

# THE ROLE OF THE JUDGE IN ARBITRAL AWARDS IN ACCORDANCE WITH THE CIVIL AND ADMINISTRATIVE PROCEDURES LAW.

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## Abstract:

Although the jurisdiction is exclusive to the judge in the implementation, the arbitrator can have an important role in the implementation process, for judges, in all legal systems, they exercise control over arbitral awards on the occasion of issuing the order to enforce them, and this is not a question of the arbitration system or lack of confidence in that country. Despite the important role of arbitrators in implementation, as judges with limited constraints and virtually unlimited procedural powers, they are often asked to identify facts arising from cultural interactions they have never been exposed to, asked to apply a law they have not seen before, and they sit side by side with their colleagues who often misunderstand them, and relentlessly misled by lawyers and expert witnesses on both sides, and they do not share the same cultural background as the witnesses. Therefore, it was necessary to exercise control by the judge, and the forms of national judicial control over the arbitral award vary according to the purpose behind the implementation of this control. The enforcement of arbitral awards can be monitored by a judge in order to verify the conditions that must be met and the degree of compliance with national law for the recognition and enforcement of arbitral awards.

**Keywords:** Judge, arbitration, recognition, enforcement.

## INTRODUCTION

The national judge has many works in which he highlights the clear role played by the state's judicial authority with regard to the stage preceding the pronouncement of the arbitral award, in order to contribute to completing the authority of the arbitral tribunal in its limitation to the arbitral process, especially what it lacks in the power of compulsion, This is so that the arbitral tribunal can decide on the dispute entrusted to it and rule on it.

Undoubtedly, there is a mandate for the judge to enjoy under his jurisdictional authority on the occasion of his work, which falls within the actions aimed at removing the obstacles of the legal system resulting from legal shortcomings, this work is a decision given to the ordinary person who does not enjoy the power of justice, the arbitrator, who he does not have the possibility to issue a full judicial act, and he needs the force of execution that can only be issued by a state judge<sup>1</sup>.

The judge has a wide right to exercise his oversight role over the arbitral award, especially regarding his power of recognition and execution of arbitral awards, this right being granted to him by the Algerian legislator in the Civil and Administrative Procedures Code. If the person against whom the arbitral award was issued is executed voluntarily, no problem arises, but if part of it is implemented, it is not considered acceptance of the award in its entirety<sup>2</sup>. This is because the

<sup>1</sup>Ali Salem Ibrahim, Jurisdiction of the Judiciary of Arbitration, Dar Al-Nahda Al-Arabiya, Cairo, 1997, p. 301.

<sup>2</sup> Forced execution: it is also called "procedural execution, because it includes special procedures that must be carried out and the work is not correct without those procedures, this contrasts with voluntary execution, which has no mechanisms or special rules". See: Naseem YKHLEF, the Adequate in terms of implementation, Josoor for Publishing and Distribution, Algeria, 2015, p. 18. It is also defined as: "An act of judicial authority and not of executive (administrative) authority, as its name suggests, which some call judicial execution". For more details on the subject, see: Ahmed Khalil, Forced Execution Law, New University Publishing House, Alexandria, 1997, p. 9.



arbitral award is not suitable for implementation because it lacks the executive power that enables the convicted person to execute forcibly<sup>3</sup>, which is what is called the execution order<sup>4</sup>, which gives the arbitral award the executive form by the judiciary, after its recognition.

Talking about the exclusive jurisdiction of the judge in arbitration matters requires first addressing the notions of recognition and enforcement of arbitral awards (**first section**), then the forms and conditions of recognition and enforcement of the arbitral award (**second section**), and finally in the (**third section**) we discussed the idea of judicial oversight positions where we focus on the powers of an execution judge and the obstacles that prevent the enforcement of the execution order.

#### **Section N°01: Recognition and execution concepts**

The national judiciary plays an effective role in the subsequent oversight of the arbitral award by recognizing it before ordering its execution, and this role is even greater when it is feared that the arbitration will lose its advantages because of the long period that the procedures related to the recognition and execution of arbitral awards may take, especially its frequency and frequency<sup>5</sup>, and the impact of international special relations related to the implementation of international contracts<sup>6</sup>, which the state concludes<sup>7</sup> with nationals or foreigners, or those related to international trade<sup>8</sup>, or those concluded in the framework of investment<sup>9</sup>.

It can be noted that the Algerian legislator, like many Arab legislations<sup>10</sup>, has fortified arbitral decisions as fortifying judicial decisions with authenticity, which means that the decision of the

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<sup>3</sup>It should be noted that arbitral awards that are subject to compulsory enforcement are those whose subject is an obligation to implement a right, since the existence, whether actual or real, is not an element in the subject matter of the arbitral award subject to compulsory enforcement. For more details on the subject, see: Ahmed Muhammad Hashish, *The Executive Force of Arbitration - Its Distinction, Presumption, Elements, Endowment, and Its Expiration* - Dar Al-Fikr Jamia, Alexandria, 2001, p. 73.

<sup>4</sup>Ben Said Lazhar, *International Commercial Arbitration - According to the Civil and Administrative Procedures Law and Comparative Laws* - Dar Houma, Algeria, 2012, p. 360.

<sup>5</sup>Ashraf Abdel Alim Al-Rifai, *Arbitration Agreement and Practical and Legal Problems in International Private Relations - A Comparative Judicial Jurisprudence Study* -, Dar Al-Fikr Al-Jamii, Alexandria, 2003, p.1.

<sup>6</sup>DAVID René, *Arbitration in International Trade*, Economica, Paris, 1982, p.15.

<sup>7</sup> Hafida Al-Sayyid Al-Haddad, *Extent of the National Judge's Competence to Take Provisional and Precautionary Measures in International Private Disputes Agreed on Arbitration*, Ibid., p. 07.

<sup>8</sup>Many see that international commercial arbitration is a path that must be followed if the parties are in the process of an international commercial contract, because they consider it the only way to resolve international trade disputes, see:

ANCLE Jean Pierre, "Reading French case law in international arbitration", in internal and international commercial arbitration, colloquium organized by the Minister of Justice of the CGEM, in collaboration with the Supreme Court of Morocco on 3 and March 4, 2004, Court notebook, n°6, 2005, p.182.

<sup>9</sup>For more details about arbitration in investment contracts, see: KEBAILI Tayeb, *Arbitration in investment contracts between states and nationals of other countries in the light of the Washington Agreement*, a thesis submitted to obtain a PhD in Law, University of Mouloud MAMMERI - Tizi Ouzou - 06/21/2012.

<sup>10</sup> Like the Jordanian legislation, for example.



arbitral tribunal acquires a legal force that applies to the facts of the dispute, to the arbitral parties and arbitrators, as well as to the courts from the date of issue<sup>11</sup>.

We point out here, that according to the text of Article 1054 of the Algerian Civil and Administrative Procedures Law, which in turn referred to Articles 1035 to 1038 of the same law, the order for execution is not only for final judgments, but also for partial judgments<sup>12</sup>.

#### 1- Definition of recognition:

The international community has prioritized the recognition and enforcement of “foreign arbitration” rulings over “foreign court rulings” and has built a superior legal infrastructure around them, and this has served part of the reasons for reluctance to recognize and enforce foreign court rulings as a justification to enhance the recognition and enforcement of foreign arbitral awards.

Since the Arab and comparative legislations did not address the definition of the term recognition of arbitral awards, it was necessary for us to present some definitions of this term as follows:

Dr. “**Abdul Hamid Al-Ahdab**” defines it as: “A request for recognition of the arbitral award is a defensive measure that is used when the court is reviewed in a dispute previously submitted to arbitration, so the party in whose favor the arbitral award was issued raises the strength of the case, and to prove this, it communicates the ruling to the court in which it is presented. The dispute is brought before it again, and it is asked to admit it again, and it is asked to acknowledge its validity and its mandatory nature in the points it has settled<sup>13</sup>.”

Professors **A.RED-FERM** and **M.HUNTER** define it as: “A defensive procedure that is used when the dispute is brought up again to the judiciary after it has been judged by the arbitration court. Recognition is giving the arbitral award the authority of the thing decided<sup>14</sup>.”

#### 2- Definition of execution (implementation):

Execution is the end of the matter for the issues in dispute, in which the arbitrator, as an ordinary person who does not enjoy the influence of judicial justice, cannot carry out the execution process, due to the lack of the authority to issue a full judicial act as previously mentioned. Rather, the judgment he issues must have an executive power, otherwise it is incomplete and deficient and needs the intervention of the national judiciary to give it the executive formula<sup>15</sup>, which would lead the judgment to rise to the ranks of executive decrees<sup>16</sup>.

Professor **FAUCHARD** defines execution as the procedure “which places the decision of an arbitrator in the judicial order whatever its consequences”, and other authors have written that *exequatur* is the procedure intended to give the possibility to enforce in one State a judgment rendered in another. So, the execution order does not tend to execute the judgment, but rather to give the

<sup>11</sup> Amer Fathi Al-BATANIA, The Judge’s Role in International Commercial Arbitration - A Comparative Study -, House of Culture for Publishing and Distribution, Amman, 2008, p. 217.

<sup>12</sup> The judgment is partial, if it is settled in part of the dispute before the arbitral tribunal, that part of the claims and other claims remain, and the arbitral tribunal remains competent to decide on it, and this type of judgment resolves only part of the dispute and not the entire dispute.” See, KEBAILI Tayeb, TAOUILT Karim, International commercial arbitration - According to the law of civil and administrative procedure - Dar BELQIS Editions, Algeria, 2020, p. 106.

<sup>13</sup> KATAF Hafid, Judicial Intervention in International Commercial Arbitration Dispute in the Light of the New Algerian Civil and Administrative Procedures Law (08-09), Memorandum for obtaining a master’s degree in Private Law - Business Law Branch -, University of Mohamed LAMINE DEBAGHIN, Setif, 2014-2015, p. 101 .

<sup>14</sup> Quoted from: Salim BACHIR, Arbitration Judgment and Judicial Control, thesis submitted for obtaining a PhD in Legal sciences, Hadj LAKHDAR University, Batna, 2012, p. 276.

<sup>15</sup> HASSANEIN Mohamed, Methods of execution in the Algerian Civil Procedure Code, University Press, Algeria, 2006, p. 173.

<sup>16</sup> Ali Salem Ibrahim, Ibid, p. 301



character of the necessity of execution, and then it differs with the idea of execution, which is a follow-up step that is represented in the making of the enforcement decision.

### 3- Difference between recognition and execution:

The arbitral award is issued with authority, as mentioned above. In Algerian law, Article 1031 of the Code of Civil and Administrative Procedure stipulates that arbitral awards have the authority of the matter decided upon as soon as they are issued in relation to the dispute settled therein.

But the force of proof is other than the executive force, which is not proven to the arbitral award except after giving it an executive formula, which is what Article 1035 in Chapter Five stipulates, as well as Article 1036 of the Civil and Administrative Procedures Law, which is concerned with the execution of arbitral awards, which are the same articles that It is applied in relation to international arbitration provisions, in accordance with the provisions of Article 1054 of the same law related to the execution of international arbitration provisions.

Consequently, the party in favor of whom the arbitral award has been rendered must initiate the procedures for its execution<sup>17</sup>, and the first procedure is to recognize it so that it may be integrated into the Algerian legal order, and secondly, to give it the executive formula so that it can be implemented on its soil<sup>18</sup>, because the executive formula represents in itself a recognition by the judge of the possibility of implementing the arbitral award and of its validity to do so<sup>19</sup>, by resorting to justice and rendering an execution order.

It is noted that there are those who do not differentiate between the recognition and execution of arbitral awards, because the link between recognition and the executive formula is very close, so, according to them, it is useless to distinguish between them<sup>20</sup>.

In short, the process of recognizing an international arbitral award is represented in: "Integrating it into the Algerian legal order, allowing it to have its effects on Algerian territory, such as using it, for example, to advance settlement of the dispute". before the Algerian judge, and it does not necessarily aim to execute the arbitral award in question in Algeria, because the implementation aims to obtain the executive formula and concretize the solution contained in the judgment on the ground<sup>21</sup>.

In clearer expression, recognition is when the arbitral award is issued in a correct manner and is binding on both parties, while execution is the request of the judicially adjudged party to oblige the sentenced party to what came in the arbitral award by compulsion<sup>22</sup>. **Section N° 02: Forms and conditions of recognition and execution**

By extrapolating the text of article 1051 of the aforementioned law, it appears to us that the conditions to be met regarding the recognition of arbitral awards and their enforcement are the

<sup>17</sup>Ben Said Lazhar, Ibid, p. 365.

<sup>18</sup>MIMOUN Mona, "International Commercial Arbitration according to the Civil and Administrative Procedures Law N°: 08-09", Legal Forum Magazine, Issue 7, p. 166.

<sup>19</sup> ADJABI Elias, "The Legal System of International Commercial Arbitration under the Civil and Administrative Procedures Law", Journal of the Legal Forum, Issue 7, p. 197.

<sup>20</sup>KEBAILI Tayeb, TAOULT Karim, Ibid, p. 108.

<sup>21</sup>Fathi Kamal Idris, "Recognition and Implementation of the International Commercial Arbitration Award in Algeria in Application of the Rules of the New York Convention and the Civil and Administrative Procedures Law 08/09", Journal of Research and Studies, Vol. 17, No. 02, 2020, p. 128.

<sup>22</sup>Maher Mustafa Mahmoud, "Judicial control of the arbitration ruling", Journal of the College of Arab and Islamic Studies for Girls - Damanhour, No. 2, Volume 9, 2017, p. 266.



same, but the request for recognition of arbitral awards and the execution of these provisions must be separated. In the following, we will provide a step for recognition and execution.

#### **1- Formal condition: Proof of arbitral awards**

It is inconceivable to recognize and enforce arbitral awards when they do not exist, because the requirement to prove international arbitral awards is considered a logical condition. Adherence to the provisions of international arbitration constitutes proof of the existence of these provisions, as if the original were attached to the arbitration agreement or copies thereof fulfilling the conditions of its validity, and it shall be deposited in the custody of the competent judicial authority of the party concerned with expediting, in this case the opponent must prove the contrary.

The Algerian legislator stipulated in Article 1051 that: "The international arbitration awards are recognized in Algeria if those who adhere to them prove their existence, and this recognition does not violate the international public order and is considered enforceable in Algeria and on the same conditions, by order of the president of the court that issued the judgments. arbitration within its jurisdiction, or a court of execution if the seat of the arbitration court is outside the national territory."

#### **2- Substantive condition: Recognition or enforcement does not contravene international public order**

The Algerian legislation also stipulated this, specifically in the Civil and Administrative Procedures Law in Article 605 in its last paragraph, where it stated that: "It is not permissible to implement orders, judgments, and decisions issued by foreign judicial authorities, in the Algerian territory, except after granting them the executive formula from one of the Algerian judicial authorities when they fulfill the following conditions: ...

*" 4- It should not include anything that violates public order and public morals in Algeria."*

So, in any case, there cannot be minimum rules protecting the entity of society in any legal system, which are the rules of public order.

If the text of Article 605 of the aforementioned Code of Civil and Administrative Procedure relates to the execution of foreign judicial judgments in general, the Algerian legislator singled out the provisions of international commercial arbitration with special provisions and stipulated the recognition and execution of these provisions, and this recognition or execution did not violate the international public order, in the text of Article 1051 of the same law.

We point out that it is difficult to put an overall definition of the general system, because the idea of the general system is flexible and cannot be placed in a specific framework.

The judge begins by verifying whether the rule invoked by the appellant is a fact of public order (if it can be automatically lifted or invoked), in which case he will have the exceptional mandate to compare the result stated in the judgment with the result you would arrive at by correctly applying this rule, it is clear that this investigation requires knowledge of the content of the arbitral award and, if necessary, a review of the award rendered by the arbitrator in flagrant violation of a rule of public order.

Also, the judge is the guarantor of respect for his public order: national public order, in principle it is not a matter of foreign public order or international public order, on the contrary, the arbitrator, who has no jurisdiction, can ensure respect for foreign public order in order to ensure the maximum efficiency of the judgment the arbitration. He can, in fact, rescind the law chosen by the parties in a preventive manner, if he deems it inconsistent with the foreign public order of the state likely to enforce the arbitral award on its territory, and he can also raise, by his authority (*ex officio*), the question of non-compliance with the provisions referred to him with foreign or international public order.

Arbitration is used as the most appropriate for resolving economic and commercial disputes and for confidence in its decisions, which can be lost due to excessive judicial control in the implementation phase in particular, which is distinguished by the large number of interventions by





the parties to the dispute of a different nature, which would intensify the intervention of national justice, which loses confidence in the judgments of the arbitral tribunal<sup>23</sup>.

Although judicial review is of great importance in the control of arbitral awards, the judiciary's excessive interference has a negative impact on arbitral awards, so the national judge must support his review of arbitral awards by giving them greater confidence<sup>24</sup>.

### **Section N° 03: Judicial Control positions**

Once the arbitral award is issued, the judge is exempted from the dispute. The principle is that the arbitral award is intended to be applied automatically, however, the losing party may refuse to comply for various reasons, as the losing party may apply to the state judge to request the annulment of the international arbitration award issued in Algeria, as It can also refuse to enforce a foreign arbitral award, and any party may, without any dispute, request recognition and execution of the arbitral award<sup>25</sup>. In all cases, the state judge exercises control, at the time of recognition and execution of the arbitral award, and under this procedural and judicial oversight, he has the right to reject the application for recognition or execution, or to issue an order to that effect.

The authority that the execution judge enjoys is a judicial authority without the traditional meaning of it. Therefore, the authority of the execution order judge is a jurisdictional authority that the arbitrator does not enjoy. This does not mean that the arbitrator is not trustworthy in his competence, and that he is less well judged and competent than the judge, but rather the judiciary is not arbitration, and the judge is not arbitrator, and the judicial decision is not the arbitral award, whether in terms of to the nature of each of them or according to their legal system<sup>26</sup>.

For example, in the Egyptian legal system, the jurisdiction of the judge to pronounce an enforcement decision has been indicated by the Egyptian Court of Cassation as follows: "The order for the enforcement of the arbitral award issued by the competent judge in accordance with the provisions of the Arbitration law is not only a purely material procedure represented in the fixing of the executive formula on the judgment of the arbitrators, Rather, this is done after reviewing jurisdiction and then ensuring that such decision does not conflict with a previous decision by Egyptian courts regarding the dispute, and that it does not include anything that violates public order in the Egyptian Arabic Republic, and that it was legally announced to the convicted person, and this research by the ordering judge gives him information and an opinion that contradicts the empty mind regarding the availability of the conditions of the order to implement the arbitral award"<sup>27</sup>.

In spite of the power of evidence enjoyed by the arbitral award, the judge must issue an order of execution, after examining, of course, the absence of obstacles that could obstruct the issuance of his order of execution.

#### **1- The power of the execution judge:**

Proceeding from the idea that the arbitrator is not the judge of the legal system of the state, and even if he is a judge, this does not mean that he is recognized as part of the judicial system of the state on whose territory he issued his judgment, this observation is able to reconcile the conflicting positions previously mentioned, Moreover, as already mentioned, the judgment issued by the judge certainly has the authority to order the *res judicata*, but not the enforceability. In order for the judgment to be subject to compulsory execution, the party wishing to invoke it must request execution from the competent State judge, since he alone has the authority of execution order.

<sup>23</sup> Mohamed Ahmed HASHISH, Ibid, p. 91.

<sup>24</sup> Ibid., p. 268.

<sup>25</sup> ALLIOUCH-KERBOUA Kamel, "The post-arbitral control of the international award in Algerian law", in the judge and the arbitrator, under the direction. Sami -BOUSTANJI and others, Editions A. PEDONE, Paris, 2014, p.269.

<sup>26</sup> For more details on the purpose of a Binding Arbitral Award, see: Ahmed Mohamed HASHISH, Ibid, pp. 22-78.

<sup>27</sup> Ibid., p. 97.



The authority that the execution order judge enjoys is a judicial authority other than the traditional meaning of it<sup>28</sup>, and therefore the authority of the execution order judge is a jurisdictional authority that the arbitrator does not enjoy. This does not mean that the arbitrator is not trustworthy in his competence, and that he is less well judged and competent than the judge, but rather the judiciary is not arbitration, and the judge is not arbitrator, and the judicial decision is other than the arbitral award<sup>29</sup>, whether that is in terms of the nature of each of them or in terms of their legal system<sup>30</sup>. **Impediments to the judge of the execution order:**

For an arbitral award to be enforceable, it must be valid and of an enforceable nature, because the requirements for an enforceable award stem from a combination of statute law and common law, and also the autonomy of the parties (the provisions of an arbitration agreement or a subsequent agreement) and any applicable rules, many legal commentators specify a set of seemingly different requirements, but quite simply, there are different ways of expressing the same basics. They are often categorized as "formal" and "substantive" requirements, although different commentators list them in different ways - and for the purposes of arbitral award drafting, there is little need to distinguish between the two concepts.

The lack of requirements for the enforcement of the arbitral award, prompts the judge of the execution order to refuse execution, but this is considered an impediment to the execution order.

The power that the execution judge enjoys makes his work a supervisory one, and through this supervision, he verifies the existence of any impediment preventing his order to implement the arbitral award. For example, each of the inability of the arbitral award to be enforced<sup>31</sup> is one of the impediments in which the judge cannot order the execution request.

The non-deposit of documents by the applicant enforcement order, which we will explain later, is also considered a prohibition (impediment)<sup>32</sup>.

In addition to the arbitral award's violation of the public order<sup>33</sup>, in the country in which the award was issued (when it comes to enforcement, the issue of public order is related to the country whose territory enforcement is requested and not to the country on whose territory the award was issued).

Therefore, the issue of procedural and judicial authority is a monopoly for the judge to order enforcement, and the arbitrator does not have to make that order, as it remains an authority that the judge enjoys without anyone else.

### CONCLUSION:

Although the jurisdiction is exclusive to the judge in the implementation, the arbitrator can have an important role in the implementation process, for judges, in all legal systems, they exercise control over arbitral awards on the occasion of issuing the order to enforce them, and this is not a question of the arbitration system or lack of confidence in that country.

Despite the important role of arbitrators in implementation, as judges with limited constraints and virtually unlimited procedural powers, they are often asked to identify facts arising from cultural interactions they have never been exposed to, asked to apply a law they have not seen before, and they sit side by side with their colleagues who often misunderstand them, and relentlessly misled

<sup>28</sup> Mohamed Ahmed HASHISH, Ibid., p. 91.

<sup>29</sup> On this difference: See: Ahmed Mohamed HASHISH, ibid., p. 42 and beyond.

<sup>30</sup> Ibid., p. 91.

<sup>31</sup> For more details on the purpose of a Binding Arbitral Award, see: Ahmed Mohamed HASHISH, Ibid, pp. 22-78.

<sup>32</sup> Ibid., p. 97.

<sup>33</sup> For more details on the subject of the arbitration ruling's violation of the public order, see: BARAKAT Ali, *Appealing Arbitration Judgments*, Dar Al-Nahda Al-Arabiya, Cairo, 2003, p. 92.



by lawyers and expert witnesses on both sides, and they do not share the same cultural background as the witnesses.

Therefore, it was necessary to exercise control by the judge, and the forms of national judicial control over the arbitral award vary according to the purpose behind the implementation of this control. The enforcement of arbitral awards can be monitored by a judge in order to verify the conditions that must be met and the degree of compliance with national law for the recognition and enforcement of arbitral awards.

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