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Are Arbitral Anti-Suit Injunctions Enforceable before Egyptian Courts?

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In May 2018, the Cairo Court of Appeals issued an intriguing judgment concerning the enforcement of an **arbitral interim measure**. In the words of the Court, the arbitral tribunal has issued a procedural order against Damietta International Ports (“**DIP**”) ordering the latter to refrain from suing the guarantor bank regarding the liquidation of a letter of guarantee issued in favor of DIP (“**Order**”). The Order was, in fact, an anti-suit injunction. DIP raised three arguments against the enforcement of the Order as follows:

1. The Order is issued in favor of the guarantor bank which is rather a third party and is not a party to the arbitration agreement;
2. The Order is a temporary conservative order and is not a final conclusive arbitral award, and therefore lacks the required *res judicata* effect to be enforced before Egyptian Courts; and
3. The Order contravenes Egyptian public policy because it orders DIP to refrain from litigating a non-arbitral party in Egypt.

The Cairo Court of Appeals held explicitly that interim orders are covered by the New York Convention, provided that:

1. The interim order is final;
2. The interim order is issued based on a valid arbitration agreement;
3. Both parties were offered the opportunity to present their case in the arbitration; and
4. The interim order does not violate the Egyptian public policy.

Upon applying these criteria, the court determined that the Order satisfied all of these requirements. The question then becomes whether the Order in question was actually a final or a temporary one. In reciting the facts of the judgment, the Cairo Court of Appeals referred to the Order as a “procedural order providing for temporary and conservatory measures.” However, it seems that the Court has surprisingly reversed its opinion in its holding by considering that the Order was final rather than temporary.

On a side note, the final ICC award in this case was issued in January 2018, while the Cairo Court of Appeals reviewed the enforcement of the Order in May 2018. It is not clear whether the Order was later amended by the ICC arbitral tribunal in its final award.

If the Order was, in fact, a temporary one rather than a final one, then we should begin by citing

Mr. Bravin who indicates that:

“The New York Convention has an enforcement regime that applies to awards. National courts that have applied the Convention have pretty uniformly concluded that an order imposing a provisional measure for relief is not an award. National courts cannot look to the Convention for authority to enforce such interim orders. It is not there.”¹⁾

In this regard, an order imposing a provisional temporary relief cannot be considered an award. Therefore, a clear distinction should have been made by the court between a temporary arbitral award that provides for a temporary relief, and interim awards that decide upon a certain issue in a final and conclusive manner. The reason why temporary arbitral orders are consistently not considered within the scope of the New York Convention is that temporary arbitral orders are usually accompanied with fewer integral formalities than arbitral awards. For example, a temporary arbitral order can be issued by the presiding arbitrator solely, and without any reasoning. Also, in the case of an ICC arbitration, a temporary arbitral order would not be subject to the typical scrutiny process followed by the ICC Court of International Arbitration with respect to arbitral awards. In a nutshell, temporary arbitral orders are not accompanied by the same safeguards accompanying arbitral awards. Further, article 298 of the Egyptian Code of Civil and Commercial Procedure (which concerns the provisions pertaining to the enforcement of foreign arbitral awards in Egypt) mandates that the foreign arbitral awards have the *res judicata* effect, and contain a decision upon the substantive matters of the dispute.

Furthermore, allowing an anti-suit injunction is still a blatant violation of the Egyptian Constitution and the Egyptian public policy.²⁾ This is because the Order was restricting the right of an arbitral party to sue a non-arbitral party (a third party). This is, in fact, an extension of a benefit to a non-party to the arbitration agreement. Arbitral tribunals should not be considered to have any authority to create rights for third parties. The Cairo Court of Appeals concluded that it does not have the authority to delve into the merits of the Order. The fact of the matter is that public policy mandates the reviewing courts to delve into the merits of the arbitral awards to a certain extent to verify their compliance with the public policy principles of the place of enforcement.

Furthermore, several other civil-law jurisdictions have uniformly considered that arbitral anti-suit injunctions violate their national public policy. In the words of a German Court dealing with an arbitral anti-suit injunction it stated that “such injunctions constitute an infringement of the jurisdiction of Germany.”³⁾ Moreover, Jean-François Poudret and Sébastien Besson assert that it is unlikely that an arbitral anti-suit injunction would be enforced under the auspices of the New York Convention. This is because it is an order and not an award⁴⁾ In this regard, a recent study reiterated the fact that anti-suit injunctions “will remain unrecognized under Egyptian law” unless article 298 undergoes an amendment by the Egyptian Legislative Authority.⁵⁾

In conclusion, the Cairo Court of Appeals might have filled a void, but sorrowfully, it did so at the expense of confusing temporary arbitral orders with interim awards under the New York Convention, and also at the expense of fundamental rights under the Egyptian Constitution. Luckily, this is not a final conclusive judgment, and it is currently in the process of being reviewed

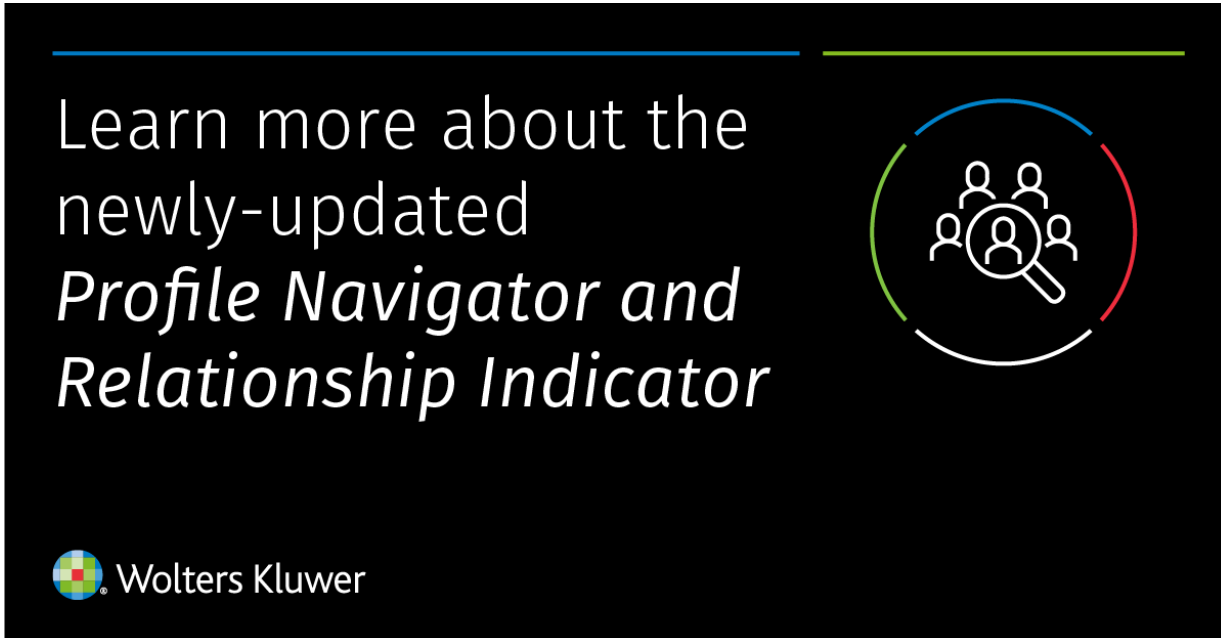
by the Egyptian Court of Cassation.

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References

- ?1 Ziyeva, *Interim and Emergency Relief in International Arbitration* (2015), at p.147.
- ?2 Article (97) of the Egyptian Constitution provides that “Litigation is a safeguarded right guaranteed to everyone.”
- ?3 Judgment of 10 January 1996, *Re the Enforcement of An English Anti-Suit Injunction*, 3 VA 11/95, [1997] I.L.Pr. 320 (Oberlandesgericht Düsseldorf).
- ?4 Jean-François Poudret, Sébastien Besson, *Comparative Law of International Arbitration* (2nd edn, Sweet & Maxwell, 2007) para. 639.
- ?5 Shalaan, Wael S. E. *Interim Measures in International Commercial Arbitration – A Comparative Study of the Egyptian, English and Scottish Law*.

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