

SETTING ASIDE AND ENFORCEMENT OF  
COMMERCIAL ARBITRATION AWARDS AND THEIR  
LEGAL IMPLICATIONS IN EGYPT

BY

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## ABSTRACT

Arbitration is an alternative dispute resolution for seeking justice in settling commercial disputes out of court. Although the Egypt Arbitration Law of 1994 marked a significant evolution in commercial arbitration in the Arab Republic of Egypt, the current position of setting aside an arbitral award may result in its enforcement with the presence of substantial reasons affecting the justice between the disputants due to the limitation of the grounds for setting it aside. In addition, enforcement of the arbitral award is subject to its consistency with the national public policy of Egypt. This is seen as legal restrictions for foreign arbitral awards, and it amounts to difficulties in seeking their enforcement. Furthermore, the decision to accept or refuse the enforcement of the arbitral award is based on the 'ijtihad (independent reasoning) of the enforcing judge. Hill, Jonathan, found in their study that not all the situations that result in setting aside the arbitral award were included in the grounds for setting aside. The arbitral award seeking enforcement may be refused because of its conflict with Shariah, although there are other judgments of Islamic jurisprudence that consider this award to be consistent with Shariah. This study, therefore, analyses the rules concerning the process of setting aside and enforcing the arbitral award. For this purpose, the methodology adopted in this study comprises non-empirical qualitative and empirical qualitative research. The black letter laws were also employed to evaluate the current situation of the problem by examining the relevant legal rules along with public policy. This study finds that the grounds for setting aside did not include all the situations that result in setting aside the arbitral award. Thus, the study suggests some necessary amendments to the Egypt Arbitration Law 1994 in order to achieve the desired justice for parties in commercial arbitration. One of the objectives of this study is to analyse the effect of the current position of setting aside an arbitral award in Egypt jurisdiction.

## مُلخَصُ البَحْث

التحكيم من الوسائل البديلة لحل المنازعات التجارية بعيداً عن القضاء، فعلى الرغم من أن نظام التحكيم المصري الحالي الصادر عام ١٩٩٤م شهد تطوراً ملحوظاً في التحكيم التجاري في جمهورية مصر العربية؛ قد يؤدي الوضع الحالي لبطلان حكم التحكيم إلى تنفيذ ذلك الحكم، مع وجود أسباب جوهرية تؤثر في العدالة بين أطراف النزاع، ويرجع ذلك إلى أن أسباب البطلان محدودة، كما أن تنفيذ حكم التحكيم يخضع لمدى توافقه مع النظام العام في جمهورية مصر العربية، فقرار قبول التنفيذ أو رفضه يصدر بناءً على اجتهاد قاضي التنفيذ، وفي دراسة أن ليست جميع الحالات التي تؤدي إلى بطلان قرار التحكيم قد أُدرجت في أسس التنحية، فقد يُرفض قرار التحكيم المراد تنفيذه بسبب تعارضه مع الشريعة؛ على الرغم من وجود أحكام أخرى في الفقه الإسلامي تُعدُّ متوافقة مع أحكام الشريعة الإسلامية، ومن ثم؛ كان هذا البحث دراسة تحليلية للقواعد القانونية المتعلقة ببطلان حكم التحكيم وتنفيذه، ولتحقيق ذلك؛ اعتمد الباحث المنهجين الوصفي والتجريبي، ومطالعة المراجع القانونية لتقويم الوضع الحالي لمشكلة البحث من خلال دراسة القواعد القانونية ذات الصلة، وتوصل البحث إلى عدد من النتائج؛ منها أن أسباب بطلان حكم التحكيم في النظام الحالي لا تشمل جميع الحالات التي تؤدي إلى بطلان حكم التحكيم، وأنه قد يُرفض تنفيذ حكم التحكيم بسبب تعارضه مع رأي قاضي التنفيذ، وعليه؛ اقترح الباحث بعض التعديلات المهمة لنظام التحكيم المصري الحالي من أجل تحقيق العدالة المنشودة بين المتخاصمين بوساطة التحكيم.

## APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion, it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Comparative Laws.

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## DECLARATION

I hereby declare that this dissertation is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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*Mark Dallah v Bank Mellat* [1986] Q.B. 411  
*National Gas S.A.E. v. Arab Republic of Egypt* [2011] ICSID No. ARB/11/7  
*Occidental Exploration & Production Company v The Republic of Ecuador* [2004] LCIA UN 3467  
*Teekay Tankers Ltd v STX Offshore and Shipbuilding Co Ltd* [2017] EWHC 253  
*XL insurance Ltd v Owens Corning* [2000] 2 Lloyd's Rep 500

## LIST OF STATUTES

Amman Arab Convention on Commercial Arbitration 1987  
Drafting of Implementation Rules of Saudi Arbitration Law 2012 (Royal Decree No. M/34/2012)  
Egypt Arbitration Law 1994 (Act No. 27/1994)  
England Arbitration Act 1996 (Ch 23/1996)  
European Convention on International Commercial Arbitration Geneva Act 1961 (Act 7041)  
France Code of Civil Procedure with the Arbitration Rules Act 2011 (Act No. 2011-48/2011)  
Gulf Cooperation Council Convention Act 1996  
International Centre for Settlement of Investment Disputes Act 2006  
International Chamber of Commerce Rules of Arbitration Act 2012  
Implementation Rules of the Execution Law 2013 (Act No. 13/T/4892 of 2013)  
Kuwait Code of Civil and Commercial Procedure Act 1980 (Act No. 38 /1980)  
Malaysia Arbitration Act 2005 (Act No. 646/2005)  
New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1958 (No. 4739/1959)  
Protocol on Arbitration Clauses Geneva Act 1923 (No. 678/1923)  
Riyadh Arab Agreement for Judicial Cooperation Act 1983  
United Nations Commission on International Trade Law Act 2010  
United Nations Commission on International Trade Law (UNCITRAL) Model law on International Commercial Arbitration Act 2006  
Vienna Convention on Diplomatic Relations Act 1961 (No. 7310/1964)

## LIST OF ABBREVIATIONS

NYC	The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
UCITRAL	United Nations Commission on International Trade Law
ICSID	International Centre For Settlement of Investment Disputes
EAL	Egypt Arbitration Law
ICC	International Chamber of Commerce
LCIA	London court of International Arbitration
CRCICA	Cairo Regional Centre for International Commercial Arbitration
AAA	American Arbitration Association
ITC	International Trade Centre
GCC	Gulf Cooperation Council
ADR	Alternative Dispute Resolution
AALCO	Asian African Legal Consultative Organization

## TRANSLITERATION

### ARABIC TRANSLITERATION

Transliteration = Alphabets Transliteration

ض = ḍ	ء = ' (alif ma'adhiyah)
ط = ṭ	ا = a
ظ = ḏ	ب = b
ع = ʿ	ت = t
ث = th	غ = gh
ف = f	ج = j
ق = q	ح = ḥ
خ = kh	ك = k
ل = l	د = d
ذ = dh	م = m
ن = n	ر = r
ه = h	ز = z
و = w	س = s
ش = sh	ي = y
ص = ṣ	

### Vowels

Short Vowels	Long Vowels
َ = a	آ = ā
ِ = i	ى = ī
ُ = u	و = ū

# **CHAPTER ONE**

## **INTRODUCTION**

### **1.1 BACKGROUND OF THE STUDY**

Period after World War II witnessed tremendous international contractual relations. Furthermore, the globalisation phenomenon and the rapid development of information technology (IT) transformed the world into a borderless global community with multinational interactions taking place, particularly in trade and commerce. The increasing volume of round-the-clock international transactions taking place between various countries with dissimilar legal jurisdictions has made it necessary to develop an appropriate system to address the unavoidable disputes arising from such international contractual activities. In fact, the pertinent issues such as the law that applies to the dispute, the procedures to be followed, to arrive at an acceptable outcome, are of considerable significance.

As such, international commercial arbitration is viewed to be the most effective approach for providing practical solutions to the diverse and different issues of international trade transactions. For this reason, it is therefore maintained that International Commercial Arbitration has gained popularity from its arbitral awards being generally recognised and enforced worldwide. However, in practice, there appears to be an increasing number of arbitral awards that have faced obstacles in being recognised and enforced.

Arbitration would therefore become futile if the final outcome of the arbitral award is not duly recognised and enforced with minimal procedural delay. Meanwhile, international initiatives to improve and promote the wider recognition and enforcement

of international arbitral awards have been introduced. These initiatives have resulted in several international treaties being signed between different countries with the aim of establishing unified and harmonised rules for to recognise and enforce foreign arbitral awards. The 1958 NYC on the “Recognition and Enforcement of Foreign Arbitral Awards” (NYC) is viewed as the most significant treaty for such recognition and acceptance of foreign arbitral awards worldwide. The New York initiative was followed by the 1985 “UNCITRAL Model Law,” which offers an international legal framework with the Convention to recognise and enforce foreign arbitral awards.

This study comprehensively evaluates and estimates the relevant NYC and Model Law provisions regarding the recognition and enforcement of foreign arbitral awards. In addition, Egypt has also become a number of the international conventions governing the arbitration process, the provisions of which have been incorporated into the national legal system of the country. However, the 1994 Egypt Law adopted an exclusive method for reviewing the arbitral award and limited grounds for setting aside. Although this method is in line with the arbitration goals, it needs to be studied in depth in order to determine the exact extent to which the grounds for setting aside include all the potential circumstances that can be found in the arbitration process or in the particular arbitral award.

Public policy considerations are the most important challenge facing the effective enforcement of foreign arbitral awards in Egypt. The enforcement issue will therefore be studied in this research on the basis of the enforcement rules in Egypt's 1994 arbitration law and other applicable laws.

In the context of Egypt, this research aims to evaluate critically the concept of arbitral awards and their legal ramifications. The study will also contribute to the ongoing development of Egypt's arbitration regulatory framework and seeks to make it



more conducive and acceptable to Egypt's business-related environment. In line with the scope of international commercial arbitration, it makes a critical analysis of the application of the Convention and the model law.

In addition, this study investigates the hurdles facing the recognition and enforcement of foreign arbitral awards in an effort to develop practical solutions. Towards this end, the study refers particularly to the recognition and enforcement in Egypt of foreign arbitral awards and their legal implications. Finally, it attempts to offer a viable conclusion embracing rational recommendations and responding to the problem stated in this thesis.

## **1.2 STATEMENT OF THE PROBLEM**

It is well known that extensive international initiatives have been launched to address the issues regarding in recognition and enforcement of foreign arbitral awards. The “NYC on the Recognition and Enforcement of Foreign Arbitral Awards” (1958) and the “UNCITRAL Model Law” set up an appropriate international legal framework and providing effective mechanisms by which the winning party to arbitration can duly recognise and enforce the foreign arbitral award. In addition, Egypt complied with the “New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards” in 1959 without making any declarations or notifications.

Moreover, Egypt has ratified several regional conventions in relation to international commercial and investment arbitration, such as; the 1954 “Convention on Enforcement of Decisions between the States of the Arab League; “the 1974 “Convention on the settlement of Investment Disputes between the Hosting Countries of Arab investors and the nationals of other Arab countries;” the “Amman Arab Convention on Commercial Arbitration” of 1987; the “Unified Agreement on the

investment of Capitals in Arab States” of 1980, which was signed in Amman and came into force on 7 September 1981.

However, an arbitral award may need to be reviewed in the event that it includes a reason for setting aside. Under Egypt Law No. 27 of 1994, it is difficult to set aside the arbitral award due to the limitation of the grounds for setting aside or the time limit for setting aside. This position may result in injustice between the disputing parties if the award includes a reason is discovered after the time limit has expired.

It, therefore, becomes necessary to carry out a study that will ensure that there is a legal solution that will guarantee entertainment of reasons other than those mentioned in the law, if fairness, finality and rapidity that are the aims of arbitration are to be achieved.

Moreover, in Egypt, enforcement of a foreign and domestic arbitral award is subject to its consistency with Egyptian public policy. Some previous studies on the problems of arbitration in Egypt have discussed the general principles of arbitration and the influence of international arbitration treaties and conventions on Egypt Arbitration domain.

They have also discussed commercial arbitration, whereas the current study, examining the Egypt Arbitration Law 27 of 1994. This study also focuses on the encumbrances facing arbitral awards in Egypt in respect of setting aside jurisdictions that are also state parties in most international arbitration conventions.

### **1.3 RESEARCH OBJECTIVES**

The main objective of this study is to provide suggestions for reforming the current Egypt Arbitration Law 1994 to make it an effective and efficient alternative dispute resolution mechanism. The sub-objectives are as follows:

- 1- To study the concept of arbitral award as provided under the Arbitration Law of Egypt 1994 and the effect of the current position of setting aside of arbitral award in Egypt
- 2- To examine how the decision of the enforcing court is influenced by the national public policy on the enforcement of an arbitral award in Egypt beside study the legal effects of enforcement of a foreign arbitral award.
- 3- To suggest recommendations for Arbitration Law of Egypt 1994.

#### **1.4 RESEARCH QUESTIONS**

This research attempts to investigate the commercial arbitral awards and their legal impacts on Egypt by answering the following questions:

- 1- What is the effect of the current position on setting aside an arbitral award in Egypt jurisdiction?
- 2- How is the decision of the enforcing judge influenced by national public policy on the enforcement of an arbitral award in Egypt and the legal effects of enforcement of a foreign arbitral award?
- 3- What are the reforms that can be taken for current position on setting aside an arbitral award in Egypt?

#### **1.5 RESEARCH HYPOTHESES**

This research will be looking at the current position in Egypt of the grounds for setting aside an arbitral award which leads to enforcement of a defective arbitral award. Therefore, the enforcement of a defective arbitral award will produce a counterproductive result of the arbitral award. However, under Egypt Law No. 27 of

1994, the arbitral award is difficult to be set aside due to the limitation of the grounds for setting aside or the time limit for setting aside.

This position may result in injustice between the disputing parties if the award includes a reason is discovered after the expiry of the time limit. It, therefore, becomes necessary to carry out a study that will ensure there is a legal solution that will guarantee entertainment of reasons other than those mentioned in the law, if fairness, finality and rapidity that the aims of arbitration must be achieved.

## **1.6 RESEARCH METHODOLOGY**

This study employs doctrinal methodology for inquiry into the phenomenon under investigation. This is due to the difficulties faced in areas related to the commercial arbitral awards in the Arab Republic of Egypt. As such, the research uses non-empirical qualitative methodologies. The non-empirical methodology applies the black letter law or doctrinal law.

This is used to appraise the various concepts and principles of law involved in the research and done through analysis of relevant legal rules derived from both the primary and secondary sources. The primary sources in this research are statutes, conventions and treaties. The secondary sources are textbooks, journal articles, electronic databases and other internet materials. Therefore, the library offers the essential resources in achieving an effective utilisation of doctrinal methodology. Finally, the research also uses the laws of other jurisdictions besides those of Egypt when the need arises. Furthermore, there is comparison between jurisdictions because of the nature of commercial arbitration and how it affects bilateral relationships.

Since the research is inclined towards legislative reform, the nature of the research requires analysis and examination of the data relevant to the problems. It also

proposes a change to the issues that affect arbitration in order to make it more effective and efficient.

### **1.7 LIMITATIONS OF THE STUDY**

This thesis is aimed at examining Egypt's arbitral award position and towards this end discusses only the arbitral award provisions, the issues surrounding their setting aside, and their enforcement based on the relevant laws. The discussion includes an analysis of certain cases concerning the setting aside and enforcement of arbitral awards from different jurisdictions. It is evident that the problem of recognition and enforcing foreign arbitral awards is a very broad topic that can involve several analyses and many discussions.

This study, however, is limited in space, time and methodology and does not permit extensive treatment of foreign arbitral award recognition and enforcement provisions inherent in other international conventions and treaties.

### **1.8 LITERATURE REVIEW**

In this study, the researcher discusses the role of the *lex loci arbitri* in international commercial arbitration and the degree to which judgments or orders arrived at by one state court should affect the enforcement of another state's foreign court where the arbitration award is sought. There has been much discourse regarding the concept of international commercial arbitration as an independent, national institution, whose actions are not subject to the constraints of national law. Thus, if any justification is

required to supplement the literature on the subject, it would be relevant to the further advancement of cross-border dispute resolution international cooperation.<sup>1</sup>

Scherer, Maxi,<sup>2</sup> in his paper explores and provides a critical assessment of the 'judgment route' in international arbitration. The route of the judgment points to a mounting trend in several jurisdictions to give effect to foreign judgments concerning international arbitral awards, such as setting aside, confirmation, recognition or enforcement arbitral awards.

Although there are many comments on the consequences of the judgments set aside, not much has been done with regard to other situations of equal importance in which the courts confirm, refuse to set aside or simply recognise or enforce an award. The purpose of this study is to bridge this gap. It is argued that national courts frequently wrongly grant effects to judgments on foreign awards.

Theoretically, the course of judgment disregards the distinctive ancillary nature of award judgments, which are different from other judgments as they relate to a preliminary judgment - the award - and therefore have to be handled in a different way. In addition, the judgment route could encourage forum shopping and multiply parallel proceedings on a practical level, which increases the likelihood of conflicting decisions. Based on these findings, the study draws the conclusion that the path taken in many jurisdictions by the courts is often the wrong path.

The aim of this study is to characterise the main rituals in international arbitration that design the way social actors are predicted to act, and also the way actors interact in the international arbitration field. It shows, in particular, how international arbitration

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<sup>1</sup> Goode Roy, "The Role of the Lex Loci Arbitri in International Commercial Arbitration", *Arbitration International*, vol. 17, no.1 (2004): 19-40.

<sup>2</sup> Maxi Scherer, "Effects of Foreign Judgments Relating to International Arbitral Awards: Is The "Judgment Route" the Wrong Road?", *Journal of International Dispute Settlement*, vol. 4, no.3 (2013): 587-628.

has evolved as a social field from a solidarity to a polarised model in which different sets of values and beliefs are shared by a variety of actors. The author investigates how standards are generated in a polarised field following the drawing of the difference between functions and roles and their effect on the valuation of conflicts of interest.<sup>3</sup>

This book reviews the Foreign Arbitral Awards Recognition and Enforcement Convention. International arbitration is characterized by a convergence of procedural rules using elements of different legal traditions.

The same "best of all worlds" approach benefits the tools that increase the accessibility of the Convention. The reader will quickly discover how each requirement was understood and how it should be interpreted under the respective provision. The work provides a concise and reasoned opinion and provides additional references to the reader, both from international case law and from academic writings.<sup>4</sup>

This study finds that not all the situations that result in setting aside the arbitral award were included in the grounds for setting aside. The arbitral award seeking enforcement may be refused because of its conflict with Shariah, although there are other judgments of Islamic jurisprudence that consider this award to be consistent with Shariah.<sup>5</sup>

This is a critical study of the 1958 NYC establishing a simplified international regime to enforce arbitral awards across borders. The literature proposes that the use of may in Article V gives the enforcement court discretion: even if the award debtor establishes one of the grounds for non-enforcement, the enforcement court has a

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<sup>3</sup> Emmanuel Gaillard, "Sociology of International Arbitration", *Arbitration International*, vol. 31, no.1 (2015): 1–17.

<sup>4</sup> Dennis Solomon, "New York Convention. Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958. Commentary" in *European Yearbook of International Economic Law*, edited by Reinmar Wolff (Berlin: Springer Heidelberg, 2013), 445-449.

<sup>5</sup> Bandar. ALthubyani Khalid, "A Study of Commercial Arbitral Awards and their Legal Implication in Saudi Arabia," (Ph.D. thesis, International Islamic University Malaysia, 2017), 15.

residual discretion to enforce the award. Even though the text of Article V NYC does not answer some significant queries, whether an award given in one country is enforceable in another is dependent on an established framework of rules and principles being applied.

This normative framework is complete in a manner that allows "strong" discretion to operate. As such, traditional accounts of Article V NYC's operation focusing on the operation of judicial discretion result in a misleading impression of the NYC's practical application.<sup>6</sup>

In this paper the writer refers to a number of international arbitration situations that suggest some lack of understanding between legal systems. Three topics analyse the problem of cultural conflicts in international arbitration and the possible options for their alleviation: (i) applying the Shari'a by Western judges (East-West conflict); (ii) the recognition of awards despite their annulment in the arbitration seat country (a specific French aspect); (iii) deviations between the practice of the Common Law countries, the civil law countries and the Middle-East, in relation to evidence and procedure.<sup>7</sup>

This study introduces and scrutinises the existing status of arbitration systems in a number of countries: i) Egypt, ii) United Arab Emirates (UAE), including the Dubai International Financial Centre (DIFC) and iii) Lebanon. It also presents the leading arbitration institutions in the Middle East, comprising i) Cairo Regional Centre for International Commercial Arbitration (CRCICA), ii) Dubai International Arbitration

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<sup>6</sup> Jonathan Hill, "The Exercise of Judicial Discretion in Relation to Applications to Enforce Arbitral Awards Under The New York Convention 1958", *Oxford Journal of Legal Studies*, vol. 36, no.2 (2015): 304-333.

<sup>7</sup> Ibrahim Fadlallah, "Arbitration Facing Conflicts of Culture: The 2008 Annual School of International Arbitration Lecture sponsored by Freshfields Bruckhaus Deringer LLP", *Arbitration International*, vol. 25, no.3 (2009): 303-318.