian law; or
- (2) expressly granting the parties to a ToT agreement the right to subject their disputes to arbitration in Egypt, in which case it must necessarily be subject to the *procedural* provisions of Egyptian law; while disputes may nonetheless also take place abroad (as according to and allowed by Egyptian law); but in any event making only the *substantive* provisions of Egyptian law (under Article 87(2) of the Trade Law) mandatory.

In other words, are the words '[a]greement may be reached on settling the dispute ... via arbitration to be held in Egypt according to the provisions of Egyptian law' of (1) a *limiting* nature, conditioning acceptable arbitration only to those seated in Egypt and necessarily pursuant to the EAL, or are those words of (2) a *permissive* nature, clarifying that acceptable arbitration 'may' be held in Egypt, in which case they must nonetheless be according to the provisions of the EAL?

While the distinction may be subtle, it could most certainly have significant consequences on the enforceability of the dispute resolution and choice of law provisions of ToT agreements with a link to Egypt.

5.3[a] *Limiting Nature of the Arbitration Provision of Article 87(1)*

In case (1) above, the arbitration provision appears to require that any such arbitration necessarily be seated in Egypt and subject to the provisions of Egyptian law.³⁷ Certainly the Supreme Constitutional Court summarily appears to have understood as such.

Thus, it would appear that the arbitration provision, together with the mandatory nature of Article 87(2), require that arbitrations of ToT agreements be seated in Egypt and subject *procedurally* and *substantively* to Egyptian law. If such a conclusion is correct, then the Egyptian provisions with respect to ToT agreements would result in the draconian imposition of Egyptian law on arbitral proceedings, both with respect to nullification and invalidation, as well as to an eventual enforcement of an award in Egypt, upon an unwary good faith foreign ‘supplier’ of ‘know-how’ being ‘imported’ into Egypt.³⁸

The explanatory note to the Trade Law indicates that the substantive governing law of the ToT agreement is to be Egyptian law and that arbitral proceedings are to be resolved in accordance with the EAL. Unfortunately, the explanatory note fails to address the distinctions in the mandatory provisions of Article 87(2) and the lack thereof in Article 87(1) and provides no guidance on the subject. Further, the explanatory note appears to condition arbitration to arbitral proceedings only in Egypt, even though no such conditionality is expressly present in Article 87(1).³⁹ In the absence of statutory grounds or a detailed explanation as to

³⁷ To the extent that the Civil Code, Law No. 131 of 1948 could be instructive, we note that Art. 19 of the Civil Code, Law No. 131 of 1948, does not settle the dispute here since it states: ‘Contractual obligations are governed by the law of the domicile when such domicile is common to the contracting parties, and in the absence of a common domicile then by the law of the place where the contract was concluded. These provisions are applicable unless the parties agree, or the circumstances indicate that it is intended to apply another law.’ (Emphasis added).

³⁸ Needless to state that the draconian aspects are further compounded by the several ambiguities in the Trade Law concerning the definitional terms of Art. 73 of the Trade Law, Law No. 17 of 1999 (as noted *supra* ns 5–9) and by the overly broad scope of the Egyptian law governing ToT agreements as briefly noted *supra* n. 9 and accompanying text. This, we submit, would defeat the logic and purpose of enacting a Trade Law which complies with the requirements of modern business practice.

³⁹ Explanatory note at 3478. *Travaux* at 76, notes of 9 Feb. 1998, re. Art. 87 (‘Article 87 gives jurisdiction to Egyptian Courts for disputes arising out of transfer of technology contracts, despite the competence of Egyptian courts, it allows parties to agree to settle disputes amicably or by arbitration, on the condition that the arbitration takes place in Egypt and in accordance with Egyptian Law, meaning the Law regulating arbitration in Egypt. In all cases, the applicable law to the subject of the dispute is Egyptian Law, and it will be considered null and void if agreed otherwise’).

how the explanatory note reaches such conclusions, we note that it has no binding power on the statutory interpretation of the enacted law.

Under Article 1 of the EAL, the scope of arbitration is wide, arbitration is allowed in any legal dispute ‘regardless of the legal nature of the relationship which is the subject matter of the dispute’. Generally, any dispute may be referred to arbitration unless the question relates to public policy or is a matter which cannot be subject to settlement.⁴⁰ Article 19 of the Civil Code demonstrates the general right of the parties to a contract to choose the governing law that will be applicable to it.⁴¹ Therefore, the interpretation under case (1) above should be avoided in order to evade a constitutional conflict where an alternative viable interpretation is also available as in case (2) above.

5.3[b] *Permissive Nature of the Arbitration Provision of Article 87(1)*

On the other hand, in case (2) above, the arbitration provision can be read as a complement to the jurisdictional provision in Article 87(1) and separate from the choice of law provision in Article 87(2). Indeed, the location of the arbitration provision is in Article 87(1) and not within Article 87(2). To be clear, unlike other statutes that list (what would be better understood as separate) paragraphs together, Article 87 clearly distinguishes Article 87(1) from Article 87(2) as separate paragraphs.

Read in this light, the arbitration provision reinforces that, despite the jurisdictional provision, the parties are free to subject their disputes to arbitration *process* (read: also) in Egypt, in which case, it would be subject to Egyptian law pursuant to Article 1 of the EAL).

Pursuant to the clear reading of Article 87 and to the general international principle of *expressio unius est exclusio alterius*, it can be concluded that the legislator clearly wished only the choice of law provision of Article 87(2) to be mandatory, while intentionally refraining from mandating the provisions of both the jurisdictional and the arbitration provisions of Article 87(1).

Further, the arbitration provision expressly refers to arbitration to be held according to the provisions of Egyptian law, i.e. the EAL. The imposition of the application of the EAL has multiple consequences: first, the EAL provides that parties are free to follow the procedural provisions of the EAL or to agree to any other procedural rules, including those of any arbitration centre, local or international. The arbitration provision was not meant to deny the parties’ right to agree to any specific set of procedural rules and limit their freedom specifically and to default provisions of the EAL.

⁴⁰ Cairo Court of Appeal 91st Commercial Circuit, Case No. 25/123, 10/9/2008, as published in *Journal of Arab Arbitration* (2009 Issue No. 2).

⁴¹ Although, as seen *supra* n. 37, this right is not absolute.

Therefore, it is clear that the words '[a]greement may be reached on settling the dispute ... via arbitration ... according to the provisions of Egyptian law' are necessarily of a *permissive* nature, clarifying that acceptable arbitration 'may' be according to the provisions of the EAL, which allows the parties to choose the governing procedural law for their arbitral proceedings.

Secondly, the EAL provides that parties are free to refer their disputes to arbitration either in Egypt or abroad. Thus, the reference to Egyptian law in the arbitration provision incorporates this permissive nature of foreign arbitration. This interpretation is supported by the legislator's use of the permissive term 'may', as it is well established that parties are free to subject their disputes to either domestic or foreign arbitration.

Further, where arbitral proceedings are subject to the EAL, whether pursuant to the parties' agreement or as a result of their seat in Egypt, Article 1 of the EAL determines that the EAL shall apply to all arbitrations, whether between public or private persons, irrespective of the legal nature of the dispute, so long as the arbitration takes place in Egypt, or the parties have subjected it to the EAL.⁴² In this case, the phrase 'according to the provisions of the Egyptian law' complements the phrase 'to be held in Egypt', to reinforce that the EAL is applicable to such proceedings, and is not meant as a limiting factor.⁴³

Therefore, just as the reference to Egyptian law in Article 87(1) is of a permissive nature, the terms words '[a]greement may be reached on settling the dispute ... via arbitration to be held in Egypt according to the provisions of Egyptian law' are necessarily of a permissive nature, clarifying that acceptable arbitration 'may' be according to the provisions of the EAL, which allows for the parties to choose arbitration to be held in Egypt.

Nothing in Article 87(1) excludes arbitration to be held abroad, especially with reference to the EAL as part of Egyptian law, and in light of the lack of any mandatory provision.

Therefore, the proper understanding of the arbitration provision and the choice of law provision together must be to limit only the parties' right to the application of non-Egyptian law when agreeing to submit their disputes to an

⁴² The first paragraph of EAL, Art. 1 states: 'Subject to the provisions of international conventions applicable in the Arab Republic of Egypt, the provisions of this Law shall apply to all arbitrations between public or private law persons, whatever the nature of the legal relationship around which the dispute revolves, when such an arbitration is conducted in Egypt, or when an international commercial arbitration is conducted abroad and its parties agree to submit it to the provisions of this Law.'

⁴³ See Court of Cassation, Case No. 966 of the Judicial Year 73, dated 10 Jan. 2005. See also Court of Cassation, Case No. 913 of the Judicial Year 73, dated 23 Feb. 2010.

arbitration seated in Egypt, although they remain free to agree to arbitration abroad, 'according to the provisions of the Egyptian law'.

6 CURRENT STATE OF ARTICLE 87 AND ITS ANOMALY IN LIGHT OF THE EGYPTIAN ARBITRATION LAW

As far as Egyptian law is currently concerned, the Supreme Constitutional Court decision of 2007 established that Article 87 must be understood as requiring both that the arbitration of ToT agreements must be in held in Egypt pursuant to the EAL, and that any ToT agreement must be governed by Egyptian law. Both provisions are mandatory laws and any agreement to the contrary is null and void.

The Supreme Constitutional Court decision of 2007 also established that Article 87 '*extended* the jurisdiction of Egyptian courts over the disputes arising from the [ToT agreements] as a general rule' (emphasis added). The aspect of the 'extension' of Egyptian courts' jurisdiction will be further addressed below.

However, the Supreme Constitutional Court decision of 2007 refrained from determining if Article 87 is part of Egyptian public order or public policy.

Thus, the current best interpretation of Article 87 is that, while Egyptian courts have jurisdiction over all ToT agreements, a single exception is allowed for the parties' agreement to refer their disputes to arbitration. However, such exception is granted under two conditions: that the arbitration is in Egypt pursuant to the EAL and that the governing law is Egyptian law.

As such, an unwary supplier of technology or know-how may inadvertently enter into an agreement to subject any disputes related to a ToT agreement to an arbitration seated overseas. However, the foreign supplier must be on notice that, since at least the Supreme Constitutional Court decision of 2007, the Egyptian importer will be able to present its case to the Egyptian courts.

However, questions remain unanswered, including, would an agreement to arbitrate in a particular foreign forum or seat be considered null and void *in toto*, or would the agreement to arbitrate survive severance from the foreign seat and/or forum provision allowing the party seeking arbitration to impose a comparable arbitration in Egypt by application of the default EAL provisions? Naturally the answer to this question may depend on the specific language and intent of the parties at the time of entering into the arbitration agreement.⁴⁴

⁴⁴ We note that Art. 23 of the Egyptian Arbitration Law, Law No. 27 of 1994, conclusively establishes the separation and independence of the agreement to arbitrate from the underlying contract, the subject matter of the dispute, and survives the latter's nullity, rescission or termination.

Finally, the Supreme Constitutional Court decision firmly stands to instruct us that Article 87 is constitutional and may not be challenged.

In turn, the Court of Cassation decision of 2011 declined to extend Article 87 retroactively, stating that it could only do so if that provision were one of Egyptian public order or public policy. Therefore, while not expressly stating in the negative, the Court of Cassation's decision can only be interpreted as determining that Article 87 does not constitute, or does not relate to, Egyptian public order or public policy.

The decision that Article 87 does not constitute, or does not relate to, Egyptian public order or public policy is final, as it has now survived the two highest courts in Egypt and is no longer subject to challenge.

6.1 EGYPTIAN ARBITRATION LAW ON REVIEW OF AWARDS AND THEIR ENFORCEMENT

Article 87(1) requires that arbitrations over disputes arising out of ToT agreements be in Egypt according to the EAL. However, this provision creates an anomaly.

Article 52 of the EAL establishes that arbitral proceedings taking place in Egypt in conformity with the EAL are not subject to appeal, but provides for a process of official notification of domestic arbitration awards, and an opportunity for challenge by nullification within ninety days of such official notification, where certain conditions have not been met in the arbitration agreement or process,⁴⁵ after which *res judicata* effect attaches to the award.

Article 53 of the EAL lists seven separate grounds for nullification of an arbitral award, including lack of an underlying arbitration agreement, failure to apply the law agreed-upon by the parties, violation of Egyptian public policy, and the ambiguous ground of 'invalidation affecting the award'.⁴⁶ The precise contours of such grounds

⁴⁵ Egyptian Arbitration Law, Law No. 27 of 1994, Art. 53.

⁴⁶ *Ibid.*, Art. 53(1)(g). This ground is of concern as it leaves open the possibility of invalidation of any award that violates the Egyptian Arbitration Law, irrespective of whether the provision of concern is an ordinary law, mandatory law or public policy. See e.g. Court of Cassation, Case No. 4623 of the Judicial Year 66, dated 18 Dec. 1997 (invalidating an arbitral award for failure to meet the provisions of Art. 43(3) of the Egyptian Arbitration Law instead of for a violation of an applicable public policy, if any). In Court of Cassation, Case Nos. 13313 and 13460 for the Judicial Year 80, dated 12 May 2015, the Court of Cassation relied first and foremost on Art. 53(1)(g) by merely stating redundantly that 'whereas, the Appealed Ruling concluded the invalidity of the arbitration clause, based on which it ruled for nullifying the Arbitral Award; then it did not abandon the authority of *res judicata*, but rather ruled for nullity in applying one of the events entailing the issuance of a ruling for nullity. Therefore, this challenge is groundless'. Cf. Court of Cassation, Case No. 547 for the Judicial Year 51, dated 23 Dec. 1991 ('And the reason behind ruling out the provisions of the applicable foreign law [by the court below] was that these provisions violate public order in Egypt as in being in contradiction to the social, political, economic, or ethical values in the state which is related to the *raison d'état* of the society, which shall not be sufficient if the provisions violate another article of the law. Article 502/3 of the [Egyptian Code of Civil and Commercial Procedures] stating that it is mandatory to state the arbitrators' names in the arbitration clause or in a separate agreement, does not relate to the public order; accordingly,

will be subject to many decisions in the future. The pendency of an action for nullification does not necessarily automatically suspend its enforcement, see below.⁴⁷

Finally, on the enforcement of any arbitral award, whether a final arbitral award issued in Egypt under the EAL with *res judicata* effect, or a final foreign arbitral award validly issued abroad, Article 58 of the EAL provides for a process for an application for an enforcement order: an *exequatur*, which cannot be denied after the ninety days post official notification, unless the court determines (1) that it violates a previous decision by an Egyptian court, (2) that it violates public policy, or (3) in the absence of official notification issued pursuant to the same law. To this extent, the EAL can largely be considered consistent with Article V of the New York Convention.⁴⁸

The tension between an Egyptian mandatory law and an Egyptian public policy provision should be noted. While arbitral awards issued in Egypt are not appealable under the EAL, Article 53(1)(d) of the EAL allows for the nullification of the award where an arbitral panel fails to apply the law agreed between the parties; Article 53(1)(f) of the EAL allows for the nullification of the award where an arbitral panel exceeded the limits of the agreement; and Article 53(1)(g) of the EAL allows for the nullification of the award where an invalidation occurs in the award, or if the arbitration procedures are invalid in a way affecting the award.

In contrast, should an arbitral award concerned with a ToT agreement (which should otherwise have been held in Egypt and pursuant to Egyptian law, including the EAL as required by Article 87 of the Trade Law) be seated and issued abroad in violation of Article 87, Egyptian courts in general have no jurisdiction to nullify such foreign award.

If such award survives nullification proceedings at the foreign courts with nullification jurisdiction, and is sought to be enforced in Egypt, the EAL determines that enforcement cannot be denied (absent a contrary Egyptian court decision and failure to notify the unsuccessful party) because the Court of Cassation has determined that Article 87 is not related to Egyptian public order or public policy.

Thus, in the case of a ToT agreement referring to disputes outside Egypt and/or not according to the EAL or not governed by Egyptian law and, therefore, in direct contradiction to Article 87, this agreement must be legally enforced in Egypt pursuant to Article 58 of the EAL, despite the mandatory nature of Article 87 as established by the Supreme Constitutional Court's decision of 2007.

violating such article does not count as a reason for the inapplicability of the foreign law subject to application."); Court of Cassation, Case No. 1259 of the Judicial Year 49, dated 13 June 1983 (same).

⁴⁷ Egyptian Arbitration Law, Law No. 27 of 1994, Art. 55.

⁴⁸ The Court of Cassation has established that the New York Convention supersedes Egyptian law to the extent that it requires that the enforcement of foreign arbitral awards be subject to no additional procedural hurdles as applicable to the enforcement to domestic arbitral awards. See Court of Cassation, Case No. 966 of 1973, dated 10 Jan. 2005.

As a result, the Supreme Constitutional Court's summary conflation of the mandatory provisions of Article 87(2) with Article 87(1) and the presence of the above anomaly in the EAL should cause legal professionals to pause and require a further in-depth review of the language of Article 87 for a more coherent interpretation of Article 87 of the Trade Law.

6.2 LIMITATIONS OF THE SUPREME CONSTITUTIONAL COURT'S DECISION OF 2007 AND THE NEED FOR AN INTERPRETATIVE DECISION OF ARTICLE 87(1)

In light of the Supreme Constitutional Court's view of the 'mandatory' nature of the arbitration provision of Article 87(1) in a manner that contradicts the plain language of the statutory provision, and the difficult synchronization of the Court's view with the current application of the EAL, we revisit the Supreme Constitutional Court's decision to determine its legal impact.

Article 192 of the Egyptian Constitution of 2014 establishes the constitutional concurrent roles of the Supreme Constitutional Court by stating:

The Supreme Constitutional Court shall be solely competent to decide on the *constitutionality of laws and regulations*, to *interpret legislative provisions*, and to adjudicate on disputes pertaining to the affairs of its members, on jurisdictional disputes between judicial bodies and entities that have judicial jurisdiction, on disputes pertaining to the implementation of two final contradictory judgments, one of which is rendered by a judicial body or an authority with judicial jurisdiction and the other is rendered by another, and on disputes pertaining to the execution of its judgments and decisions.

The law shall determine the Court's other competences and regulate the procedures that are to be followed before the Court.⁴⁹ (Emphasis added)

The Egyptian Constitution of 2014 sets out tasks held exclusively by the Supreme Constitutional Court. Among the several tasks, Article 192 delegates the task *to determine the constitutionality* of laws and regulations separate and apart from the task *to interpret* legislative provisions.

With respect to determining the constitutionality of legal provisions, Article 25 of Law No. 48 of 1979 ('Constitutional Court Law') provides for the legal principle of judicial supervision of the constitutionality of laws, decrees and regulations.

Further, Article 29 of the Constitutional Court Law addresses the process for the determination of the constitutionality of laws and regulations and provides:

The [Constitutional] Court shall be responsible for the judicial supervision of the constitutionality of laws and regulations as follows:

⁴⁹ Egyptian Constitution of 2014, Art. 192.

(a) If any court or judicial authority sees during a case that a provision in a law or decree is unconstitutional, and that such a provision is necessary to the settlement of the dispute, *said court or judicial authority shall suspend the case and refer it to the Constitutional Court* without fees to rule on the constitutional matter.

(b) If, during a case, a party to a dispute claims before a court or judicial authority that a provision in a law or regulation is unconstitutional, and the court or judicial authority sees that the claim is serious, said court or judicial authority shall postpone adjudicating the case and shall grant the party advancing the claim a timeline that shall not exceed three (3) months to initiate proceedings before the Constitutional Court. If the case is not filed within the deadline the claim shall be null.⁵⁰ (Emphasis added)

Separately on the interpretation of legal provisions, Article 26 of the Constitutional Court provides:

The Supreme Constitutional Court is responsible for the *interpretation of the provisions of the laws passed by the legislature* as well as the decisions issued by the President in accordance with the provisions of the Constitution, if the application of said provisions caused controversy and they were of enough importance to warrant a unified interpretation.⁵¹ (Emphasis added)

Article 33 of the Constitutional Court Law provides:

A request for *interpretation* is presented by the Minister of Justice at the request of the Prime Minister or the Chairman of the Parliament or the Supreme Council of Judicial Bodies. The request for interpretation must include the controversy caused in the application of the provision as well as the reasons for its importance *to an extent that warrants a unified interpretation*.⁵² (Emphasis added)

Finally, Article 49 of the Constitutional Court Law addresses the effect and process for their respective publications by stating:

The Constitutional court's *judgments* in constitutional cases as well as its *interpretative decisions* are binding to everyone including all state authorities. The abovementioned *judgments* and *decisions* are to be published in the Official Gazette and without expenses within fifteen days from the date of their issuance.⁵³ (Emphasis added)

From the above constitutional provision and statutory provisions, it is clear that there are different and separate processes for issuing a *judgment* on the constitutionality of a legal provision and an *interpretative decision* interpreting such legal provision. While the Supreme Constitutional Court may engage in both or either, they are inherently different in their functions and legal

⁵⁰ Constitutional Court Law, Law No. 48 of 1979, Art. 29.

⁵¹ *Ibid.*, Art. 26.

⁵² *Ibid.*, Art. 33.

⁵³ *Ibid.*, Art. 49.

consequences and must each ultimately be published in the *Official Gazette* in order to acquire legal status.

While the Court's judgment of 2007 was properly issued, no interpretative decision has been published in the *Official Gazette* within fifteen days of the Court's hearing of 15 April 2007 interpreting Article 87 of the Trade Law.

Consequently, while the Court's judgment of 2007 sets clear legal precedent as to the *constitutionality* of Article 87 with all its legal consequences, the Court's apparent *interpretation* concerning the mandatory nature of the arbitration provision has not acquired legal status in the form of an interpretative decision. In light of the Supreme Constitutional Court's view of the 'mandatory' nature of the arbitration provision in a manner that contradicts the plain language of the statutory provision, and the difficult synchronization of that Court's view with the current application of the EAL, it becomes clear that a proper interpretative decision must be requested from the Supreme Constitutional Court pursuant to Articles 33 and 49 before it can be conclusively determined that the arbitration provision of Article 87(1) is indeed mandatory.

Before counsel rushes to the conclusion that parties to a ToT agreement may freely agree to refer their disputes to arbitration abroad unencumbered by the arbitration provision of Article 87(1) of the Trade Law, careful consideration must be given to the above and the steps required. Concerned parties properly in a position to request the Prime Minister, the Chairman of the Parliament, or the Supreme Council of Judicial Bodies to make a request to the Minister of Justice to present a request to the Supreme Constitutional Court for an interpretative decision pursuant to Articles 33 and 49 of the Constitutional Court Law, may consider such request as a possible avenue, while considering the balance of the totality of the circumstances at hand.

The failure to publish an interpretative decision in the *Official Gazette* confirms our conclusion that the Court's 'interpretation' concerning the mandatory nature of the arbitration provision is *obiter dictum*. Absent the full legal consequences of an interpretative decision, parties may consider arguing that the Supreme Constitutional Court's judgment of 2007 with respect to the 'mandatory' nature of the arbitration provision is *obiter dictum* and not as part of the Court's necessary judgment on the constitutionality of Article 87.

In light of the above, concerned parties should consider pursuing the argument that, under the arbitration provision of Article 87(1) of the Trade Law, the clear language of the statute dictates that they remain free to refer their disputes with respect to ToT agreement to arbitration with the seat of their choice.

6.3 PRACTICAL SOLUTIONS TO THE REQUIREMENT THAT ARBITRATION BE HELD IN EGYPT UNDER THE ARBITRATION PROVISION

Until the Supreme Constitutional Court issues an interpretative decision on the meaning of Article 87(1), commercial partners are left with the current language of the arbitration provision, as interpreted, and must nonetheless move forward and seek practical solutions in light of all available information. With this in mind, two recent developments in Egypt bring to light a possible practical solution to ToT arbitrations.

First, we note that the arbitration provision of Article 87(1) ambiguously refers to ‘arbitration to be *held in Egypt* according to the provisions of the Egyptian law’ (emphasis added) without specifying whether the term ‘held in Egypt’ refers to the ‘seat’ or the ‘venue’ of the arbitration.

In turn, Article 28 of the EAL states:

The two parties to the arbitration are free to agree on *the place of arbitration in Egypt or abroad*. Failing such agreement, the arbitral tribunal shall determine the place of arbitration having regard to the circumstances of the case *including the convenience of the place to the parties*. This shall be *without prejudice to the power of the arbitral tribunal to meet in any place it considers appropriate to undertake any of the arbitral proceedings, such as hearing the parties to the dispute, witnesses and experts, reviewing documents, inspecting goods or other property, for consultation among its members or for any other reason*.⁵⁴ (Emphasis added)

Article 43 of the EAL requires the final award to include, inter alia, the ‘date and place of making’ of the award.⁵⁵

Again, the above provisions do not specify whether the terms ‘place of arbitration’ and ‘place of making’ refer to the ‘seat’ or the ‘venue’ of the arbitration. Thus, Articles 28 and 43 of the EAL recognize that not all procedural steps must be taken within this jurisdiction and that the place of arbitration may consider all circumstances of the case, including matters of geographical convenience to the parties and to the arbitral proceedings.

Considering the above, one can argue that the requirement that ToT arbitration ‘be held in Egypt’ is closer to the concept of location, and thus venue, rather than to its legal seat.

Recognizing the above ambiguity, Article 18 of the Rules of Arbitration of the Cairo Regional Center for International Commercial Arbitration allows the parties to separately agree to both the location or venue of the arbitral proceedings as well as to the ‘place’ of arbitration, and clarifies that ‘[t]he award shall be deemed to have been made at the place of arbitration.’⁵⁶

⁵⁴ Egyptian Arbitration Law, Law No. 27 of 1994.

⁵⁵ *Ibid.*

⁵⁶ See Girgis Abd El-Shahid & Donia El-Mazghouny, *Seat vs. Venue of Arbitration Demystified*, 20 Sept. 2016, <http://shahidlaw.com/2016/09/20/seat-vs-venue-of-arbitration-demystified/> (accessed 16 Oct. 2016).

In a recent decision, the Cairo Court of Appeals recognized the nuance between the seat versus location of an arbitration, wherein the argument was made that the arbitral award was physically made abroad, in Dubai, while stating the place of its making in Cairo as agreed between the parties.⁵⁷ The Court recognized that the parties are free to agree to its seat and location, and that even if an arbitration was physically made abroad, the parties' choice of the seat determined the Court's jurisdiction over nullification proceedings as it was legally seated in Cairo. In doing so, the Court recognized both the distinction between the seat of an arbitration and its location, as well as the parties' power to agree, with the resulting power to set aside the arbitral award deriving from its seat.

In another recent development, following months of discussions and lobbying with the Egyptian government by direct foreign investors, lenders and sponsors after the near collapse of Round 1 of the Feed-In Tariff (FIT) Programme for the development of new and renewable energy in Egypt, largely because of disagreements over the proposed place of arbitration, the Egyptian Electricity Holding Company recently announced that it was prepared to accept arbitration seated outside Egypt, so long as the venue of the arbitration remained in Egypt, at the Cairo Regional Centre for International Commercial Arbitration.⁵⁸

In the context of the arbitration provision in Article 87(1), until the day when the Supreme Constitutional Court issues an interpretative decision clarifying the meaning of Article 87(1), parties to a ToT agreement can explore the inherent ambiguity of the language of the term 'to be held in Egypt', recognizing that it contains both an element of venue as well as of seat. Thus, it may be possible to satisfy the arbitration provision requirement that arbitration be 'held in Egypt' by agreeing to hold the venue of the arbitration in Egypt, while nonetheless agreeing to a foreign seat for the purposes of setting it aside.

7 CONCLUSION

This article has demonstrated, by the application of general international statutory construction provisions and a review of the *travaux préparatoires*, that the arbitration provision of Article 87(1) of the Trade Law does not necessarily result in the mandatory seat only in Egypt, but instead, parties should be free to determine the seat of their choice pursuant to the provisions of the EAL.

In light of the Supreme Constitutional Court's view of the 'mandatory' nature of the arbitration provision of Article 87(1) in a manner that contradicts the plain

⁵⁷ Cairo Court of Appeals, Commercial Circuit, Appeal Nos. 46 and 47 of the Judicial Year 132, dated 7 Dec. 2015.

⁵⁸ See Abd El-Shahid & El-Mazhouny, *supra* n. 56.

language of the statutory provision, and the difficult synchronization of that Court's view with the current application of the EAL, and most importantly, the limitations on the legal consequences of the Supreme Constitutional Court's judgment, while refraining to issue an *interpretative* decision, the Supreme Constitutional Court's judgment of 2007 is not final on the 'mandatory' nature of the arbitration provision. Indeed, absent the full legal consequences of an interpretative decision, the Supreme Constitutional Court's judgment of 2007 with respect to the 'mandatory' nature of the arbitration provision should be considered *obiter dictum*.

Until the Supreme Constitutional Court issues an interpretative decision clarifying the meaning of Article 87(1), parties to a ToT agreement may be able to satisfy the arbitration provision requirement that arbitration be 'held in Egypt' by agreeing to hold the venue of the arbitration in Egypt, while nonetheless agreeing to a foreign seat for the purposes of setting it aside.

As a result, parties should carefully consider the possibility of arguing that, under the arbitration provision of Article 87(1) of the Trade Law, the clear language of the statute dictates that they remain free to refer their disputes with respect to ToT agreements to arbitration with the seat of their choice.