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Egyptian Arbitration Law: The Absence of Some Generic Concepts of the New York Convention of 1958 (A Private International Law Perspective)

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١٩٥٨ من منظور القانون الدولي الخاص

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Abstract

Over the course of six decades since Egypt's accession to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, successive Egyptian arbitration laws as well as court decisions have been rigidly devoted to the territoriality principle, whether in regard to arbitration's procedural law or to the courts which have jurisdiction on setting aside the arbitral award. This article discusses whether the concept of "non-domestic" awards and the rule prescribed under the New York Convention, and applied by the courts in several countries, in regard to jurisdiction on setting aside "foreign" and "non-domestic" arbitral awards, have been endorsed by the arbitration law or court decisions in Egypt. The article highlights the criteria for and legal consequences of the "internationality" as adopted by Egyptian arbitration law and the latter's overlapping scope with the Convention in respect of the enforcement of international arbitral awards made abroad under that law. The article also addresses the debate on whether arbitral awards annulled by the courts of the seat of arbitration may still be enforceable and how private international law principles uphold a coherent application of articles V(1)(e) and VII(1) of the Convention. Finally, from a private international law standpoint the article suggests harmonious solutions, and highlights the necessity of some reforms in the Egyptian arbitration law to conform with the latest developments at the comparative level in the arena of international commercial arbitration.

Keywords: "Non-domestic" arbitral awards in the Egyptian arbitration law and comparatively; Determination of the *lex arbitri* in the Egyptian and comparative law; Jurisdiction over the setting-aside of the "made-abroad" and "non-domestic" arbitral awards under the New York Convention and the Egyptian arbitration law; Procedural aspects of enforcement of the "made-abroad" arbitral awards in Egypt; The extent the arbitral award that has been annulled by the courts of the seat could be enforced.

المخلص

على مدار ستة عقود منذ انضمام مصر لاتفاقية نيويورك ١٩٥٨ بشأن الاعتراف بأحكام التحكيم الأجنبية وتنفيذها، كرسّت قوانين التحكيم المصرية المتعاقبة فضلاً عن الأحكام القضائية لمبدأ الإقليمية بشكل صارم سواء فيما يتعلق بالقانون الإجرائي للتحكيم، أو المحاكم التي ينعقد لها الاختصاص بإبطال حكم التحكيم. يناقش هذا البحث ما إذا كان قانون التحكيم وأحكام القضاء المصري قد تبني مفهوم أحكام التحكيم "غير الوطنية"، وكذلك القاعدة التي قررتها اتفاقية نيويورك، وطبقتها الأحكام القضائية في العديد من الدول، بشأن الاختصاص بإبطال كل من أحكام التحكيم "الأجنبية" و "غير الوطنية". كما يلقي البحث الضوء على معيار

"دولية" أحكام التحكيم و الآثار القانونية المترتبة على توافر صفة "الدولية" كما تبناها قانون التحكيم المصري، وتداخل نطاق هذا القانون مع اتفاقية نيويورك فيما يتعلق بتنفيذ أحكام التحكيم الدولية الصادرة في الخارج وفقاً له. ويعرض البحث أيضاً للنقاش حول ما إذا كانت أحكام التحكيم التي قضي بطلانها من قبل محاكم دولة مقر التحكيم لا تزال قابلة للتنفيذ، وكيف تدعم مبادئ القانون الدولي الخاص تطبيقاً متسقاً لحكم المادة (١/٥هـ) والمادة (١/٧) من اتفاقية نيويورك ١٩٥٨. أخيراً، يقترح البحث حلاً توفيقية من منظور القانون الدولي الخاص، كما يلقي الضوء على ضرورة إجراء بعض التعديلات في قانون التحكيم المصري ليتوافق مع آخر التطورات على الصعيد المقارن في مجال التحكيم التجاري الدولي.

الكلمات المفتاحية: أحكام التحكيم "غير الوطنية" في قانون التحكيم المصري والمقارن؛ تحديد القانون الإجرائي للتحكيم وفقاً للقانون المصري والمقارن؛ الاختصاص بإبطال كل من أحكام التحكيم "غير الوطنية" و "الصادرة في الخارج" وفقاً لاتفاقية نيويورك وقانون التحكيم المصري؛ الجوانب الإجرائية لتنفيذ أحكام التحكيم "الصادرة في الخارج" في مصر؛ مدى إمكان تنفيذ حكم التحكيم الذي قررت محاكم دولة المقر بطلانه.

Introduction

While the recognition and enforcement of foreign arbitral awards under the New York Convention have been handled consistently,⁽¹⁾ though not identically, at the international level,⁽²⁾ the relevant Egyptian experiment reveals, somehow, the absence of basic conceptualization.

Prior to Egypt's accession to the Convention, arbitration matters were regulated by articles (818–50) of the old Civil and Commercial Procedure Law,⁽³⁾ under which the enforcement of foreign arbitral awards was regulated for the first time. According to article 492 of that law, the enforcement of that type of awards was to be sought through ordinary proceedings of adversarial lawsuits, while under article 847 thereof, the enforcement of domestic arbitral awards was to be initiated by an exequatur request, which is ex parte process. Of course, at that time, the assumption that an arbitration might be conducted in one country while being subject to the procedural law of another was inconceivable.

In 1959, Egypt acceded to the Convention, the provisions of which became part of the country's laws under the implementing law of the same year.⁽⁴⁾ Unfortunately, except for de-

⁽¹⁾United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 10 June 1958), (1959) 330 UNTS 3, 38 <<https://treaties.un.org/doc/Publication/UNTS/Volume%20330/volume-330-I-4739-English.pdf>>.

⁽²⁾For how the Convention's provisions are interpreted and applied by contracting States' courts see UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards—New York 1958 (2016 edn) <http://newyorkconvention1958.org/pdf/guide/2016_Guide_on_the_NY_Convention.pdf>.

⁽³⁾Law No 77/1949.

⁽⁴⁾Law No 171/1959.

clarifying the accession to the Convention, the implementing law was void of any procedural or non-procedural provisions,⁽⁵⁾ and left some of the important questions unanswered.⁽⁶⁾

In 1968, the present Code of Civil and Commercial Procedure (CCPL) was passed.⁽⁷⁾ Following the traditional track, the enforcement of foreign arbitral awards was to be sought through an adversarial lawsuit filed with the court of first instance that originally had jurisdiction over the dispute;⁽⁸⁾ however, the enforcement of domestic arbitral awards was to be initiated by the *exequatur* process.⁽⁹⁾

In 1994, the Egyptian Law on Arbitration in Civil and Commercial Matters (ELACC) was promulgated.⁽¹⁰⁾ Influenced by the UNICTRAL Model Law of 1985,⁽¹¹⁾ article 1 provides that the provisions of the ELACC are applicable to (a) all arbitrations conducted in Egypt regardless of the nature of the disputed matter and (b) international commercial arbitrations conducted abroad if the parties have so agreed.⁽¹²⁾

The mandatory application to all arbitrations that are or were conducted in Egypt raises the question of the extent to which the ELACC admits the autonomy of parties concerning the selection of a procedural law other than that of the seat. This question is, of course, associated with that of whether the dictum and successive arbitral laws have ever tended to identify all types of arbitral awards laid under article I(1) of the Convention from the national legislature's point of view.

Relevantly, decisions and commentaries demonstrate considerable fluctuation regarding the determination of jurisdiction over the setting aside of international arbitral awards, whether arbitration is conducted domestically or abroad. Indeed, the nature of article V(1) (e) of the Convention has not been deliberated about either from the private international law perspective or otherwise.

⁽⁵⁾ Compare eg the US Federal Arbitration Act, 9 USC, ss 201-208 (2006).

⁽⁶⁾ See text to (nn 92-102).

⁽⁷⁾ Law No 13/1968.

⁽⁸⁾ CCPL, art 509.

⁽⁹⁾ *ibid*, art 297. It is worth mentioning that arts (296-8) of CCPL originally set forth the requirements and procedure for enforcement of foreign judgements; however, according to art 299, the same are applicable *mutatis mutandis* to the enforcement of the foreign arbitral awards, without prejudice to international conventions (art 301).

⁽¹⁰⁾ Law No 27/1994.

⁽¹¹⁾ UNICTRAL Model Law on International Commercial Arbitration, 21 June 1985, UN Doc A/40/17, Annex 1 <[https://undocs.org/en/A/40/17\(SUPP\)](https://undocs.org/en/A/40/17(SUPP))>.

⁽¹²⁾ Art 1 provides the following: '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 in an international commercial arbitration conducted abroad the parties agree to submit it to the provisions of this Law.'

Despite the complicated criteria of “internationality”, the applicability of the ELACC to international arbitral awards made abroad where the parties have so agreed, raises the question of whether the borderline between the ELACC and the Convention regarding the non-procedural provisions of enforcement of such type of awards is, nevertheless, maintainable. This has additionally resulted in a controversy in regard to the enforcement procedure of “foreign” arbitral awards.

Finally, based on a rigid conception of territoriality in the field of arbitration, Egyptian scholars have, in the context of France and US enforcement of an arbitral award that was annulled by Egyptian courts, discussed the probable effect of the more-favorable right under article VII(1) on the refusal grounds set forth in article V(1)(e) of the Convention.

I. Ambiguous Conception of The Lex Arbitri

It has been a long time since trade and service entities tended to have cross-border businesses under manifold economic and legal regimes. Therefore, ‘mechanical rules granting jurisdiction have no place in modern commercial setting’,⁽¹³⁾ and it is now common practice for international business partners to opt for a neutral forum for their probable controversies.⁽¹⁴⁾

The situation in regard to arbitration is more liberal. The selection of the place of arbitration should not necessarily embrace the existence of a significant nexus with disputed matter, the parties, or their assets.⁽¹⁵⁾ More frequently, selecting a specific place as a seat depends on logistical facilitations, professional expertise, or the neutrality of the place.⁽¹⁶⁾ These realistic considerations instructed the drafters of the New York Convention to consider, in article I(1), the cases in which an arbitral award might be considered non-domestic for the purposes of enforcement despite being delivered domestically.⁽¹⁷⁾ As a matter of course, the most conceivable case is that in which the parties agree to a lex arbitri other than the procedural law of the country of the seat.

⁽¹³⁾IM Farquharson, Choice of Forum Clauses—A Brief Survey of Anglo-American Law, (January 1974) 8(1) Intl Lawyer 83, 99–100.

⁽¹⁴⁾See RA Bay, ‘Forum Selection Clauses: Substantive or Procedural for “Erie” Purposes’ (June 1989) 89(5) Colum L Rev 1068, 1083 (‘Most federal courts today hold forum selection clauses to be “prima facie” valid and enforce them’).

⁽¹⁵⁾See AJ van den Berg, ‘When is an Arbitral Award Nondomestic under the New York Convention of 1958?’ (Fall 1985) 6(1) Pace L Rev 25, 32–38.

⁽¹⁶⁾See P Lalive, ‘On the Neutrality of the Arbitrator and of the Place of Arbitration’ in Swiss Essays on International Arbitration (C Reymond and E Bucher edn, 1984) 23, 28–33; L Silberman, ‘The New York Convention after Fifty Years: Some Reflections on the Role of National Law’ (2009) 38 Ga J Intl & Comp L 25, 30.

⁽¹⁷⁾Art I(1) provides the following: ‘(. . .) It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.’

The first subsection discusses the extent to which the ELACC and court decisions consider the concept of “non-domestic” awards and admit the parties’ freedom in selecting the *lex arbitri*. The second subsection discusses, from a conflict-of-laws perspective, the conceptual basis relied upon by Egyptian courts in determining the applicable arbitral law.

A. Restrained Autonomy and Denial of Non-domestic Awards

Taking into consideration the fact that the relation between transnational arbitration and the country of the seat may be ‘fortuitous or artificial’,⁽¹⁸⁾ there should be no harm if it were attached to the mandatory stipulations of a procedural law other than that of the seat.⁽¹⁹⁾ This cannot be opposed by the allegation that the supportive role of the courts of the seat categorically requires the arbitration’s subjection to the mandatory stipulations of the domestic arbitral law.⁽²⁰⁾

In principle, conducting the supportive role by the domestic courts does not depend on the existence of a significant connection with the country of the seat.⁽²¹⁾ In *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd.*, Lord Mustill has perfectly clarified that

[N]ational laws may also apply ab-extra Here, the matter is before the court solely because the court happens to have under its own procedural rules the power to assert a personal jurisdiction over the parties, and to enforce protective measures against them. Any court satisfying this requirement will serve the purpose.⁽²²⁾

Therefore, at the comparative level, the award might be considered non-domestic for the purposes of enforcement in case, *inter alia*, at least one of the parties is a non-citizen, his domicile or place of business is located abroad,⁽²³⁾ the subject matter relates to a property

⁽¹⁸⁾See United Nations Conference on International Commercial Arbitration (Travaux Préparatoires), Summary Record of the Fifth Meeting (22 May 1958), UN Doc E/CONF.26/ SR.5, 8 <<https://undocs.org/E/CONF.26/SR.5>>.

⁽¹⁹⁾*cf van den Berg* (n 15) 43 (‘In practice, however, parties rarely agree to arbitrate in one country under the arbitration law of another country. Such agreement is a rather hazardous undertaking’).

⁽²⁰⁾See in this context H Alastair, ‘Lex Arbitri, Procedural Law and the Seat of Arbitration (Unraveling the Laws of the Arbitration Process)’ (2014) 26 S Ac L J 886, 887–93.

⁽²¹⁾Nevertheless, such a connection might sometimes be required in respect of specific interim measures. In *Bank Mellat v Helliniki Techniki SA*, Lord Kerr stated: ‘As it seems to me, the English courts should be slow in applying the jurisdiction to order security for costs in international arbitration unless . . . there is some more specific connection with this country . . . than the mere fact that the parties have agreed that any arbitration is to take place in England.’ [1984] QB 291 (CA) 308 <<http://uniset.ca/other/cs3/1984QB291.html>>.

⁽²²⁾[1993] Adj L R 1, 11 <<http://expertdeterminationelectroniclawjournal.com/wp-content/uploads/2017/04/Channel-Group-LtdAnor-v-Balfour-Construction-Ltd-v-Ors-1993-AC334.pdf>>.

⁽²³⁾See UNCITRAL Guide (n 2) 24.

abroad,⁽²⁴⁾ or the parties have expressly excluded the arbitral law of the seat.⁽²⁵⁾

Whether these instances have been considered by the drafters of the Convention is evident not only in article I (1) of the Convention, but also when the relevant articles under both the New York Convention and the Geneva Convention of 1927 (Geneva Convention) are compared.⁽²⁶⁾ While articles 1(d), 2(a), 3, and 4(2) of the Geneva Convention refer to the country of the seat only, article V(1)(e) of the New York Convention consciously adds the country under whose law the award is made, the provision that should necessarily be read in conjunction with article I(1)'s notion of non-domestic awards.

Despite its declared aim of responding to international arbitration's distinctiveness, the ELACC didn't abandon the territorial tendency that was constantly adopted by the Court of Cassation under the arbitration provisions of the CCPL, in which the arbitration's internationality wasn't specifically considered,⁽²⁷⁾ and imposes its application to all arbitrations conducted in Egypt irrespective of the presence of any transnational factor.⁽²⁸⁾ As a consequence, an arbitral award rendered in Egypt will not be treated as non-domestic, even though the arbitration was transnational, and shall be enforced under the ELACC rather than the Convention. This attitude is contradictory to what is followed, for example, in *LaPine v Kyosera Corp*, where the court held that '[r]espondent Kyocera is not a citizen of the United States. Accordingly, the arbitration agreement and the arbitral award fall under the Convention. That the arbitral award was made in the United States under American law does not change the court's conclusion.'⁽²⁹⁾

Due to the fact that the possibility to select a foreign arbitral law for domestic arbitrations hasn't legislatively been regulated, the Cairo Court of Appeal misrecognized the difference between the institutional arbitration rules and arbitral law and held that 'the arbitral award, delivered under ICC Arbitration Rules referred to by the parties, is a foreign award

⁽²⁴⁾ *ibid.*

⁽²⁵⁾ For example, s 51 of the Swedish Arbitration Act (1999) provides the following: 'Where none of the parties is domiciled or has its place of business in Sweden, such parties may in a commercial relationship through an express written agreement exclude or limit the application of the grounds for setting aside an award as are set forth in section 34. An award which is subject to such an agreement shall be recognised and enforced in Sweden in accordance with the rules applicable to a foreign award.'

⁽²⁶⁾ Convention on the Execution of Foreign Arbitral Awards, Geneva 26 September 1927 <https://www.trans-lex.org/511400/_/convention-on-the-execution-of-foreign-arbitral-awards-signed-at-geneva-on-the-twenty-sixth-day-of-september-nineteen-hundred-and-twenty-seven/>.

⁽²⁷⁾ arts (501-13) of the CCPL were originally set for domestic arbitration and repealed by the ELACC.

⁽²⁸⁾ See text to (nn 61-74).

⁽²⁹⁾ US District Court, no C 07-06132 MHP (ND Cal 22 May 2008) 5 <http://newyorkconvention1958.org/index.php?lvl=notice_display&id=1054&opac_view=6>.

and would be enforceable under the New York Convention, although the arbitration was conducted in Egypt.⁽³⁰⁾

The same problem exists also in regard to international arbitral awards made abroad under the ELACC. This type of awards are enforceable according to the enforcement conditions and procedure of the ELACC although it should be treated as foreign” because it is made in the territory of a State other than where the recognition and enforcement is sought. In *Bharat Aluminium Co v Kaiser Aluminium Technical Service Inc*, it was held that provisions of the enforcement of arbitral awards under the New York Convention applies to the ‘foreign seated arbitration, even if the agreement purports to provide that the arbitral proceedings will be governed by the Arbitration Act, 1996.’⁽³¹⁾

B. Imposing the Arbitration Law as a Lex Fori

While the majority of jurisdictions tend to apply national procedural law to arbitrations conducted domestically in regard to the grounds of setting aside the ensuing award,⁽³²⁾ the conceptual basis of such an application is, from the conflict-of-laws view, crucial.

Prior to the ELACC, Egyptian courts have adopted the bilateral conflict-of-laws rule embodied in article 22 of the Civil Code, which states that “all matters of procedure are governed by the *lex fori*”,⁽³³⁾ as the theoretical basis of determining the nationality of the arbitral award for purposes of either jurisdiction on the setting aside of the award or the enforceability thereof, and whether the seat was in Egypt or another country.⁽³⁴⁾

Notwithstanding that the ELACC’s mandatory application to international arbitrations conducted domestically should be based on a presumption that by selecting Egypt as a seat, the parties have implicitly subjected the arbitration to its arbitral law (ie to be applied as a *lex loci arbitri*), the Court of Cassation, in justifying domestic arbitration’s inevitable subordination to the ELACC, has regularly stated that ‘the judiciary, as one of the functions of the State, must be carried out under its national law of procedure . . . since the undertaking of the judiciary is territorial, the procedure of such undertaking must be territorial as well.’⁽³⁵⁾

⁽³⁰⁾Cairo Ct App, 6 August 2012 (7th Cir no 66-128).

⁽³¹⁾India, Sup Ct, 6 September 2012 (Civ App no 7019-2005) 86 <http://newyorkconvention1958.org/index.php?lvl=notice_display&id=1398&opac_view=6>.

⁽³²⁾See Emanuel Gaillard, ‘International Arbitration as a Transnational System of Justice’16 ICCA Congress Series (2011) 66, 67–68.

⁽³³⁾Law No 131/1948.

⁽³⁴⁾See for arbitrations conducted domestically eg Cass civ 6 May 1969 (no 231-35); 26 April 1982 (no 714-47); 23 December 1991 (no 547-51). See for arbitrations conducted abroad eg Cass civ 1 February 1983 (no 1288-48); 13 June 1983 (no 1259-49).

⁽³⁵⁾See eg Cass civ 13 December 2005 (nos 648-73, 5745-75, 6467-75, and 6787-75); 22 March 2011 (no 145-74). See also

The same reasoning is also adopted to justify foreign arbitration's subjection to the law of the seat,⁽³⁶⁾ but in cases when the ELACC wasn't the agreed arbitral law.⁽³⁷⁾

According to this constant tendency, arbitration, national and international, is equalized to the judiciary of the State where the national law of procedure is applied per se as, and overlooks the fact that the *forum regit processum* doctrine is attached to the judiciary, whose representation and allegiance to a particular set of procedure and substantive laws is ipso jure.⁽³⁸⁾ To the contrary, the arbitrator represents no particular sovereign or legislature, and the constitution of the tribunal or proceedings of a transnational arbitration in a specific country should not entail automatic subordination to its procedural law.⁽³⁹⁾

From the conflict-of-laws perspective, arbitral law of the seat may be applied to arbitration conducted domestically as a *lex arbitri* where the parties have so agreed or, in the absence of an agreement or any significant indicator that helps in localizing the arbitration in a specific country other than that of the seat, as a *lex loci arbitri*.⁽⁴⁰⁾

The applicability of the arbitral law, whether as a *lex arbitri* or as a *lex loci arbitri*, would be under a competency different than that of the law of procedure when applied per se or as a *lex fori*. This is because, while the role of the law of procedure is to administer the judiciary of the State in a strict manner, where the will of the individuals normally vests a limited ambit of freedom, the arbitration law enjoys a distinctive sphere where the derogatory rules have a wider range.

For instance, under the ELACC, as an arbitration law, the parties can agree that the proceedings shall commence on a date other than that of the respondent's receipt of the request of arbitration,⁽⁴¹⁾ the arbitration will be conducted in a language other than Arabic,⁽⁴²⁾ there

Cairo Ct App, 26 March 2003 (91st Cir no 10-119); 26 May 2004 (91st Cir no 83-120).

⁽³⁶⁾See eg Cass civ 27 March 1996 (no 2660-59); 1 March 1999 (no 10350-65); 28 March 2011 (no 1042-73). See also Cairo Ct App, 29 September 2003 (91st Cir no 22-119).

⁽³⁷⁾See (n 66) and accompanying text.

⁽³⁸⁾See E Spiro, 'Forum Regit Processum (Procedure Is Governed By The Lex Fori)' (October 1969) 18(4) ICLQ 949, 949-51.

⁽³⁹⁾See P Lalive, 'Les règles de conflit de lois appliquées au fond du litige par l'arbitre international siégeant en Suisse' (1976) 3 *Review de l' Arbitrage* 155, 159 ('[T]he judge of the State, as necessitated by of the conflict rules of the forum, applies the private international law rules through which the State from which he derives his authority expresses a certain vision on the politico-juridical concepts of delimitation of the legislative jurisdiction of States. The international arbitrator is in a fundamentally different position. He derives his powers from the parties to the arbitration clause and doesn't exercise justice on behalf of any specific country, whether that of the seat or another.') (author tr) <http://www.lalive.law/data/publication/59_regles_de_conflit_de_lois_appliquees_au_fond_du_litige_par_l%27arbitre_international_siegeant_en_Suisse_Rev_de_lArb.pdf>.

⁽⁴⁰⁾See text to (nn 49-57).

⁽⁴¹⁾ELACC, art 27.

⁽⁴²⁾*ibid*, art 29(1).

will be no procès-verbal for the hearings,⁽⁴³⁾ the award will be made by unanimity instead of majority and the arbitral award will not be reasoned.⁽⁴⁴⁾ In contrast, the corresponding provisions under the CCPL, as the courts' national law of procedure, are non-derogatory, so the proceedings commence when the defendant is summoned,⁽⁴⁵⁾ court procès-verbal is unavoidable, the judgment has to be made by the majority and should be reasoned.⁽⁴⁶⁾ Also, Arabic is the court official language.⁽⁴⁷⁾

II. Inequitable Determination of Jurisdiction on Setting Aside

International Arbitral Awards

Although by referring to the country under whose law the award was made, article V(1) (e) of the Convention has taken a step to mitigate the rigid territoriality principle in determining jurisdiction over the setting aside of "transnational" arbitral awards (i.e., both the non-domestic and made-abroad awards), such article has neither received a uniform application nor proved sufficient to solve all practical problems. As will be discussed, this issue has some reflections in the Egyptian arbitration law when note that it has differentiated between international arbitral awards rendered abroad and those are rendered domestically in regard to the jurisdiction over the setting aside thereof.

The first subsection discusses the nature of article V(1)(e) of the Convention from the conflict-of-laws perspective and the way a uniform rule of jurisdiction on setting aside the transnational arbitral awards may be reached.

The second subsection discusses the methodology of the Egyptian judiciary and successive arbitration laws with respect to the jurisdiction over the setting aside of international arbitral awards, whether made domestically or abroad.

A. The Convention's Rule of Jurisdiction on Setting Aside

Foreign and Non-domestic Arbitral Awards

Based on the fact that the grounds for setting aside an arbitral award involve public policy content and are of a nationalistic nature, the Convention avoided the stipulation of any grounds for the setting aside of arbitral awards and instead set forth the rule by which the

⁽⁴³⁾ *ibid*, art 33(3).

⁽⁴⁴⁾ *ibid*, arts 40 and 43(2), respectively.

⁽⁴⁵⁾ CCPL (n 7), art 68(3).

⁽⁴⁶⁾ *ibid*, arts 169 and 179, respectively.

⁽⁴⁷⁾ Egyptian Constitution of 2014, art 2.

jurisdiction thereover is determinable.⁽⁴⁸⁾ Of course, this rule correlates the judicial jurisdiction with the legislative jurisdiction in that the competent court shall necessarily apply its national law to the grounds of nullification.

While such rule of jurisdiction hasn't receive a uniform application at the comparative level, the Convention does not provide a uniform solution in situations when the court of the seat, while considering a setting-aside request, does not identify a substantial connection with its territory or its national arbitral law, or when the enforcement court is confronted with a set-aside decision made by the courts of a country that has no significant connection with the arbitration's backdrops except that of being selected as a seat.

Towards a compatible determination of the country whose law and courts have jurisdiction over the setting aside of transnational arbitral awards national lawmakers must accept the fact that transnational arbitration supposed, by nature, not to be exclusively linked with the country of the seat. Therefore, jurisdiction of the courts of the seat should not be automatic,⁽⁴⁹⁾ and jurisdiction of the courts of the country under whose law the arbitral award was made must be taken into consideration.⁽⁵⁰⁾

In fact, the wording of paragraph (e) of article V(1) of the Convention provides for the non-exclusive jurisdiction of the courts of the seat over the nullification action by expressly stating two alternatives which are the courts of the place of arbitration and the courts of the country whose law has been applied to the arbitration. If the drafters have presumed that the award should anyway be subject to the arbitral law of the place of arbitration, then the phrase "the country in which" would suffice and they wouldn't have added "under the law of which". This interpretation also conforms the principle of the autonomy-of-will in the field of the conflict-of-laws solutions which urges prioritization of the courts of the country of the chosen arbitral law over that of the place of arbitration.

In furtherance of this view, the parties' freedom to exclude the arbitral law of the seat or the setting aside grounds therein, shouldn't be limited to the case where none of them has its domicile or place of business in the country of the seat.⁽⁵¹⁾ Also, the courts of the seat sup-

⁽⁴⁸⁾As one of enforcement's refusal grounds, para (e) of art V(1) of the Convention states the following: 'The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.'

⁽⁴⁹⁾In *Union of India v Hardy Exploration and Production Inc*, it was held that 'a venue can become a seat if something else is added to it as a concomitant. But a place unlike seat. It does not ipso facto assume the status of seat.' India, Sup Ct, 9 September 2018 (no 4628/2018) <<http://indiankannon.org/doc/85584373/>>.

⁽⁵⁰⁾cf CA Giambastiani, 'Lex Loci Arbitri and Annulment of Foreign Arbitral Awards in U.S. Courts' 20 (5) *Am U Intl L Rev* (2005) 1101, 1105–11.

⁽⁵¹⁾cf eg art 192 (1) of the Swiss Private International Law Act of 1987, as revised in 2021 (Swiss PILA).

posed to decline jurisdiction not only when the seat's arbitral law was explicitly excluded,⁽⁵²⁾ but also when strong signs that the award was made under a specific arbitral law exist.

In the *Götaverken* case, the Paris Court of Appeal declined to take jurisdiction over the setting aside of an award rendered in France for the reason that France was identified merely as being a neutral place, and that the arbitral award was rendered following a procedure other than that of French law.⁽⁵³⁾ Likewise, some enforcement courts have noted that primary jurisdiction is to be conferred on the courts of the country under whose law the arbitration was conducted.⁽⁵⁴⁾

Of the cases that the arbitral award should be attached to a jurisdiction other than that of the seat in regard to the question of its setting aside, is when the arbitration is strongly connected to one specific country, though its arbitral law wasn't expressly agreed. In the *National Thermal* case,⁽⁵⁵⁾ for example, the Supreme Court of India has ruled that Indian courts may take jurisdiction over the setting aside of the arbitral award although it was made in a foreign seated arbitration. The Court has stated:

Where there is no express choice of the law governing the contract as a whole, or the arbitration agreement as such, a presumption may arise that the law of the country where the arbitration is agreed to be held is the proper law of the arbitration agreement. But that is only a rebuttable presumption The arbitration clause must be considered together with the rest of the contract and relevant surrounding circumstances The disputes between the parties under the contract had no connection with anything English, and they had the closest connection with Indian Laws, Rules and Regulations.⁽⁵⁶⁾

Lastly, when none of the above assumptions occurred, jurisdiction of the courts of the seat over the setting aside of the award that was made domestically shall be inevitable, and its arbitral law would be applied as a *lex loci arbitri*. As it was held in *Channel Tunnel*, 'in the

⁽⁵²⁾ *ibid.*

⁽⁵³⁾ *Libyan General National Maritime Transport Co v Götaverken Arendal AB*, 21 February 1980 (1st chamber no F 9224) 7 <http://newyorkconvention1958.org/index.php?lvl=notice_display&id=111&opac_view=6>. See for a discussion on this case J Paulsson, 'Arbitration Unbound: Award Detached from the Law of Its Country of Origin' (April 1981) 30(2) *ICLQ* 358, 363–73.

⁽⁵⁴⁾ *In Belize Social Development Ltd v Government of Belize*, the court held that the actions which may justify suspension of the enforcement proceedings should have been made to the courts of England, which wasn't only the country of the seat, but also the country 'under the law of which the award was made.' *US, Ct App*, 13 January 2012, 668 F3d 724 (DC Cir 2012) 731, 733 <<http://caselaw.findlaw.com/us-dc-circuit/1591215.html>>.

⁽⁵⁵⁾ *National Thermal Power Corp v Singer Co*, 1992 (3) SCR 106, 118-25 <<https://indiankanoon.org/doc/633347/>>.

⁽⁵⁶⁾ Notwithstanding that *National Thermal* case was decided under the Arbitration Act of 1940, the same standards were applied under the Arbitration and Conciliation Act of 1996 in *Nirma Ltd v Lurgi Energie und Entsorgung GmbH, Gujarat High Ct*, 19 December 2002, AIR 2003 Guj 145 <<http://indiankanoon.org/doc/1368168/>>.

absence of an explicit choice of this kind, or at least some very strong pointer . . . the inference that the parties when contracting to arbitrate in a particular place consented to having the arbitral process governed by the law of that place is irresistible.⁽⁵⁷⁾

Nevertheless, the fact that the above solutions are severally adopted by some national courts doesn't prevent contradicting decisions, even within the same national judiciary.⁽⁵⁸⁾ Therefore, an exhaustive solution needed to be addressed by the Convention; otherwise, the issue will continue to be controversial and left to odd suggestions.⁽⁵⁹⁾

B. Rules of Jurisdiction on Setting Aside International Awards Made in Egypt or Abroad

Egyptian arbitration laws went through two stages, in neither of them either the jurisdictional rule of article V(1)(e) of the Convention or another jurisdictional localization analysis was followed.⁽⁶⁰⁾ Prior to the ELACC, there was no controversy that jurisdiction over the setting aside of the arbitral award is conferred on the courts of the seat, regardless of whether the parties may have agreed on another arbitral procedural law.⁽⁶¹⁾ This rule has been applied "bilaterally" i.e., for domestic and foreign arbitral awards.⁽⁶²⁾

The second stage began with the ELACC, under the provisions of which the question arose of whether the jurisdiction over the setting aside of an arbitral award rendered abroad under the ELACC would be treated similarly to that of the foreign awards and conferred on the courts of the country where arbitration took place, or on the courts of Egypt as the country of the selected arbitral law.

Some scholars suggest that the parties' agreement to apply the ELACC to an arbitration conducted abroad would not give rise to changing the traditional bilateral jurisdictional rule. According to this part, the parties' agreement in that case should be limited to the regulatory provisions only; however, the courts of the country of the seat still have exclusive

⁽⁵⁷⁾See (n 22) 11.

⁽⁵⁸⁾See eg Bharat Aluminium (n 31) 14 ('the "second alternative" is an exception to the general rule. It was only introduced to make it possible for the award to be challenged in the court of "second alternative", if the court of the "first alternative" had no power to annul the award, under its national legislation.')

⁽⁵⁹⁾See JF Poudret and S Besson, *Comparative Law of International Arbitration* (SV Berti and A Ponti trs, 2nd edn, Sweet & Maxwell 2007) 854 ('In the aftermath of the Hilmarton and Chromalloy cases, various suggestions were made by legal scholars. The most audacious solution was defended by Philippe Fouchard who suggested to exclude any setting aside of international arbitral awards, the sole control of these would therefore be delayed until the request to recognize or enforce in a determined country.')

⁽⁶⁰⁾See text to (nn 49-57).

⁽⁶¹⁾See F Wali, *Arbitration In National and International Commercial Disputes* (Monchaat Al Maaref 2014) 694; S El-Sharkawi, *National and International Commercial Arbitration* (3rd edn, Dar Elnahda 2019) 468-70.

⁽⁶²⁾See (n 34).

jurisdiction over the setting aside of the award i.e., the same treatment of the purely foreign awards.⁽⁶³⁾ Another part are of the view that the jurisdiction over the setting aside in that case should be conferred on Egyptian courts. Paradoxically, however, this part insists that where arbitration takes place in Egypt, jurisdiction should be conferred on Egyptian courts irrespective of any transnational factor.⁽⁶⁴⁾ On the practical side, courts are adopting the traditional “bilateral” rule that, jurisdiction on the setting aside of arbitral awards is conferred on the courts of the seat,⁽⁶⁵⁾ save as to awards made abroad under the ELACC where Egyptian courts should have the jurisdiction.⁽⁶⁶⁾

The lack of an apparent methodology to cover situations where arbitration, though conducted in Egypt, is autonomously subjected to another arbitral law caused a noteworthy legal battle between the Court of Cassation and the Cairo Court of Appeal in *re Libya v Al-Kharafi Co*. The dispute arose from the termination of a ninety-year usufruct contract made under the Unified Treaty for the Investment of Arab Capital in the Arab States 1980 (Unified Treaty) for the development of a tourist project along the Libyan north coast. Al-Kharafi alleged some hardships in commencing the project for about seven years before the contract was terminated by the Libyan government.

After acquiring the approval of the General Secretary of the League of Arab States, Al-Kharafi initiated arbitral proceedings in Cairo in accordance with the Unified Treaty’s Conciliation and Arbitration Annex (Annex). The tribunal awarded Al-Kharafi approximately USD 940 million, of which USD 900 million represented compensation for loss of profit for the remaining usufruct period of eighty-three years.

Libya brought a setting aside action before the Cairo Court of Appeal. The action has been declared inadmissible on the grounds that, in addition to the express wording of article 8 of the Annex that the arbitral award was non-appealable, the Annex was silent in respect of the availability of recourse by a setting aside action.⁽⁶⁷⁾ Libya filed a petition for review with the Court of Cassation, which remanded the case on the grounds that the ELACC *ipso jure*

⁽⁶³⁾See Wali (n 61) 695–7.

⁽⁶⁴⁾See M Abdel-Raouf, ‘Analytical Study for the Egyptian Decisions on the Setting Aside of the Arbitral Awards’ 6 *Journal of Arab Arbitration* (August 2003) 141, 153–4; S El-Sharkawi, ‘The Creative Role of the Judiciary in the Field of International Commercial Arbitration,’ 9 *Journal of Arab Arbitration* (Arabic edn, August 2006) 47, 56–57.

⁽⁶⁵⁾See (nn 35-36).

⁽⁶⁶⁾Notwithstanding that the jurisdiction over the setting aside of an arbitral award made abroad under the ELACC has not been directly tested, some decisions indirectly mentioned that the jurisdiction in such a case should be conferred on Egyptian courts. See *eg* Cairo Ct App, 29 January 2003 (91st Cir no 40-119).

⁽⁶⁷⁾Cairo Ct App, 5 February 2014 (62nd Cir no 39-130).

applies to all arbitrations conducted in Egypt.⁽⁶⁸⁾

For the second time, the Cairo Court of Appeal declined jurisdiction on the grounds that jurisdiction over any questions or disputes that directly stem from the Unified Treaty is exclusively conferred on the “Arab Court of Investment” as an international judicial body independent of the law of procedure of any of the member States,⁽⁶⁹⁾ but the Court of Cassation remanded the case for the second time on the grounds that the question of whether the jurisdiction had categorically been answered under the first reversal.⁽⁷⁰⁾

Upon the second reversal, the Cairo Court of Appeal nullified the award on the grounds that the tribunal had misinterpreted civil liability law and transgressed the disciplines of arbitration, and consequently, the award was repugnant to the public policy.⁽⁷¹⁾ In fact, article 3(2) of the Unified Treaty provides that the provisions of the treaty take priority over the laws and regulations in the member States.⁽⁷²⁾ Also, article 8 of the Annex uses the term “unchallengeable,” which is primarily used to refer to all kinds of legal recourse, including setting aside. Additionally, that decision does not provide clear analysis of how, in an international arbitration, the tribunal’s mistake in the seat’s substantive law or the award’s repugnance to its norms of public policy might constitute grounds for the annulment of the award.⁽⁷³⁾

Eventually, the Court of Cassation overturned the last judgment of the Cairo Court of Appeal on the basis that whether the arbitral award had overestimated the compensation isn’t among the setting aside grounds of article 53 of the ELACC.⁽⁷⁴⁾ By this ruling, the Court confirmed that the ELACC is ipso jure applicable to all arbitrations conducted in Egypt irrespective of whether the parties have agreed for another procedural law.

III. A Quasi-overlapping Scope With The New York Convention

Upon the promulgation of the ELACC, the question has been raised on whether its provisions of enforcement should be followed in regard to the enforcement of the purely foreign

⁽⁶⁸⁾Cass civ 14 November 2015 (no 6065-84).

⁽⁶⁹⁾Decision of 6 August 2018 (62nd Cir no 39-130).

⁽⁷⁰⁾Cass civ 10 December 2019 (no 18615-88).

⁽⁷¹⁾Decision of 3 June 2020 (1st Cir no 39-130). The court stated that ‘principles of equality and proportionality of compensation constitute established principles of the collective rules of public policy. here the compensation is due only for the missing opportunity not for the future missing profit.’

⁽⁷²⁾cf van den Berg (n 15) 63 (‘The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States. This Convention provides for a self-sufficient system of truly international arbitration which is solely governed by the provisions of the Convention and the rules and regulations issued thereunder.’).

⁽⁷³⁾cf M Abdel-Wahab, *Demystifying Public Policy in International Commercial Arbitration: Curbing the Unruly Horse* (English edn, August 2006) 9 *Journal of Arab Arbitration* 39, 53–54.

⁽⁷⁴⁾Cass civ 24 June 2021 (no 12262-90).

awards i.e., awards made abroad but not under the ELACC. This question arose from the fact that the ELACC's enforcement procedure for the international awards is easier than that prescribed under the CCPL for the enforcement of the foreign awards. This is notwithstanding the primitive question of whether international arbitral awards rendered abroad under the ELACC are in the same time "foreign" where the enforcement provisions of the New York Convention should prevail than those of the national laws.

The first subsection discusses the criteria and the significance of internationality adopted by the ELACC. The second subsection discusses the contravention of the Convention's scope and the consequent debate on the enforcement procedure of both foreign and international arbitral awards.

A. A Confusing Criteria and the Limited Significance of the "Internationality" of the Award

In identifying "internationality," the ELACC did not rely on a straightforward criterion, such as the relevancy to the international trade,⁽⁷⁵⁾ or the nondomestic domiciliation of residency or business place of at least one of the parties;⁽⁷⁶⁾ instead, it adopted a compound criteria. While the prologue of article 3 of the ELACC refers to relevance to international trade as a primary criterion, the subsequent paragraphs set forth various propositions.⁽⁷⁷⁾

This complex criterion raises the question of whether the existence of any of the exemplified propositions, including the cases where the parties have agreed to submit their dispute to a permanent arbitral institution situated in Egypt or abroad,⁽⁷⁸⁾ would be sufficient to qualify an arbitration as "international." A group of writers see that these propositions are examples in which the relevancy to the international trade is presumed. Accordingly, the court may also analogize similar situations, as in the case of diversity of citizenship, or when two citizens have agreed to an ad hoc arbitration in a country other than their home country.⁽⁷⁹⁾

⁽⁷⁵⁾See eg the French Code of Civil Procedure, art 1504.

⁽⁷⁶⁾See eg art 176 (1) of the Swiss Private International Law, (n 51).

⁽⁷⁷⁾Article 3 of the ELACC provides the following: 'Within the context of this Law, the arbitration is international whenever its subject matter is a dispute related to international commerce in any of the following cases: (1) If the principal places of business of the arbitrating parties are situated in two different States . . . (2) If the parties to the arbitration have agreed to resort to a permanent arbitral organization or to an arbitration centre having its headquarters in the Arab Republic of Egypt or abroad . . . (3) If the subject matter of the dispute . . . is linked to more than one country (. . .)'

⁽⁷⁸⁾For a critique of such proposition see T Hozayen, 'May the Arbitration Acquiring the Internationality for its Institutional Character?' (2015) 25 Journal of Arab Arbitration 19, 19–26. See also, Y Mansour, 'Insights Into Article 3 of the Egyptian Arbitration Law' (2015) 25 Journal of Arab Arbitration 27, 44–47.

⁽⁷⁹⁾See M Beriry, *International Commercial Arbitration* (4th edn, Dar Elnahda 2004) 23–24; A El-Sawi, *A Digest of*

In contrast, other writers have pointed out that article 3 creates a twofold criterion of internationality according to which relevancy to international trade is required in addition to at least one of the prescribed propositions. In other words, the court has to examine the relevancy to the international trade even with the existence of any of the exemplified situations.⁽⁸⁰⁾

The rulings of the Cairo Court of Appeal have passed through three stages. At the beginning, it was held that while relevance to international trade is a fundamental requirement, at least one of the stipulated propositions must also exist.⁽⁸¹⁾ In the second stage, the court held that the existence of any of those instances, including in cases where the dispute was submitted to a permanent arbitration institution in Egypt, would be solely sufficient for the award to acquire internationality.⁽⁸²⁾ In recent decisions, the court has reverted to its earlier view.⁽⁸³⁾

Taking into account that the ELACC does not differentiate between domestic and foreign arbitral awards but rather differentiates national from international awards that are made abroad or domestically, the main question remains whether such differentiation bears considerable significance.

In fact, the significance of differentiating between the two types of arbitration under the ELACC is limited to the court that is competent to act in support of arbitration, on the one hand, and that is competent to decide upon the enforcement or the nullification of the arbitral award, on the other hand. For national arbitration, the court of first instance that originally had jurisdiction over the disputed matter would have the competence to act in support to arbitration and to decide upon the exequatur application of the ensuing arbitral award.⁽⁸⁴⁾ The setting-aside action of that type of awards is to be brought before the court of appeal that has competence over the aforementioned court of first instance.⁽⁸⁵⁾ For international commercial arbitration, whether conducted in Egypt or abroad under the ELACC, the Cairo Court of Appeal acts in support of arbitration, decides on the enforcement action, and adjudicates the setting aside of the ensuing award, unless the parties agree on another appellate court in Egypt.

Arbitration (4th edn, Dar Elnahda 2013) 48–50; Wali (n 61) 64–67.

⁽⁸⁰⁾See AA Salama, *Arbitration and Amicable Dispute Resolution in Intellectual Property Disputes* (Dar Elnahda 2017) 215.

⁽⁸¹⁾Cairo Ct App, 25 June 1996 (50th Cir no 45-111); 19 March 1997 (63rd Cir no 64-113); 30 March 2004 (91st Cir no 25-120); 9 January 2007 (7th Cir nos 43/123 and 44-123); 23 April 2007 (108th Cir no 105-123).

⁽⁸²⁾Cairo Ct App, 6 September 2010 (7th Cir no 10/127); 2 November 2011 (7th Cir no 13/2011).

⁽⁸³⁾Cairo Ct App, 8 February 2012 (7th Cir no 23-128); 8 May 2013 (62nd Cir no 8-130). See also Cass civ 21 January 2016 (no 5162-79).

⁽⁸⁴⁾ELACC, arts 9 and 56.

⁽⁸⁵⁾*ibid*, art 54(2).

Since the exequatur request for a national arbitral award is decided upon by the court of first instance, its decision would be appealable. Conversely, since enforcement of an international award is decided upon by the Cairo Court of Appeal, its decision would be non-appealable and, therefore, the only remaining route to challenge that decision shall be the cassation. Lastly, since the setting aside of both types of awards is to be decided by a court of appeal, the set-aside decision would be challengeable before the Court of Cassation as a court of law. Beyond those limited differences, both types are subject to the same provisions, including, as will be explained in the following subsection, enforcement provisions.

B. Debatable Enforcement Procedure for Foreign Arbitral Awards

According to the Convention, the arbitral award would be “foreign” for the mere fact that it was made outside the country of enforcement, and therefore should be enforced under the Convention’s provisions rather than those under the national laws, and regardless of whether the award is characterized as “international” by the law of the enforcement country or that that law was chosen as a *lex arbitri*.⁽⁸⁶⁾ This conception has not been maintained by the ELACC since it has subjected the enforcement of the international made-abroad awards to its enforcement provisions for the reason that the ELACC has been chosen as a *lex arbitri*.

The point is that, enforcing the arbitral award that was made abroad under the ELACC according to its enforcement provisions, rather than that of the Convention, bears some important differences. For example, according to article 58(1) of the ELACC, the enforcement of an international arbitral award, whether made domestically or abroad, cannot be requested during ninety days following the date of notifying the award to the party against whom it was made, the period in which the nullification action could be filed. Of course, this limitation does not exist under the Convention.

Further, enforcing international arbitral awards through the exequatur process under the ELACC has, in turn, triggered a debate on the enforcement procedure for purely foreign awards, or awards made abroad not under the ELACC, which supposed to be enforced through the ordinary adversarial lawsuit proceedings under the CCPL.⁽⁸⁷⁾ A group of commentators are of the view that according to the wording of article 1, the ELACC’s exequatur process would be followed only when the award was made abroad under the ELACC; otherwise, the adversarial enforcement proceedings stipulated for in article 297 of the CCPL

⁽⁸⁶⁾See van den Berg (n 15) 40.

⁽⁸⁷⁾Prior to ELACC, the Court of Cassation consistently ruled that enforcement of foreign arbitral awards should be sought through adversarial proceedings. See eg Cass civ 21 May 1990 (no 815-52); 16 July 1990 (no 2994-57).

should be followed.⁽⁸⁸⁾

Another group see that the adversarial procedure should be followed whenever the award was made abroad, even it was subject to the ELACC. According to this group, the enforcement procedure of the ELACC constitutes the canon of all types of arbitral awards, while the enforcement provisions of the CCPL is exceptional and prescribed for the awards made abroad and must therefore be applied a priori.⁽⁸⁹⁾ Further, the CCPL's respective provisions are of a public policy nature that cannot be derogated by the parties' agreement.⁽⁹⁰⁾ This view has been endorsed by some decisions of the Cairo Court of Appeal.⁽⁹¹⁾

A third group embraces the view that the process of exequatur should be followed whenever the award was made abroad, even it wasn't subject to the ELACC.⁽⁹²⁾ According to this group, the adversarial procedure of the CCPL is more "onerous" than the exequatur proceedings and, therefore, the former procedure doesn't satisfy the guidance of article III of the Convention. This view has also been adopted in some decisions of the Cairo Court of Appeal.⁽⁹³⁾

The position of the Court of Cassation has been oscillatory. In one of its decisions, the Court adopted the view that the enforcement procedure under the ELACC is easier than that of the CCPL, and be followed for the enforcement of arbitral awards rendered abroad, even in cases where the arbitration was not conducted under the ELACC.⁽⁹⁴⁾ In another decision, the Court held that the agreement of the parties to apply the ELACC is required to follow its easier enforcement procedure; otherwise, the adversarial lawsuit should be followed.⁽⁹⁵⁾ In a recent decision, the Court retreated to its earlier opinion that the exequatur

⁽⁸⁸⁾El-Sharkawi (n 61) 528–31; Beriry (n 79) 291–3.

⁽⁸⁹⁾See F Wali, 'The Role of the Judge in Granting the Enforcement to the Arbitral Awards' (Arabic edn, August 2006) 9 *Journal of Arab Arbitration* 209, 214–24. See also A Zamzam, *An Illustration of Arbitration Law* (2nd edn, Dar Elnahda 2014) 317–23.

⁽⁹⁰⁾See Wali (n 61) 666–7 ('Because the procedures to grant enforcement to a foreign arbitral award relate to the sovereignty of the State, and that the determination of both the competency to issue the order and the instrument of resorting to the judiciary to obtain an enforcement order relate to public order . . . hence the procedures of ordering enforcement of the foreign arbitral awards set forth in the Civil and Commercial Procedure Law relate to public order.').

⁽⁹¹⁾Decisions of 17 February 1999 (63rd Cir no 76-115); 27 July 2003 (9th Cir no 7-120); 27 March 2007 (91st Cir no 43-122); 5 May 2009 (7th Cir no 29-125).

⁽⁹²⁾B Amrallah, 'Tendencies of the Egyptian Judiciary Regarding the Enforcement of Foreign Arbitral Awards in Light of the New York Convention 1958 and the UNCITRAL Model Law' (Arabic edn, August 2006) 9 *Journal of Arab Arbitration* 255, 256–8.

⁽⁹³⁾Decisions of 23 May 2001 (8th Cir no 15-116); 18 January 2005 (75th Cir no 10-122); 14 April 2005 (75th Cir no 17-122).

⁽⁹⁴⁾Cass civ 10 January 2005 (no 960-73).

⁽⁹⁵⁾Cass civ 23 February 2010 (no 913-73).

process under the ELACC complies with the requirement of article III of the Convention.⁽⁹⁶⁾

IV. Enforcement of Annulled Arbitral Awards

In Comparative And Egyptian Dictum

While in the *Götaverken* case, France was the country of the seat of arbitration,⁽⁹⁷⁾ the view that international arbitration should be legally liberalized, except from subjection to the so-called international public policy, has also been maintained where France was the country of enforcement. In a series of well-known decisions,⁽⁹⁸⁾ it was held that article VII(1) of the New York Convention neutralizes the grounds of refusal of enforcement found in article V(1)(e) in favor of the refusal grounds in the French law.⁽⁹⁹⁾

Of these decisions was that of *Egypte v Chromalloy*, in which the Paris Court of Appeal confirmed the enforcement order that was granted to an arbitral award rendered in Egypt although it was annulled by the Cairo Court of Appeal.⁽¹⁰⁰⁾ Few months earlier, enforcement of the same arbitral award was granted by a US district based on the authority given to the enforcement court by article VII(1) of the Convention.⁽¹⁰¹⁾

Influenced by the above decisions and motivated by the desire to promote the efficacy of international arbitration, some writers have asserted that, except to what has been agreed by the parties,⁽¹⁰²⁾ an international arbitral award is unattached to any national legal system, and, therefore, the annulment decision of the country of the seat, if any, shouldn't have any hindrance effect on the enforcement of the award abroad.

Of course, the idea that international arbitral awards are "stateless" hasn't receive much support on the basis that the validity of an act should be determined by reference to a spe-

⁽⁹⁶⁾Cass civ 6 April 2015 (no 15912-76).

⁽⁹⁷⁾(n 53).

⁽⁹⁸⁾For an extensive discussion on the *Norsolor*, *Hilmarton* and *Chromalloy* cases see E Gaillard, 'The Enforcement of Awards Set Aside in the Country of Origin' 14(1) *ICSID Rev/FILJ* (Spring 1999) 16, 19-31.

⁽⁹⁹⁾See J Paulsson, 'May or Must under the New York Convention: An Exercise in Syntax and Linguistics' 14(2) *Arbitration Intl* (1 June 1998) 227 ('In France, ironically, it does not matter what article V(1) says, since courts there rule on enforcement applications without need to the New York Convention. They are able to do so because article VII of the New York Convention requires enforcement jurisdictions to allow applicants to rely on treaties or laws that are more favourable than the Convention itself. Article 1502 of the French Code of Civil Procedure allows a smaller range of objections to enforcement than those defined in the New York Convention.')

⁽¹⁰⁰⁾*République arabe d'Egypte v Société Chromalloy Aero Services, France*, Cour d'appel de Paris, 14 January 1997 (n° 95-23025) 3, 4 <https://newyorkconvention1958.org/index.php?lvl=notice_display&id=147&opac_view=6>.

⁽¹⁰¹⁾*Chromalloy Aeroservices v Arab Republic of Egypt*, 939 F Supp 907 (DDC 1996) 914 <<https://casetext.com/case/matter-of-chromalloy-aeroservices-arab-republic>>.

⁽¹⁰²⁾See J Paulson, 'Arbitration Unbound' (n 53) 363-72, 375-6. See also writers cited by L Silberman (n 16) fn 9, and by van den Berg (n 15) fn 102.

cific law and not to itself,⁽¹⁰³⁾ and that perusing article V(1)(e) in conjunction with other provisions reveals that that type of awards were not conceivable under the Convention.⁽¹⁰⁴⁾ According to some writers, the refusal grounds under article V(1)(e) must not be eliminated since a losing party must be afforded the right to have the validity of the award finally adjudicated in one jurisdiction. If that were not the case, in the event of a questionable award a losing party could be pursued by a claimant with enforcement actions from country to country until a court is found, if any, which grants the enforcement.⁽¹⁰⁵⁾

In the context of the *Chromalloy* decisions, some Egyptian writers held that article VII(1) of the Convention might deceptively be relied upon to deny *res judicata* of the setting aside judgements of the country of the seat.⁽¹⁰⁶⁾ The way that the French courts interpreted and applied article VII(1) was entirely objected by some writers to the extent that they call for the Convention to be abandoned.⁽¹⁰⁷⁾

On the other hand, it could be said that contentions of some writers that article V(1)(e) was not intended to be a binding jurisdictional rule,⁽¹⁰⁸⁾ are open to doubt:

First, the discretion of the enforcement court in whether to stay the proceedings pending the decision on the nullification action is not an evidence that a set-aside judgment could anyway be bypassed.⁽¹⁰⁹⁾ In reaching a conclusive “decision on enforcement” the court might not need to wait for the outcome of the nullification action, whatever that outcome may be. For instance, refusal of enforcement would be definitive if the subject matter was, according to the law of the enforcement country, inarbitrable.⁽¹¹⁰⁾ Equivalently, in the absence of other influential factors, there will be no logic to stay the enforcement if the only grounds of the

⁽¹⁰³⁾See Poudret and Besson (n 59) 95–96 and 851–2; L Silberman (n 16) 29–31. See also *Bank Mellat* (n 21) 301, 303.

⁽¹⁰⁴⁾van den Berg (n 15) 60–64.

⁽¹⁰⁵⁾AJ van den Berg, *The New York Arbitration Convention of 1958* (Kluwer Law and Taxation 1981) 355; Poudret and Besson (n 59) 854 ([T]his solution increases the risk of contradicting decisions by enabling each state to “decide the degree of liberalism which it intends to apply” with respect to the foreign awards. Second, it is a source of legal uncertainty. It rests on a presumptuous conviction that the jurisdiction(s) of the places of recognition and enforcement are more trustworthy than the one of the seat chosen by all parties.) See also *Baker Marine Ltd v Chevron Ltd*, 191 F 3d 194 (2nd Cir 1999) 197 <<https://casetext.com/case/baker-marine-nig-ltd-v-chev-nig-ltd>>.

⁽¹⁰⁶⁾See I Ahmed, ‘Some Practical Problems Faced by Arab Arbitration’ (May 2016) 2 *Journal of Arab Arbitration* 169, 172–3.

⁽¹⁰⁷⁾See A El-Ahdab, ‘Is it the Time to Abandon the New York Convention on the Recognition of Foreign Arbitral Awards?’ (May 2016) 2 *Journal of Arab Arbitration* 107, 115–17.

⁽¹⁰⁸⁾See E Gaillard (n 98) 33–35; J Paulsson, ‘Arbitration Unbound’ (n 53) 363–73.

⁽¹⁰⁹⁾See J Paulsson, ‘May or Must’ (n 99) 228–29. cf E Gaillard (n 98) 33.

⁽¹¹⁰⁾For a discussion on the law governing arbitrability when a national court is called upon to recognize an arbitration agreement or enforce a foreign arbitral award see H Arfazadeh, ‘Arbitrability under the New York Convention: The *Lex Fori* Revisited’ (1 March 2001) 17(1) *Arbitration Intl* 73, 79–83.

alleged nullity is repugnant to the public policy of the enforcement country.⁽¹¹¹⁾

Second, acknowledging the impact of the set-aside judgment on the enforceability of arbitral awards does not constitute a return to the “dual exequatur” system of the Geneva Convention.⁽¹¹²⁾ In the era of that convention, arbitral awards were appealable in the majority of jurisdictions and, therefore, the convention wanted to cover the assumption where the award has been set-aside through an original lawsuit though it was final because of its non-appealability or statute of limitations.⁽¹¹³⁾ The New York Convention’s disregarding of the appealability while keeping the annulment decisions as one of the grounds of refusal of enforcement proves that the potential effect of such decisions on enforcement cannot be overpassed.

Third, the fact that the enforcement court is not bound to automatically grant enforcement in case the set-aside action was dismissed by the courts of the seat does not mean that the set-aside decision shouldn’t, analogously, have any negative effect on the enforcement of the arbitral award. The language of the Convention is neutral in either case, so that the judgements of the courts of the seat do not have an automatic effect on the enforcement of the award. According to the settled principles of private international law, whether a foreign judgement is eligible for recognition would be verified by the judge, whatever the subject of that judgment was.⁽¹¹⁴⁾

Finally, the fact that the enforceability of the arbitral award under the Convention is not dependent on whether the law of the country of the seat allows recourse through the setting aside supports the proposition that the jurisdiction of the country of the seat over the setting aside of the arbitral award is not exclusive rather than the proposition that annulment decisions have no impact on the enforcement of the award.⁽¹¹⁵⁾ According to the laws referred to by the argued opinion,⁽¹¹⁶⁾ exclusion of setting aside recourse is conditional on the nonexistence of any significant link with the country of the seat; which means that the arbitration is more connected with another country.⁽¹¹⁷⁾

⁽¹¹¹⁾See text to (nn 120–22).

⁽¹¹²⁾cf E Gaillard (n 98) 33; J Paulsson, ‘Arbitration Unbound’ (n 53) 373.

⁽¹¹³⁾Geneva Convention (n 26), arts 1(d) and 2(a).

⁽¹¹⁴⁾cf writers cited by L Silberman (n 16) fn 19.

⁽¹¹⁵⁾cf E Gaillard (n 98) 34–35.

⁽¹¹⁶⁾For example, art 78(6) of the Tunisian Arbitration Law of 1993 provides the following: ‘The parties who have neither domicile, principal residence, nor business establishment in Tunisia, may expressly agree to exclude totally or partially all recourse against an arbitral award.’ See also art 192 of the Swiss Private International Law, (n 51).

⁽¹¹⁷⁾See eg text to (n 55)

Nevertheless, the question remains: how can the discrepancy between the potential implication of the annulment judgment under article V(1)(e) and appealing to the more favorable domestic law provisions under article VII(1) be reconciled?

Of course, suggestion that availing of the more favorable domestic law of the enforcement country should be limited to procedure and questions of proof has no clear basis, and makes no sense,⁽¹¹⁸⁾ taking into account that article III of the Convention already refers to the law of the forum in that regard. To prove that articles V(1)(e) and VII(1) of the Convention are non-contradictory, it has to be recalled that all of the grounds of the setting aside are of a public policy nature,⁽¹¹⁹⁾ and they may conform or intersect between relevant laws. This means, while it is certain that the annulment grounds conforms the public policy of the seat, it may contradict the public policy of the enforcement country.

In almost all of the decisions in which the more favorable domestic law provisions were invoked against the set-aside judgment of the country of the seat, the point examined by the judgment negatively touches the national public policy of the country of enforcement in cases where the foreign judgment would generally be denied enforceability.⁽¹²⁰⁾

In denying the recognition of the annulment decision of the Cairo Court of Appeal, the District Court of Columbia stated that '[t]he U.S. public policy in favor of final and binding arbitration of commercial disputes is unmistakable A decision by this Court to recognize the decision of the Egyptian court would violate this clear U.S. public policy.'⁽¹²¹⁾

Also, while the decision of *Hilmarton* was an inspiring example of the so-called legal delocalization of international arbitration, the public policy of the enforcement country was indirectly involved. The court stated that 'the award rendered in Switzerland is an international award . . . and its recognition in France is not contrary to the public policy.'⁽¹²²⁾

The above reveals that, the more favorable domestic law provisions may not prevent the recognition of the annulment judgment in all cases. The focal point is to examine whether recognizing the basis underlying the nullification judgment would undermine the public

⁽¹¹⁸⁾See F Wali (n 61) 651–9.

⁽¹¹⁹⁾cf van den Berg, *The New York Arbitration Convention* (n 105) 355. ('The possible effect of this ground for refusal is that, as the award can be set aside in the country of origin on all grounds contained in the arbitration law of that country, including the public policy of that country, the grounds for refusal of enforcement under the Convention may indirectly be extended to include all kinds of particularities of the arbitration law of the country of origin. This might undermine the limitative character of the grounds for refusal listed in Article V.')

⁽¹²⁰⁾This could also be considered one of the applications of article V(2)(b) of the Convention.

⁽¹²¹⁾(n 103).

⁽¹²²⁾See E Gaillard (n 98) 22–23.

policy of the enforcement country. That is to say, beyond the public policy concerns, the mere difference between the law of the enforcement country and that of the country of origin in regard to annulment grounds would be insufficient to deprive the annulment judgment of its effect on the enforcement of the arbitral award.

Conclusion

International arbitration's need for harmonious national laws has become an incontestable fact. However, an arbitration law may lose its functional significance if fundamental concepts are unclear, discordant, or obscurely handled by national courts. In that regard, whether the conceptual principles upon which a national arbitration law is anchored are in full concurrence with those of the international instruments and comparative standards might not be the hurdle, but clear and comprehensive treatment is essential for deciding whether an international trade dispute would be better arbitrated in, or under the law of, one country or another.

From the view of the internationally settled objectives, Egyptian arbitration law is in crucial need of a reform that serves legal certainty so that the arbitrating parties trust that conducting their arbitration in Egypt, or under its arbitration law, will not end in unforeseen consequences.

The cornerstone is to standardize the jurisdictional rule of setting aside international arbitral awards in all conceivable situations. Globalizing businesses and recent developments in private international law have adjusted the territoriality concept in favor of the autonomously selected law or the law which has the most significant connections with the arbitration.

Accordingly, while Egyptian courts should have jurisdiction over the setting aside of an arbitral award made abroad under the Egyptian arbitration law, they should nevertheless decline such jurisdiction when the arbitration, though conducted domestically, was subjected, or should be attached, to another arbitral law. Simultaneously, enforcement provisions of the New York Convention should be applied whenever the arbitral award is made abroad, even made under the Egyptian arbitration law. It also supposed to be applied for the enforcement of transnational arbitral awards made domestically under another arbitral law.

Abbreviations:

Am U Intl L Rev	The American University International Law Review	American University College of Law, Washington
Arbitration Intl	Arbitration International	London Court of International Arbitration
Colum L Rev	Columbia Law Review	Columbia Law School USA
Ga J Intl & Comp L	The Georgia Journal of International & Compara- tive Law	Georgia School of Law, USA
ICCA Congress Series	ICCA Congress Series	International Council for Com- mercial Arbitration
ICLQ	International & Compara- tive Law Quarterly	Cambridge University Press
ICSID Rev/FILJ	ICSID Review of Foreign Investment Law Journal	Oxford University Press
Intl Lawyer	The International Lawyer	American Bar Association
Pace L Rev	Pace Law Review	Pace Law School, Pace Univer- sity, New York
Review de l' Arbitrage	Review de l' Arbitrage	Comité français de l' arbitrage, France
S Ac L J	Singapore Academy of Law Journal	Singapore