

# THE ROLE OF LEGISLATIVE ENACTMENT OF INTERNATIONAL ARBITRATION IN ENSURING INVESTMENT

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## Abstract:

The developments taking place in the world, especially with the entry of the private sector into major infrastructure projects, have led to the emergence of new opportunities in the field of investment guarantees, accompanied by new risks. These developments have prompted countries to enact laws that facilitate investment and encourage foreign investors, including providing legal guarantees such as international arbitration to settle disputes away from national jurisdiction. International arbitration provides investors with reassurance that they are not subject to the jurisdiction of another country, and helps attract foreign investment.

**Keywords:** International arbitration, foreign investment, investment disputes, national judiciary.

## INTRODUCTION:

The continuous developments, particularly with the involvement of the private sector in infrastructure projects and large-scale, sometimes multinational ventures, have created opportunities for new activities in the field of guarantees. These opportunities have come with accompanying risks, necessitating the establishment of mechanisms and laws to address these new risks and facilitate and encourage the investment process.

Within this context, the concept of security emerged as a means to attract foreign investors to contribute to the development of the country's national economy. Countries began enacting laws to facilitate the investment process, in addition to providing financial, customs, tax incentives, and even those related to ownership. Another equally important guarantee emerged, namely the necessity of legislative enactment to international arbitration in the domestic laws of countries.

On this basis, the first thing foreign investors look into is the domestic laws of the countries where they intend to invest their capital. If these laws serve their interests, protect them, and ensure the success of their investments, they are encouraged to enter those countries, especially those laws regulating investment disputes and avoiding resorting to national courts by adopting arbitration as a means to resolve these disputes. **International arbitration** is about "agreeing to submit the dispute to a specific person or persons to decide on it outside the competent court and is based on two principles: the will of the parties and the legislator's recognition of this will, and if it begins with a contract, it ends with a judgment".<sup>1</sup>

Thus, arbitration has many advantages related to attracting foreign investors, especially since neither party to the dispute is subject to the jurisdiction of a foreign state due to the existence of a prior agreement or international agreements regulating arbitration in disputes arising between countries and nationals of another state, which reassures investors and encourages them to invest without fear of judicial biases, incompetence, and deviation.

Furthermore, arbitration is a mechanism of the global capitalist system, used by investors to ensure the dominance of advanced Northern countries and the perpetuation of underdevelopment and

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<sup>1</sup> Khaled Mohamed Al- Kadi: Encyclopedia of International Commercial Arbitration, 2<sup>nd</sup> Edition, Al-Chorouk House, Egypt, 2002, p. 100.

dependency in the Global South. This is achieved by preventing national courts in developing countries from adjudicating disputes arising from economic development contracts, which may lead to the national judge being influenced by the economic interests of their country, thus affecting the interests of the investor. Arbitration, therefore, becomes a "lifeline" for the investor, relying on the principle of "administrative authority", leaving the weaker party, i.e., developing countries and their projects, at the mercy of the "arbitrator" who cannot be held accountable like a judge, resulting in the exacerbation of injustice within the arbitration system.<sup>2</sup>

All of this ultimately leads us back to the era of foreign concessions, which remained a hindrance to the national legislator in developing countries during the colonial period. Some argue that issuing and enacting national arbitration legislation has become imperative for developing countries, including Algeria, or else they will find themselves deprived of international aid and the support of international institutions tasked with assisting these countries, such as the World Bank, the International Monetary Fund, and all United Nations agencies.

Based on these considerations, countries have included provisions in their legislation to settle disputes that may arise between host countries or their entities and foreign investors. States resort to adopting this approach to attract foreign investment by announcing their consent in advance to submit disputes to international arbitration centers. Building on this, this topic raises several questions, which can be summarized in the following problematic: How did the Algerian legislator establish the international commercial arbitration system? Is this enactment sufficient to attract foreign investment?

Answering this problematic requires us to use both the historical and analytical methods by tracking the Algerian legislator's stance on institutionalizing commercial arbitration in its legal texts (Chapter One), then addressing the study of the adequacy or effectiveness of the legal provisions regulating international arbitration to ensure the attraction of foreign investment (Chapter Two).

### **Chapter One: Algerian law's trends in institutionalizing international arbitration as a guarantee for investment**

The Algerian judicial system was accused of being cumbersome, inefficient, and lacking neutrality, especially when the state or its institutions were parties to disputes. Consequently, it became necessary to resort to alternative means outside the judicial framework to resolve disputes, in order to instill greater confidence in foreign economic partners. International commercial arbitration is considered one of the most important of these means. However, international commercial arbitration in Algeria has gone through two stages: the first characterized by hesitation in adopting international commercial arbitration as an alternative mechanism for resolving international commercial disputes (Section One). The second stage witnessed the adoption of this system as a necessity driven by pressures from foreign investors and global economic crises (Section Two).

#### **Section One: Legislative Hesitation in Institutionalizing International Commercial Arbitration**

Algeria has gone through several stages marked by oscillation between acceptance and rejection of international commercial arbitration. To study this oscillation, we divided these stages into two periods: the period of continued application of French legislation, and the period following the issuance of the first civil procedure law.

Following Algeria's independence from France, Algeria enacted Law of December 31, 1962, which provided for the continued application of French laws except where they contradicted national sovereignty. During this period, it was generally understood that states could only be sued in their national courts, as it was unreasonable for a sovereign state to be brought before an arbitral tribunal. Based on this Principle, especially after independence, it was not possible for the Algerian state to arbitrate unless with countries or with international organizations without the Private Law. Nonetheless, there was an exception in the field of hydrocarbons, where the Algerian government

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<sup>2</sup> Taher Brayek: Lectures on International Commercial Arbitration (unpublished), delivered to Master's students specializing in Business Law, Faculty of Law and Political Science, Amar Theliji University, El Oued, 2012-2013.

continued to apply the pre-1962 law governing petroleum, specifically the Sahara Petroleum Law of 1958. Article 41 of this law referred all disputes arising between the granting authority of exploitation licenses and privileges - the French government and the contracting companies - to arbitration. Additionally, the Évian Accords between Algeria and France recognized arbitration as a legal guarantee for resolving disputes, particularly concerning hydrocarbons, to safeguard acquired rights and ensure their continuity after independence.<sup>3</sup>

Algeria also entered into several agreements with France, agreeing to settle disputes between the two countries through international arbitration. The most significant of these was the Algerian-French agreement dated June 26, 1963, which conferred jurisdiction to the International Court of Arbitration to adjudicate disputes and made arbitration awards enforceable without the need for execution requests<sup>4</sup>. Additionally, Algeria and France agreed on July 29, 1965, to include mandatory conciliation alongside arbitration.<sup>5</sup>

### **Section Two: Inevitable Acceptance of Institutionalizing International Commercial Arbitration**

After the issuance of Order No. 66-145, which included the Civil Procedure Law<sup>6</sup>, the Algerian legislator adopted a fundamental principle derived from the French domestic arbitration system, namely, the inadmissibility of arbitration requests by the state or its legal entities<sup>7</sup>. However, contrary to this principle, Algeria entered into numerous cooperation agreements, many of which included arbitration clauses<sup>8</sup>, thus constituting a legitimate violation of the general principle enshrined in the Civil Procedure Law.<sup>9</sup>

Given this contradiction, the legislature intervened to review the Civil Procedure Law through Order No. 71-80<sup>10</sup>, which emphasized arbitration and made it applicable to public institutions. However, it did not specify the nature of arbitration, whether it was optional or mandatory. This was addressed in the amendment to the Civil Procedure Law by Order No. 75-44 dated June 17, 1975, which made arbitration mandatory domestically and optional internationally for these institutions.<sup>11</sup>

Due to the inevitability imposed by international trade, both domestically and internationally, Algeria enacted laws explicitly allowing recourse to arbitration in disputes involving public institutions, as stipulated in Law No. 88-01 dated January 12, 1988.<sup>12</sup>

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<sup>3</sup> Kula Mohamed: Arbitration within the framework of Algerian Investment Law, Master's thesis, Business Law Department, Faculty of Law, Mouloud Mammeri University, 2001, p. 15 and beyond.

<sup>4</sup> See, Decree No. 653 dated September 14, 1963, concerning the approval of the agreement of June 26, 1963, issued on September 17, 1963, official Gazette, Issue No. 67 repeated, Wali, Nadia, Arbitration as a Guarantee for Investment within the Framework of Bilateral and Multilateral Arab Agreements, Master's thesis in Business Law, Faculty of Law and Commercial Sciences, M'hamed Bougherra University, Boumerdes, 2006, p. 22.

<sup>5</sup> Order No. 65-287 dated November 18, 1965, concerning the approval of the agreement of 29/07/1965 concerning the exploitation of fuel and hydrocarbon revolution, Official Gazette, Issue 95, issued on November 19, 1965. Wali, Nadia, *ibid.*, p. 15.

<sup>6</sup> Dated June 8, 1966, Official Gazette, No. 47 of 1966.

<sup>7</sup> See Article 442/3 of the Civil Procedure Law mentioned in the footnote above.

<sup>8</sup> Order No. 76-246 dated November 16, 1967, concerning the approval of the agreement concluded between Algeria and the Lebanese government concerning air transport, signed on April 21, 1967, Beirut. See: Wali, Nadia, *Op. Cit.*, p. 15.

<sup>9</sup> Because the treaties ratified according to the conditions stipulated in the 1976 Constitution had the same force as the law and acquired a force superior to the law in the 1989 Constitution.

<sup>10</sup> Dated December 29, 1971, Official Gazette, year 1972.

<sup>11</sup> Kamal Maarouf: International Commercial Arbitration under Legislative Decree 93/09 of April 25, 1993, Master's Thesis in Business Law, Institute of Law and Administrative Sciences, Ibn Aknoun, University of Algiers, 1999-2000, p. 09.

<sup>12</sup> Relating to the Guiding Law of Public Economic Institutions, Official Gazette, issued on January 13, 1988.

Moreover, Algeria entered into several bilateral or multilateral international agreements and treaties that include arbitration clauses aimed at promoting and attracting investment. This includes Algeria's accession to the New York Convention dated June 10, 1958, concerning the recognition and enforcement of foreign arbitral Decisions, as well as its signing, without ratification, of the 1978 Oman Convention concluded between 14 Arab states, which established an Arab Center for International Commercial Arbitration based in Rabat.<sup>13</sup>

For these reasons, the Algerian legislator explicitly intervened to enact legislation specifically on international arbitration through Legislative Decree No. 93-09<sup>14</sup> to amend and complement the Civil Procedure Law of 1966. This amendment aimed to include a specific chapter on international arbitration to align with the economic transformations, thereby enabling Algeria to engage in international arbitration, adapt its economy to international economic and commercial changes, and allow legal entities subject to public law to seek arbitration in international commercial relations.

After the Algerian legislature institutionalized commercial arbitration through Legislative Decree No. 93-09, it turned its attention towards investment law. Law No. 93-12, concerning the promotion of investment<sup>15</sup>, replaced by Order No. 01-03, by Order No. 01-03 amended and supplemented, relating to investment development<sup>16</sup>. It included provisions in Article 17 stating: "Any dispute between a foreign investor and the Algerian state arising from the actions of the investor or measures taken by the Algerian state against them shall be subject to competent judicial authorities unless there are bilateral or multilateral agreements concluded by the Algerian state related to reconciliation and arbitration, or in the presence of a specific agreement allowing for settlement or arbitration, or any provision allowing the parties to reach an agreement based on specific arbitration.

The legislator still ends the same approach to this day, with only the text of Article 18.22 of July 24, 2022 relating to investment "...unless there is a bilateral or multilateral agreement ratified by the Algerian state whose provisions relate to the interest, mediation, arbitration, or concluding an agreement between the agency."

mentioned in Article 18, which grants jurisdiction exclusively to the national judiciary. Accordingly, we find that the legislator explicitly grants jurisdiction as a first degree to international commercial arbitration, and in return it did not prevent the submission of investment disputes to the national judiciary

Furthermore, the Algerian legislature repealed the Civil Procedure Law 66-145 under Law 08-09, which included the Civil and Administrative Procedure Law<sup>17</sup>. The latter regulated commercial arbitration in the second chapter of the fifth book of this law, starting from Article 1006.

This indicates Algeria's swift adoption of arbitration as a primary non-judicial means of resolving disputes that may arise with foreign investors, whom Algeria actively seeks to attract, providing them with all possible guarantees. However, the question that arises here is: How effective is this guarantee represented by the legislative enshrinement of arbitration in protecting and attracting foreign investment in Algeria, especially with the issuance of Law 08-09 and the increase in agreements concluded by Algeria?

## **Chapter Two: The Extent of The Effectiveness of Legislative Institutionalization of International Arbitration in Ensuring Investment**

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<sup>13</sup> Kamal Marouf: *Op. Cit.*, p. 15.

<sup>14</sup> Kamal Marouf: *Op. Cit.*, p. 20.

<sup>15</sup> Aliouche Qurboue Kamal: *International Arbitration in Algeria*, University Publications Office, Algeria, 2001, p. 25.

<sup>16</sup> Order No. 01-03 dated August 20, 2001, concerning investment development, *Official Gazette*, No. 47, dated August 22, 2001, amended and supplemented by Order No. 06-08, dated July 15, 2006, *Official Gazette*, No. 47, dated July 19, 2006.

<sup>17</sup> Dated February 25, 2008, *Official Gazette*, No. 21, year 2008.

Algerian law and international treaties provide many privileges and guarantees to foreign investors. However, expanding these guarantees is not effective without the appropriate investment climate. Foreign investors seek not only protection for their funds but also conditions ensuring greater profits, freedom to transfer and dispose of profits. This climate is achieved through a legal system that institutionalizes parties' willingness to resort to international arbitration in its texts, aiming to attract and succeed in investment (Section One). This includes the state's monitoring of this willingness to achieve or balance between the state's interest in preserving public order and the parties' interest in preserving their rights (Section Two).

### **Section One: Aspects of Institutionalizing International Commercial Arbitration in Ensuring Investment**

The Algerian legislature has provided several guarantees to foreign investors in the Civil and Administrative Procedure Law, most notably those related to the freedom to resort to international commercial arbitration as an alternative means of dispute resolution. This aims to achieve greater justice and ensure the rights of all parties in commercial relationships. The legislature has granted them the freedom to agree to private arbitration, allowing them to appoint arbitrators and establish basic arbitration rules. The parties may agree to institutional arbitration, thereby adhering to the will of the parties, where the dispute is referred to an international arbitration institution such as the International Chamber of Commerce or the International Centre for Settlement of Investment Disputes.

We note that The Algerian legislature has empowered any legal or natural person subject to private law to resort to arbitration concerning rights over which they have absolute discretion<sup>18</sup>. Public legal entities can only seek arbitration if it relates to international economic relations or falls within the scope of public contracts<sup>19</sup>. By opening up arbitration in administrative contracts, especially those related to public contracts<sup>20</sup>, the legislature encourages foreign investors and provides them with broad guarantees. This allows them to resort to arbitration in all foreseeable disputes and free themselves from the host state's law governing investment.

In this regard, the Algerian legislature has ensured an important guarantee for dispute parties by agreeing to resort to arbitration as an alternative to litigation to resolve disputes. This begins the guarantee of investment by institutionalizing commercial arbitration and addressing all issues and procedures related to it. So, how did the Algerian legislature address this?

#### **Subsection One: Guaranteeing Freedom of Will in Agreeing to Arbitration.**

Resorting to international arbitration relies on the consent and meeting of the wills of the disputing parties. The presentation of the dispute, agreed upon by the parties, occurs either upon the dispute's occurrence or at its convenience, focusing solely on the subject of the agreement, so its effect does not extend to other disputes. The agreement may be made to resort to arbitration before the occurrence of any dispute and then it includes all disputes or a specific type of them<sup>21</sup>. Thus, the parties' meeting of minds is evident in agreeing to all matters falling within the scope of international commercial arbitration.

The Algerian legislator defined arbitration agreement in Article 1011 of the Civil and Administrative Procedure Law as: "The agreement whereby parties accept to submit a dispute that has previously arisen to arbitration." It also addressed the definition of the arbitration clause related to submitting a dispute to the arbitrator after its occurrence in Article 1007 of the same law as follows: "The arbitration clause is the agreement whereby the parties in a contract related to rights available within the meaning of Article 1006 commit to submitting the disputes that may arise regarding this contract is subject to arbitration."

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<sup>18</sup> See, paragraph 01 of Article 1006 of the Civil Law.

<sup>19</sup> See, paragraph 03 of Article 1006 of the Civil Law.

<sup>20</sup> Contrary to what was applicable in the old Civil Procedure Law in Article 442, where only public legal entities were allowed to resort to arbitration if the contract related to international trade.

<sup>21</sup> Khaled Mohamed El- Kadi: Op. Cit., p. 103.

Moreover, the legislature unified pre-dispute arbitration agreements and post-dispute arbitration agreements under the term "arbitration agreement," stating that it applies to existing and future disputes.

In addition to this, the legislator required that the arbitration agreement be in writing or that it can be proven in writing only in the event that it was concluded by any means of communication<sup>22</sup>. And make this agreement valid even if the original contract related to the investment is invalid<sup>23</sup>. This is known as the principle of independence of the arbitration clause from the original contract. Additionally, the Algerian legislature granted dispute parties the freedom to choose the law governing the arbitration agreement. In the absence of agreement on a specific law, the arbitrator applies either the law governing the subject matter of the dispute or a law deemed appropriate by the arbitrator<sup>24</sup>, pursuant to Article 18 of the Civil Code<sup>25</sup> and Article 1040 of the Civil and Administrative Procedure Law.

Furthermore, the Algerian legislature allowed disputing parties to choose the arbitration system and procedures to be followed in the dispute, whether agreed upon directly, subject to a specific procedural law, or assigned to a specific arbitration system<sup>26</sup>. This aligns with the rules of permanent arbitration bodies such as the International Chamber of Commerce in Paris or the Regional Centre for International Commercial Arbitration in Cairo, or according to the UNCITRAL (United Nations Commission on International Trade Law)<sup>27</sup> rules. If the parties fail to appoint an arbitration system or encounter difficulties in appointing, disqualifying, or replacing arbitrators, the party seeking expedited recourse may resort to Algerian courts<sup>28</sup>. This recourse to national courts reaffirms the principle of protecting the party's good faith and maintaining the credibility of arbitration, especially if one party delays in appointing or fails to appoint an arbitrator.

As a guarantee against judicial intervention in disputes, the Algerian legislature prohibits the judge from ruling on the subject matter of the dispute if there is an existing arbitration agreement or if a previous arbitration agreement is evident, provided that the dispute is raised by one of the parties<sup>29</sup>. An exception to this is when the judge can intervene in the subject matter of the dispute by issuing interim or precautionary measures<sup>30</sup>, or providing judicial assistance to the arbitrators, whether by presenting evidence, extending the arbitrators' mandate, establishing procedures, or any other case where assistance may be provided, provided that authorization is obtained from the arbitration court by the party seeking expedited action. In this case, the law of the judge's country to which the parties have resorted applies.<sup>31</sup>

Regarding how the arbitration court rules on the dispute, it issues its judgment according to the law chosen by the parties. In the absence of that, it decides according to the rules of law and customs it deems appropriate. This is in accordance with Article 1050 of the Civil and Administrative Procedure Law<sup>32</sup>. Therefore, we wonder about the exclusion of applying and

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<sup>22</sup> See, Paragraph 02 of Article 1044 of the Civil Law.

<sup>23</sup> See, Paragraph 04 of Article 1044 of the Civil Law.

<sup>24</sup> See, Paragraph 03 of Article 1044 of the Civil Law.

<sup>25</sup> See, Article 18 of Order No. 75-58 dated 20 Ramadan 1934 of H. corresponding to September 26, 1975, containing the Civil Law, amended and supplemented by Law No. 05-10 dated 13 Jumada al-Awwal 1426, corresponding to June 20, 2005, Official Gazette, No. 44, of 2005.

<sup>26</sup> See, both Paragraph 01 of Article 1041 and Article 1043 of the Civil Law.

<sup>27</sup> Taher Brayek: *op. cit.*

<sup>28</sup> Whereby the matter is raised either to: the President of the Court within whose jurisdiction the arbitration is taking place, if the arbitration is conducted in Algeria. Or to the President of the Algerian Court if it is conducted abroad and the parties choose to apply the procedural rules applicable in Algeria, according to paragraph 02 of Article 1041 of the Civil law.

<sup>29</sup> See, Article 1045 of the Code of the Civil Law.

<sup>30</sup> See, Paragraph 02 of Article 1046 of the Civil Law.

<sup>31</sup> See, Article 1048 of the Civil Law.

<sup>32</sup> See Article 1050 of the Civil Law.

adhering to the law by the arbitrator (the arbitration court) and relying on customary rules based on justice and fairness in issuing its decisive ruling on the dispute, known as arbitration by equity. Most comparative laws governing arbitration allow arbitration by equity with the explicit consent of the parties, such as the French Civil Procedure Code in Article 1497, Swiss Arbitration Law in Article 182/1, which states that: “The parties may authorize the arbitration court to decide the dispute in accordance with the rules of justice and fairness,” as well as Egyptian Arbitration and Litigation Law in Article 39/4, Tunisian Arbitration Law in Chapter 73/3, and Kuwaiti Arbitration Law in Article 176.<sup>33</sup>

As for the Algerian legislator, referring to the Civil and Administrative Procedure Law, we did not find explicit provisions on authorizing arbitration by equity. However, according to Article 1050 of the same law, the legislature obliged the arbitration court to rule on the dispute according to the law chosen by the parties. In the absence of this, the arbitration court decides based on the rules of law and customs it deems appropriate. Thus, the legislature did not grant the parties to the dispute the right to agree to exclude a certain law and granted them the freedom to agree on it. In the absence of agreement, the arbitration court must seek a law and customs that are suitable for the nature of the dispute for its ruling, rather than excluding the law and replacing it with the rules of justice and fairness, unlike most of the aforementioned comparative legislations.

In summary, the Algerian legislature has provided the greatest guarantee for foreign investors to invest their money in Algeria, especially as their major concerns relate to disputes that may arise after entering into an investment contract. This is evident in granting them complete freedom and will in negotiating contractual terms, especially regarding arbitration clauses and excluding the national judiciary of the host state, starting from their choice of contract law, the law applicable to arbitration procedures, to the law governing how the arbitration court rules on the dispute.

#### **Subsection Two: Ensuring the Effectiveness of International Commercial Arbitration Award.**

Any arbitration award enjoys the force of *res judicata* as soon as it is issued by the arbitral tribunal or arbitrator and relates to the resolved dispute<sup>34</sup>. To ensure this feature, the Algerian legislator has regulated the recognition and implementation of these awards by granting the judge the authority to give legal validity to the arbitral award by recognizing it. Additionally, the judge can confer enforceability on the award, allowing its execution within Algeria. Consequently, this has strengthened the guarantees provided to foreign investors by establishing the principle of consent in arbitration agreements or clauses.

The Algerian legislator has institutionalized this crucial guarantee by activating the internal enforcement of international arbitration awards. This is achieved by enabling the party seeking recognition of the award to claim recognition before the court within whose jurisdiction the arbitration award was rendered or the court at the place of enforcement if the arbitration took place outside the national territory. However, this recognition is subject to the condition that the award does not contravene international public policy, as stipulated in Article 1051<sup>35</sup>.

On this basis, the Algerian legislator has obliged the party seeking recognition of the arbitration award to prove its existence through legal means, while the opposing party is required to prove the contrary by rejecting recognition. The concerned party must submit the original arbitration award along with the arbitration agreement or copies thereof that meet the necessary formal requirements<sup>36</sup>. Translated copies into Arabic must also be provided if the award and arbitration agreement are not originally in Arabic<sup>37</sup>. This submission is under the supervision of the secretariat

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<sup>33</sup> Aissaoui Mohamed: *The Effectiveness of Arbitration in Protecting Foreign Investment in Algeria in Light of Algeria's International Agreements*, Doctoral Dissertation in Public Law, Faculty of Law and Political Science, University of Mouloud Mammeri, Tizi Ouzou, n.d, pp. 171-172.

<sup>34</sup> See Article 1031 of the Civil Law.

<sup>35</sup> See, Article 1051 of the Civil Law.

<sup>36</sup> See, Article 1052 of the Civil Law.

<sup>37</sup> See, Paragraph 02 of Article 08 of the Civil Law.

of the competent judicial authority<sup>38</sup>, represented by the jurisdictional court of the court that issued the arbitral award or the court of its enforcement location if it is outside the national territory<sup>39</sup>. Furthermore, the arbitration award must not violate international public policy<sup>40</sup>.

Regarding the guarantee of implementing international arbitration awards, which is a primary objective sought by investment-attracting countries, the legislator has given it importance by regulating its regulation. In this regard, Article 1054 of the Algerian Law of Civil and Administrative Procedure refers to the application of provisions related to the implementation of domestic arbitration awards as stipulated in Articles 1035 to 1038 of the same law<sup>41</sup>. Article 1035 of the Law allows final, partial, or even preparatory arbitration award to be enforceable by order of the court within its jurisdictional district. The original award must be deposited with the court's registry by the party seeking expedited enforcement, with a fifteen-day (15) deadline to appeal the judge's refusal to execute the order before the judicial council<sup>42</sup>.

It is noteworthy that the Algerian legislator did not impose objective control on international arbitration awards but rather required formal conditions to elevate them to the level of domestic judgments and grant them legal effects, notably enforcement. This constitutes an important guarantee for foreign investors, as imposing arbitrary conditions for the enforcement of international arbitration awards would inevitably elevate the status and role of the national judiciary over the parties' will, something foreign investors seek to avoid.

Additionally, the legislator overlooked specifying the competent authority for enforcing awards issued abroad. Should the competent authority for enforcing arbitral awards be the court at the place of issuance or the place of enforcement? Similar to the approach taken in recognizing international arbitration awards, we call on the Algerian legislator to address this legal gap and designate the judicial authority in both scenarios—the place of issuance and the place of enforcement—as under the jurisdiction of the national judge. This would facilitate and streamline the process of obtaining enforcement orders and alleviate the burdens on the party in whose favor the judgment was rendered.

### **Section Two: Judicial Oversight of International Arbitration Awards**

To address potential problems arising from recognizing international arbitration awards and to limit the dominance of the stronger party in contract negotiation regarding arbitration agreements, the Algerian legislator has established a system for judicial control of arbitration awards by rejecting recognition and non-enforcement. The legislator has restricted cases of non-recognition and non-enforcement of arbitral awards, making recognition the rule and refusal the exception by defining the cases in which the judge may refuse enforcement and recognition.

Explicitly, The legislator stipulated in Article 1051 of the Algerian Law of Civil and Administrative Procedure imposes one objective condition for refusing recognition of an arbitration award, which is its non-contravention of international public policy<sup>43</sup>. Thus, if the judge finds that the parties' chosen law in applying the international arbitration award contradicts international public policy, the award is not recognized. However, the Algerian legislator vaguely refers to the concept of international public policy without specifying its nature and elements, and thus granting the judge broad authority to interpret and determine the content of international public policy and whether the international arbitration award violates it. Nevertheless, the judge must consider international imperative norms closely related to the dispute and take into account international trade rules<sup>44</sup>.

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<sup>38</sup> See, Article 1053 of the Civil Law.

<sup>39</sup> And thus, the Algerian legislator violated the rule that allows parties to agree to designate the competent judicial authority in settling disputes between them, even if it is not territorially competent, as provided for in Article 46 of the Civil Law.

<sup>40</sup> Aissaoui Mohamed: *Op. Cit.*, p. 211.

<sup>41</sup> See, Article 1054 of the Civil Law.

<sup>42</sup> See Article 1035 of the Civil Law.

<sup>43</sup> See, Article 1051 of the Civil Law.

<sup>44</sup> Aliouche Qurboue Kamal: *Op. Cit.*, pp. 72-73.



The judge should also handle disputes that impact international public policy with flexibility to avoid hindering investment attraction and commercial exchanges.

In addition to the condition that the international arbitration award must not contravene the rules of international public policy, other cases for refusing recognition or enforcement of foreign arbitral awards can be derived from Article 1056 of the Algerian Law. The judge can refuse recognition or enforcement in six cases:

1. If the arbitral tribunal issued its decision without an arbitration agreement or based on an invalid agreement or after the agreement's expiration.
2. If the composition of the arbitral tribunal or the appointment of the sole arbitrator violates the law.
3. If the arbitral tribunal decides beyond its mandate.
4. If the principle of fairness is not observed.
5. If the arbitral tribunal's decision lacks reasoning or if there are contradictions in the reasons.
6. If the arbitral award violates international public policy<sup>45</sup>.

Despite the Algerian judge's authority to refuse recognition and enforcement of international commercial arbitration awards, which constitutes a limitation and interference in the parties' agreement to arbitration as an alternative dispute resolution method, the legislator has also granted parties the right to request a review of this refusal as another safeguard to uphold the principle of justice and ensure the investor's right to challenge it by appealing the refusal decision within one (01) month from the date of the official notification of the court president's order<sup>46</sup>.

Furthermore, the legislator has granted parties to the dispute the right to challenge international arbitration awards. However, in this regard it distinguishes between awards issued domestically and those issued abroad. While a domestic arbitration award is immune from any judicial review unless it is invalidated under one or more of the six cases mentioned above in Article 1056 of the Law<sup>47</sup>. An international arbitration award issued abroad is not subject to any annulment appeal before the national judge<sup>48</sup>, safeguarding foreign sovereignty.

Additionally, the legislator has granted parties another right, which is the right to appeal to the Court of Cassation against the judge's decisions refusing recognition or enforcement of international commercial arbitration awards or their annulment, as stated in Article 1061 of the aforementioned law<sup>49</sup>. However, it is noteworthy that the legislator did not specify the cases for appeal to the Court of Cassation in arbitration-related judgments, the grounds on which such appeal should be based, or the procedures to be followed before the Supreme Court regarding this appeal. Perhaps the legislator intended to apply general rules for the cassation appeal process.<sup>50</sup>

## CONCLUSION

In conclusion, the legislative enactment to international commercial arbitration emerges as crucial in attracting and ensuring investment. The enactment of domestic laws regulating the process of international arbitration and regulating all related matters, making it an alternative means for dispute resolution, is the most important guarantee for investors, instilling trust in the domestic laws of the host country. It achieves international justice as it does not belong to any legal system of any state but rather is subject to the will of the parties.

To study the effectiveness of this legislative enactment to international arbitration, we have traced all stages of the legislative process for international arbitration, examining the texts on the effectiveness of this enactment from the agreement of the parties to commercial arbitration, through its procedures and the manner of rendering the arbitral award, to its enforcement and

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<sup>45</sup> See, Article 1056 of the Civil Law.

<sup>46</sup> See, both Article 1057 and Article 1056 of the Civil Law.

<sup>47</sup> See, Paragraph 1 of Article 1058 of the Civil Law.

<sup>48</sup> See, Paragraph 2 of Article 1058 of the Civil Law.

<sup>49</sup> See, Article 1061 of the Civil Law.

<sup>50</sup> Aissaoui Mohamed: *Op. Cit.*, p. 299.

recognition. We found that the legislator has addressed all these issues, elevating the will of the parties above the law in agreeing on all matters related to international arbitration, except for those related to enforcement procedures and recognition, which the legislator has entrusted to the discretionary power of the judge who has the right to refuse recognition or enforcement of international commercial arbitration awards. Moreover, the legislator has given the affected party the right to appeal this refusal through both an appeal and a cassation.

However, despite all these advantages of the Algerian legislator's enactment to international commercial arbitration in its domestic legal texts, we call upon it to address some legislative shortcomings that we deem necessary, including:

1. In addition to granting freedom to the contracting parties to agree on international commercial arbitration, the legislator should allow the arbitrator the freedom, in case the parties do not choose, to choose the law governing the contract and the arbitration agreement and procedures, or to arbitrate based on the principles of justice and fairness, known as arbitration by amicable settlement. This is in line with the will of the parties who have placed their full trust in the arbitrator to settle the dispute between them.
2. The Algerian legislator has not clarified its position regarding the enforcement or recognition of an international arbitration award accepted for recognition by a foreign state. In this case, the legislator should accept recognition and enforcement of the international arbitration award, giving confidence to the judiciary of the state that accepted the award and only refusing it in one case, if it conflicts with its public policy.
3. To address the oversight of the legislator in specifying the competent authority for enforcing arbitration awards rendered abroad by making the competent judicial authority the court where the international arbitration award was rendered or where it will be enforced if it was rendered in Algeria or will be enforced there, to facilitate obtaining the enforcement order and not to increase the burden on the affected party.
4. In the case of appealing the cassation against the judge's order refusing recognition or enforcement of international commercial arbitration awards or their annulment in Article 1061 of the Law, the legislator must explicitly state the authority empowered to review this appeal by expressly stating that only the Supreme Court is the sole competent authority. Thus, the ambiguity of this article is removed.

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