Court of Cassation Reaffirms That Public Order Defences Cannot Be Overlooked in the Enforcement of Foreign Arbitral Awards

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Dispute Resolution | Apr 20, 2024

Court of Cassation (Civil and Commercial Circuit)

20 April 2024

Appeal No. 14385 of Judicial Year 91

The Egyptian Court of Cassation quashed a Court of Appeal judgment ordering the enforcement of a foreign arbitral award after finding that the latter had failed to examine the appellant's substantive argument that enforcement of the award would violate Egyptian public order. **Referring to the 1958 New York Convention, the Court noted that recognition and enforcement may be refused where a ground under Article V is established, including a violation of public order.**

Facts:

In the context of a contract dated 4 March 2015 concerning the supply of French durum wheat, a dispute arose between the parties, which was referred to arbitration. On 29 January 2019, the Grain and Feed Trade Association (GAFTA) issued award No. 4524 of 2019, ordering the appellant company to pay EUR 3,275,036.90 as compensation for damages sustained by the respondent. The respondent then applied to the President of the Cairo Court of Appeal for enforcement of the award. That application was initially refused.

The respondent challenged the refusal before the Cairo Court of Appeal, which annulled it and ordered enforcement of the arbitral award. Before that court, the appellant argued that enforcement should not be permitted because it would violate Egyptian public order. The appellant maintained that the wheat shipment underlying the dispute had contained seeds of the cannabis plant — classified as a narcotic substance under Egyptian law — and that the Egyptian Public Prosecution had investigated the matter under Criminal Case No. 15681 of 2015, Montazah II. It further contended that technical evidence had established that the cannabis seeds could not be completely separated from the wheat, and that the compensation awarded by GAFTA in fact included, among other items, expenses relating to unloading the shipment and sorting and destroying the cannabis seeds. On this basis, the appellant argued that enforcing the award in

Egypt would effectively give legal effect to dealings in a substance which the legislator has criminalized in all its forms, given that such dealings contravene the rules designed to protect the public interest of the country.

Because the Court of Appeal failed to address this argument, the appellant company appealed by way of cassation against its judgment.

The Court of Cassation Decision:

The Court first stated that:

> *"...it has been established—in the jurisprudence of this Court—that the provision in Article (1) of Law No. 27 of 1994 concerning arbitration in civil and commercial matters stipulates that "Without prejudice to the provisions of international conventions in force in the Arab Republic of Egypt, the provisions of this Law shall apply to any arbitration between parties governed by public or private law, regardless of the nature of the legal relationship surrounding the dispute, provided that such arbitration takes place in Egypt or, if it is commercial arbitration conducted abroad, the parties have agreed to submit it to the provisions of this Law..." This indicates that the legislature has limited the application of this Law to arbitration conducted in Egypt, and that it does not apply to any arbitration conducted outside the country unless it is international commercial arbitration in which the parties have agreed to submit to its provisions..."*

Having said that, the Court emphasized that

> *"However, if the awardee seeks enforcement in Egypt, he must file a lawsuit through the ordinary procedures in accordance with the provisions of the Egyptian Code of Civil and Commercial Procedure (Articles 296 et seq.) and the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which Egypt acceded by Presidential Decree No. 171 of 1959, issued on February 2, 1959, and which entered into force as law on June 8, 1959. Articles 1 and 2 of the Convention require each contracting state to recognize the binding force of foreign arbitral awards and to enforce them in accordance with its domestic procedural rules, unless the party against whom enforcement is sought proves the existence of one of the five cases listed exhaustively in Article V, paragraph (1), of the Convention, namely: (a) lack of capacity of the parties to the arbitration agreement or its nullity; (b) failure to be duly notified of the appointment of the arbitrator or of the arbitration proceedings, or the impossibility of presenting a defence for any other reason; (c) the award exceeding the scope of the arbitration agreement or clause; (d) the composition of the arbitral*

tribunal or its procedures being contrary to the agreement of the parties or, in the absence of such agreement, to the law of the country in which the arbitration took place; (e) the award has become non-binding on the parties, has been set aside, or has been suspended; or it is determined by the enforcement judge, in accordance with the second paragraph of the aforementioned article, that it was not legally permissible to resort to arbitration to settle the dispute, or that enforcement of the award would violate public order.

The existence of any of these grounds shall result in the court accepting the defence and refusing to issue an order for enforcement. Although the Civil Code does not define what is meant by 'public order', it is generally agreed that it encompasses the rules aimed at achieving the public interest of the country—whether political, social, or economic—which relate to the natural, material, and moral condition of an organized society and take precedence over the interests of individuals; This is a relative concept; in determining its content, the judge is bound by the prevailing general trend regarding it in his country and at his time, which makes it a legal matter subject to the oversight of the Court of Cassation—and therein lies a major guarantee that this determination is based on objective grounds. Furthermore, any claim or defence raised before the trial court—and which the court has been explicitly requested to address and decide—that may affect the course of the proceedings or alter the outcome must be examined by the trial court, which must state its opinion regarding its substance and implications and respond to it with specific reasoning; otherwise, its judgment would be devoid of grounds and deficient in reasoning....”

In light of that, the Court of Cassation decided that since the impugned judgment ordered the enforcement of the arbitral award without examining the appellant company's public order argument— although it was a substantive defence which, had it been established, could have changed the outcome of the case — the judgment was defective in its reasoning and violated the right of defence. Therefore, the Court of Cassation quashed the judgment and remitted the case for reconsideration.

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